



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 04 OF 2020

GEORGE MUTISYA MUTONDE.....APPELLANT

-VERSUS-

DOMINIC KYALO.....RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 2nd March 2020 brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, as well as section 65(1) (b) of the Civil Procedure Act (cap 21).
2. The application seeks several orders, some of which have been spent as follows –
 - 1) *(Spent)*
 - 2) *(Spent)*
 - 3) *That pending the hearing and determination of the appellant's appeal, this court do grant a stay of execution of the judgment and order of the subordinate court in Makueni CMCC 14 of 2019 by Hon. Otieno and delivered on 19th December 2019.*
 - 4) *That the costs of the application be provided for.*
3. The application has grounds on the face of Notice of Motion that judgment had been entered in the subordinate court in the sum of Kshs.1,380,370.00 with interest and costs, that an appeal had been filed and is arguable and if stay orders are not granted the appeal will be rendered nugatory if the amount is paid to the respondent and the respondent is not able to refund the same.
4. The application was filed with a supporting affidavit sworn by George Mutisya Mutonde the applicant on 2nd March 2020 which amplifies the grounds of the application.
5. The application has been opposed through a replying affidavit sworn on 22nd June 2020 by Dominic Kyalo the respondent in which it was deponed that the application is incompetent, misconceived and bad in law. It was also deponed that the application was brought after inordinate delay and does not meet the legal requirements for grant of the stay of execution orders sought.
6. In response, the applicant filed a supplementary affidavit he swore on 30th September 2020 in which it was deponed that both the application and the appeal were filed without inordinate delay, except for delays caused due to the Covid-19 pandemic.
7. The application was canvassed through written submissions. The applicant's counsel Kibatia & company filed their submissions on 28/10/2020, while the respondent's counsel M/s S. Ngare & company advocates filed their submissions on 30th October 2020.
8. This being an application for stay of execution of judgment or decree pending the hearing of an appeal, the provisions of Order 42 Rule 6 of the Civil Procedure Rules apply.
9. Flowing from the requirements under Rule 6(2) above, the first issue is whether the application was filed without undue delay. In this regard, the judgment was delivered on 19th December 2019 and the application filed on 2nd March 2020. That is a period of almost 2 ½ months.

10. In my view, this period cannot be said to be inordinate delay as the duration between 25th December 2019 and 1st January 2020 was Christmas and New Year period. I find that the application was filed without undue delay.

11. The second issue is whether if the stay orders sought are not granted, then substantial loss may result to the applicant. In this regard, I note that the appeal herein is mainly on quantum of damages. The financial means of the respondent being unknown, in my view, if the entire amount is paid to the respondent, the appeal could be rendered nugatory, if the appeal is successful and the amount cannot be recovered.

12. This being a money decree, I will grant stay, but subject to payment of part of the decretal amount.

13. With regard to provision of security by the applicant, in my view, the part decretal amount to be paid by the applicant will provide adequate security.

14. Consequently and for the above reasons, I order as follows –

1) I grant stay of execution of judgment or decree herein pending determination of appeal, as requested.

2) The above stay is granted subject to the applicant paying the respondent through counsel part of the decretal amount Kshs.400,000/= within 45 days from today.

3) In default of payment under (2) above, the stay orders herein granted will automatically lapse.

4) The costs of this application will follow the determination of the appeal.

DELIVERED, SIGNED & DATED THIS 4TH DAY OF APRIL, 2022, IN OPEN COURT AT MAKUENI.

.....

George Dulu

Judge