



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO 59 OF 2021

LUCY NYANCHOKA NYARIEKO.....APPELLANT

VERSUS

NANCY CORRIS.....RESPONDENT

RULING

INTRODUCTION

1. In her Notice of Motion dated 27th August 2021 and filed on 2nd September 2021, the Appellant herein sought an order for stay of execution of the judgment/ decree in **Nyamira CMCC No 86 of 2020** that was delivered on 28th July 2021 pending the hearing and determination of her appeal.
2. She further sought an order that she does provide sufficient security in the form of a suitable Bank Guarantee from a reputable institution to secure the judgment herein of Kshs 308,750/=. She swore an Affidavit in support of the present application on 27th August 2021.
3. She contended that she was aggrieved by the entire judgment of the Learned Trial Magistrate and had instructed her advocates to appeal against the same. She stated that she had an arguable appeal which had a high chance of success. She was apprehensive that she would not be able to recover the decretal sum from the Respondent, who was a person of straw, if she paid her the decretal sum and was successful on appeal. She was also apprehensive that if the Respondent executed against her, it would render the present application and her Appeal nugatory.
4. She further averred that she was willing, ready and able to furnish security in form of a bank guarantee and thus urged this court to allow her application.
5. In opposition to the said application, on 20th September 2021 the Respondent filed a Replying Affidavit that was sworn on 15th September 2021. She contended that the Appellant was intent on delaying the cause of justice and that the purported appeal was purely calculated at denying her enjoyment of the fruits of her successful litigation. In addition, she deposed that the purported appeal was frivolous with no chance of success at all.
6. It was her contention that the Appellant would not be occasioned any prejudice if she paid her the entire decretal sum as she was doing business and that she would comfortably refund the same in the unlikely event that the purported appeal succeeded.
7. She averred that provision of a bank guarantee as security was not envisaged under Order 42 rule 6(1) (b) of the Civil Procedure Rules. She added that Diamond Trust Bank was a stranger to the proceedings and in the event it went under, she was bound to suffer irreparable loss and damage.
8. She contended that the present application was not merited and was misplaced and thus urged this court to dismiss the same with costs.
9. The Appellant's Written Submissions were dated 6th December 2021 and filed on 8th December 2021 while those of the Respondent were dated 31st January 2022 and filed on 1st February 2022.
10. The Ruling herein is based on the aforesaid Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

11. The present application was brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 which empowers a court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from.

12. Both parties were in agreement that before an order for stay of execution pending appeal could be granted, an applicant had to demonstrate the following:-

- a. **That substantial loss may result unless the order is made.**
- b. **That the application has been made without unreasonable delay.**
- c. **Such security as the court orders for the due performance of the decree has been given by the applicant.**

13. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.

14. The Appellant submitted that she had filed the present application without undue delay and reiterated that she was ready, willing and able to furnish security. The point of departure between her and the Respondent herein was whether she had demonstrated that she would suffer substantial loss.

15. She argued that the Respondent had not filed any documents to prove her financial standing and in this regard, she relied on the case of **Kenya Orient Insurance Company Co Ltd vs Paul Mathenge Gichuki & Another [2014] eKLR** where the court therein held that the burden of proof that the respondent can refund the decretal sum if the appeal succeeded shifted to the respondent the moment the appellant stated that it was unaware of the respondent's resources.

16. On the other hand, the Respondent argued that a successful litigant was entitled to enjoyment of the fruits of his judgment, which he could only be deprived of for a just cause. She further submitted that if the court was persuaded to so grant the order that had been sought, then it ought to order that the Appellant deposit the entire decretal sum of Kshs 308,050/= into court within the next twenty-one (21) days.

17. The decision the Appellant intended to appeal against was delivered on 28th October 2021. She filed the present application on 22nd November 2021. It was evident that the present application was filed without undue delay. She was also ready to provide security as would be binding upon her for the due performance of the decree herein. This court was thus satisfied that she had met two (2) conditions for the granting of an order for stay of execution pending appeal.

18. Although the decretal sum was not colossal, in the absence of an Affidavit of Means that would have proven that the Respondent was capable of refunding the decretal sum if she was paid the same if the Appellant succeeded in the intended appeal, this court was persuaded to find and hold that the Appellant was likely to suffer substantial loss. In the mind of this court, institution of recovery proceedings for the decretal sum that was paid before the hearing and determination of an appeal amounted to substantial loss to the successful appellant.

19. Going further, this court took the view that security in form of a bank guarantee was not suitable considering that there was a possibility of the bank not honouring the bank guarantee as the bank issuing the same would not be a party to the suit therein making it difficult for a successful appellant to enforce any orders he or she would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished herein would be in form of money.

20. Weighing the Appellant's right to have her dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if she was denied an opportunity to ventilate her Appeal on merit without an order for stay of execution pending appeal being granted herein.

DISPOSITION

21. Accordingly, the upshot of this court's ruling was that the Appellant's Notice of Motion application dated 27th July 2021 and filed on 2nd September 2021 was merited and the same was hereby allowed in the following terms:-

1. **THAT an order for stay of execution of Judgment that was delivered in Nyamira CMCC No 86 of 2020 by Hon W.C.Waswa on 28th July 2021 be and is hereby granted pending the hearing and determination of the appeal on condition the Appellant shall deposit the sum of Kshs 308,050/= into court within thirty (30) days from the date of this Ruling.**
2. **For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 21(1) hereinabove, the conditional stay of execution shall automatically lapse.**
3. **The Appellant be and is hereby directed to file and serve her Record of Appeal within thirty (30) days from the date of this Ruling.**
4. **This matter will be mentioned on 2nd June 2022 to confirm compliance and/or for further orders and/or directions.**
5. **Costs of the application herein shall be in the cause.**
6. **Either party is at liberty to apply.**

22. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 4TH DAY OF APRIL 2022

J. KAMAU

JUDGE