



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. E11 OF 2020

LEONARD MUNYAO KAMBA.....APPELLANT/APPLICANT

VERSUS

CLINTON ONYIEGO MOGAKA.....RESPONDENT

RULING

1. The Appellant/Applicant filed an application dated 23/11/2020 seeking principally two reliefs: *firstly that the court do issue an order of stay of execution of the judgement delivered on 7/10/2020 and consequential decree pending determination of the appeal and secondly, that the Appellant be permitted to pay the principal sum by instalments of Kshs. 10,000/= per month up to 30% of the principal claim until the appeal is heard and determined.*

2. The application is supported by the grounds set out on the body of the application and the affidavit of the Applicant sworn on even date. The Applicant's case is that he is dissatisfied with the judgement of the lower court and has preferred an appeal which is arguable. It was his case that liability for the accident should be shared between himself, owner/driver of M/v KCN 912 T and a road contractor in which he should shoulder only 30% thereof. It was further his case that he should be allowed to liquidate the sums comprising the 30% liability by way of instalments of Kshs. 10,000/= per month. Finally, it was his case that he stands to suffer immense loss and irreparable harm if execution is not stayed as his appeal will be rendered nugatory.

3. The application is opposed by the Respondent who filed a replying affidavit dated 2/12/2020 where he raised several grounds of objections *inter alia: that the application is frivolous, bad in law and an abuse of court process; that the Applicant has not fulfilled the requirements of order 42 Rule 6 of the Civil Procedure Rules; that the Respondent stands to be prejudiced due to the delay in realizing the fruits of the judgement; that he is a man of means and will easily refund the decretal sums in the event of success of appeal and finally that should the court be inclined to grant the application then an order for release of half the sums to the Respondent while the rest be deposited into court be made.*

4. Vide submissions dated 17/12/2020 M/s P. M. Mutuku & Co. Advocates, learned counsels for the Appellant/Applicant submitted that the prerequisites under Order 42 Rule 6 of the Civil Procedure Rules have been met in that an arguable appeal has been lodged as well as the present application timeously and that the Applicant stands to suffer substantial loss if stay is not granted and finally that the Applicant is willing to furnish security or meet any condition to be imposed by the court. Reliance was placed in the cases of **Channan Agricultural Constructors (K) limited –vs- Nicodemus Mungara [2016] eKLR, Swanya limited –vs- Daima Bank limited [2001] eKLR.**

5. Annie W. Thoronjo & Co. Advocates for the Respondent filed submissions dated 18/01/2021. It was submitted that the Applicant has not fulfilled the mandatory conditions provided under Order 42 Rule 6 of the Civil Procedure Rules in that the present application was filed about one and half months from the date of judgement by the trial court which is inordinate and is thus an afterthought meant to delay the finalization of the matter. It was also submitted that the Applicant has not shown that he stands to suffer substantial loss if stay is not granted and that if anything it is the Respondent who had sustained serious injuries requiring medication and who stands prejudiced as he is being kept away from the fruits of the judgement. It was finally submitted that the prayer to be allowed to pay 30% of the decretal sum in instalment presupposes that the Appellant has already given himself judgement yet the appeal is yet to be heard. Learned counsel urged this court to dismiss the application. Several cases were cited namely **Ngingyanga Kavole –vs- Mailu Gideon [2019] eKLR, First American Bank of Kenya –vs- Gulab P. Shah & 2 others [2003] eKLR.**

6. I have considered the rival affidavits and the submissions of learned counsels. It is not in dispute that the Appellant has lodged an appeal against the judgement of the trial court both on liability and quantum. The only issue for determination is whether or not the Appellant has satisfied the conditions for the grant of stay of execution of decree pending appeal as provided under Order 42 Rule 6 (2) of the Civil Procedure Rules.

The principles found under Order 42 Rule 6 (2) of the Civil Procedure Rules are a four-part test which an applicant has to satisfy in order to obtain a grant of an order of stay pending appeal. These principles were highlighted in the case of **UAP Insurance Co. Ltd Vs Michael**

John Beckett, Civil Application No. 2014 Of 2004 where it was held that the applicant must demonstrate that :

a) **The appeal he has filed is arguable.**

b) **He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted.**

c) **The application was made without unreasonable delay.**

d) **He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.**

The above position was also reiterated in the case of **Antoine Ndiaye Vs African Virtual University (2015) eKLR.**

7. As regards the issue of the appeal, I have perused the Memorandum of Appeal dated 19.10.2020 and note that the same has dwelt mainly on the issue of liability. I am unable to say that the same is unarguable as it seeks to lay blame on the accident against other parties in the suit one of whom was not enjoined as a party and that the appellant seeks to have the liability shared between him and those parties. I am satisfied that there is an arguable appeal thereby meriting an order of stay of execution so as to ensure the same does not become nugatory in the end.

8. On the issue of substantial loss, it has been submitted for the Appellant that he stands to suffer great loss if monies are ordered to be paid at this stage only for the appeal to succeed with the Respondent's inability to refund the same. The Respondent on the other hand maintains that he has the means with which to refund the monies if called upon in the event of success of the appeal and who also maintains that he needs the monies with which to use for medication due to the injuries sustained. The Appellant who has lodged an appeal is entitled to pursue it and which must be preserved lest it becomes nugatory in the end. On the other hand the Respondent should not be prevented from enjoying the fruits of his successful judgement. The Appellant in his affidavit has not shown or indicated the specific loss to be suffered if the order of stay is not granted. He has also not shown that the Respondent will not refund the decretal sums in the event of success of the appeal. Despite the Respondent's response that he has the means the Appellant did not put a rejoinder thereto and hence the Appellant's concerns or worries will appear to have been taken care of. It is my view that the Appellant has not convinced the court that he stands to suffer loss other than just to claim that his right to appeal is sacrosanct and should not be impeded. I have not lost sight of the fact that the Appellant's right of appeal is sacrosanct and is guaranteed under Article 48 and 50 of the Constitution and thus he is entitled to ventilate it. There is therefore need to protect the subject of the appeal so that it does not become nugatory. The Respondent's concerns will be taken care of by an order that a certain amount be paid to him while the balance is put into an interest earning account in the joint names of the parties' advocates.

9. On the issue of whether the application has been filed without unreasonable delay, it is noted that the judgement was delivered on 7/10/2020 while the present application was lodged after about one and half months. I find the said period not to be inordinate. The Memorandum of Appeal was lodged on 19/10/2020 about nine days after the judgement and that the application was filed following the Respondent's threat to execute the decree. The one and half month is excusable in my view.

10. On the issue of security, the Applicant in his affidavit did not give any indication of his willingness to offer security for the due performance of the decree. However, in the submissions learned counsel pointed out that the Respondent is ready to offer security or adhere to conditions to be imposed. The Respondent on his part beseeches the court to grant conditional order of stay by allowing the Respondent receive half of the decretal sums while the rest is deposited into court. It is noted that the Appellant is seeking to be permitted to pay the decretal sums pegged at 30% liability in form of instalments. It seems the Appellant has already conjured up in his mind about a determination on liability yet the appeal is yet to be heard. Since the Appellant is not averse to making some payments, I find the Respondent's requests to be paid part of the monies in advance pending determination of the appeal merited as it is obvious that the Respondent is not likely to come out empty handed at the determination of the appeal.

11. As I pen off, I need to say something about the appellant's request to be allowed to pay 30% of the decretal sums in form of instalments. I find such a prayer rather preposterous as it seems the Appellant has already taken upon himself the role of the court yet the issues raised in the appeal are yet to be determined. The said prayer is misplaced and must be rejected pronto. The appellant is advised to hold his horses and wait for the determination of the appeal.

12. In the result, the Appellants application dated 23/11/2020 is allowed in the following terms:

(a) An order of stay of execution of decree in Machakos CMCC No.27 of 2019 granted to the Appellant/Applicant pending determination of the appeal is hereby granted to the Appellant upon the Appellant paying half of the decretal sums to the Respondent while the balance shall be deposited into a joint interest earning account in the name of the Advocates for the parties within forty five (45) days from the date hereof failing which the stay shall lapse.

(b) The costs of the application shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 25th day of January, 2021.

D. K. Kemei

Judge