



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. E003 OF 2021**

**JULIUS MUTURI THUMI.....APPELLANT**

**VERSUS**

**JOSPHAT NTONGAI with SOLOMON GITUNDU as the Guardian.....RESPONDENT**

**RULING**

1. Before the Court is an application dated 8<sup>th</sup> February 2021 seeking the following orders: -

***i) Spent***

***ii) Spent***

***iii) THAT the Court be pleased to grant stay of execution in Meru CMCC No. 302 of 2016 Josphat Ntongai v Julius Muturi Thumi pending the hearing and determination of this application.***

***iv) THAT the Court be pleased to grant stay of execution in Meru CMCC No. 302 of 2016 Josphat Ntongai v Julius Muturi Thumi pending the hearing and determination of the appeal filed herein.***

***v) THAT the costs of this Application be provided for.***

***vi) THAT the court grants any other orders that this Court may deem fit and just.***

***Applicants' Case***

2. The application is supported by the grounds on the face of the application and by the Applicant's supporting affidavit. He avers that the lower Court erred in awarding Judgment in the sum of Ksh 12,059,727 as this was an excessive and erroneous estimate and that if stay of execution is not granted, substantial loss and inconvenience may result to the Appellant considering that the Respondent is a person of no means and will not be able to pay back the amount in case the appeal succeeds and that the appeal has high chances of success and if execution is carried out, it will render the appeal nugatory.

***Respondents' Case***

3. The application is opposed vide the Respondent's replying affidavit sworn on 19<sup>th</sup> February 2021. The Respondent states that he is the brother and guardian of the Respondent herein who has lapse of memory due to head injuries and will not be able to remember the minute details and particulars needed in a case of this nature thus the appointment of a guardian. He states that in the suit at the lower Court, the Applicant was duly served and he filed a memorandum of appearance and a defence and that he closed his case without calling any witnesses and/or adducing any evidence. He states that the Applicant, who was the driver of the motor vehicle was charged with careless driving and found guilty in Traffic Case No. 269 of 2016 at Meru and that the medical report produced in Court clearly showed that the Respondent suffered serious injuries and the same was not disputed. He states that there was enough evidence to support the quantum. He states that in the submissions before the lower Court, his Advocates proposed a figure of Ksh 10,000,000/= and the Court ultimately awarded him a total of Ksh 7,000,000/= for pain and suffering, Ksh 1,440,000/= for loss of future earnings and Ksh 3,619,727/= as special damages. He states that the Applicant failed to disclose all these facts to Court in order to get an order of stay unjustly and without conditions and that the Appellant has not offered any security as required by law.

***Respondent's Submissions***

4. Only the Respondents filed submissions in the matter. The Respondent filed submissions dated 11<sup>th</sup> March 2021. The Respondent restated

the facts and arguments flowing from the application and the affidavits. He submits that the Applicants closed its case without calling any witness and/or adducing any evidence and has at all times sat on its levels until threatened with execution and the application is therefore an abuse of court process, malafides and improper before the Court. He submits that the Applicant's application has not met the threshold for grant of stay as per the provision of Order 42 Rule 6 (2) of the Civil Procedure Rules. He submits that the Applicant has not indicated the substantial loss likely to be suffered and he has further not provided any security. On the allegation made by the Applicant that he, the Respondent is a man of straw, the Respondent submitted that this argument is neither here nor there and that no evidence has been tendered to prove the same. He submits that money can be deposited in a joint account for the Counsels. He submits that despite the appeal being one on liability and quantum, it is not possible that the Respondent will leave empty handed and he also needs some money for treatment. He prays that the application be dismissed. He relied on the case of **Pamela Akinyi Opundo v Barclays Bank of Kenya Ltd (2011) eKLR**.

#### **Issues for Determination**

5. There is only one issue which the instant Application presents for determination: -

***i) Whether or not this Court should grant stay of execution pending Appeal.***

#### **Stay of Execution Pending Appeal**

6. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, as follows: -

***'No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***No order for stay of execution shall be made under sub rule (1) unless: -***

***a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.***

***b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.'***

#### **Substantial loss and whether the Appeal will be rendered nugatory**

7. One of the leading authorities in the issue of substantial loss is the case of **Kenya Shell Limited v Kibiru Another Court of Appeal Civil Application No. NAI 97 of 1986 (1986) KLR 416** where Platt, AG JA held as follows: -

***"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".***

8. On whether substantial loss may result to the Applicant unless the order is made, this Court observes that subject matter of the matter is money decree being the award of damages of Ksh 12,059,727. The Applicant has argued that should the appeal succeed, he is apprehensive that the Respondent may not be in a position to settle the decretal sum. In response, the Respondent merely states that this averment is neither here nor there and that no evidence has been adduced to prove the same.

9. Concerning this issue, this Court has previously held that once an Applicant states that they are apprehensive of the inability of the Respondent to pay the decretal sum should the appeal succeed, the burden of proof shifts to the Respondent to prove that they can pay. See the case of **National Industrial Credit Bank Limited -v- Aquinas Francis Wasike and Another (UR) C.A and Bonface Kariuki Wahome v. Peter Nziki Nyamai & Another Kajiado Civil Appeal No. 43 of 2018 (2019) eKLR**. The Applicant having raised his suspicions as to the ability of the Respondent to settle the decretal amount, the Respondent ought to have refuted this claim and stated that he has the financial muscles. To the contrary, the Respondent herein merely avoided this argument and purported that the burden was on the Applicant to confirm that the Respondent was not able to pay. The Court is alive to the fact that the decretal sum in issue is the substantial sum of Ksh.12,059,727 and being compelled to pay the sum in execution is a substantial loss as is the prospect of failure to recover it upon successful appeal.

10. In the end, this Court finds that although the Respondent has a judgment for which fruits he ought to enjoy, he failed in his duty to show that he is capable of settling the decretal sum in the event the appeal is successful more so in the face of a hefty award and there is a likelihood that the Applicant may suffer substantial loss in the form of inability to recover. Whereas this being a matter touching on a claim for damages arising out of a road traffic accident and it is unlikely that the Respondent will lose out entirely, it is possible that the quantum may be significantly reduced. It is therefore necessary for the Respondent to show that he would be in a position to pay back whatever difference would arise.

#### **Application without undue delay**

11. As to whether this application for stay was made without unreasonable delay, this Court finds that the same has indeed been made without unreasonable delay. The Judgment was delivered on **11<sup>th</sup> December 2020** and the instant application was filed on **9<sup>th</sup> February 2021** almost two (months) later. This does not constitute unreasonable or undue delay noting that the delivery of Judgment in consideration of the prevailing Covid-19 situation.

### **Security**

12. On security, the Applicant, at paragraph 6 of the grounds in support of the applications has confirmed that he is ready and willing and to abide by any conditions and terms as to security as the Court may deem fit to impose. The Respondent has submitted that no security has been offered by the Applicants. This is however a contradiction of the Applicant's own averments.

### **Conclusion**

13. In the end, this Court finds that should stay not be granted, the Applicants may suffer substantial loss noting that the Respondent has not demonstrated and/or at the very least confirmed by averment his capability of settling the undoubtedly high decretal amount, should the appeal be successful. This Court has, however, taken note of the argument that the Respondent needs the monies for treatment. It would however have been helpful for the Applicant to identify the exact nature and probable cost of the treatment required. Nonetheless, the Respondent indeed suffered injuries and it is said that he suffers from memory lapse, and he court accepts that he may become in need of medical treatment and care from time to time. The Court considers that the payment of a sum of Ksh.1,000,000/= approximating a twelfth of the decretal sum will not expose the Applicant to substantial loss, and will thus order the payment thereof to the Respondent as one of the conditions for stay of execution coupled with a deposit into Court of Bank Guarantee for the balance of the decretal amount.

### **Orders**

14. Accordingly, for the reasons set out above, this Court makes the following orders: -

***i) An order for stay of execution of the Judgment and Decree in Meru CMCC No. 302 of 2016 pending the filing, hearing and determination of Civil Appeal No. E003 of 2021 is hereby issued.***

***ii) The Applicants shall with thirty days (30) days from the date of this order pay to the Respondent the sum of Ksh.1,000,000/= and deposit with the Court a Bank Guarantee or Insurance Bond for the payment of the balance of Ksh.11,059,727/= together with interest and cost as may be adjudged upon it upon unsuccessful appeal.***

***iii) In default of the payment and or deposit of the Bank Guarantee or Insurance Bond as per order ii) above, the stay of execution shall lapse and be of no effect.***

***iv) The costs of the applications shall abide the outcome of the Appeal.***

*Order accordingly.*

**DATED AND DELIVERED ON THIS 22<sup>ND</sup> DAY OF APRIL, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Simiyu Opondo Kiranga & Co. Advocates for the Applicant.

M/S Maitai Rimita & Co. Advocates for the Respondent.