



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 764 OF 2019**

**JOSEPH MUTUKU NDAVI.....APPELLANT**

**VERSUS**

**ZIPPORAH SYOMBUA MWANGANGI.....RESPONDENT**

*(Being an Appeal from the whole of the Judgement of the Honourable Magistrate*

*D.O, MBEJA (SRM) delivered on 21<sup>st</sup> November, 2019 from CMCC NO. 9219 of 2017)*

**RULIG**

The application dated 10<sup>th</sup> February 2020 seeks the following orders.

**1. Spent.**

**2. Spent.**

**3. THAT** this Honourable Court be pleased to order a stay of execution of the Judgement of the Honourable Magistrate D.O Mbeja (SRM) delivered on 21<sup>st</sup> November, 2019 pending the hearing and determination of the Appeal.

**4. THAT** the applicant be heard *inter partes* on such date and time as this Honourable Court may direct.

**5. THAT** the court be pleased to make any other order as may deem fit in the interest of Justice.

**6. THAT** the costs of this application abide the outcome of the Appeal.

The application is supported by the affidavit of Sharon Laboso sworn on the same date of the application. The Respondent filed a replying affidavit sworn on 21<sup>st</sup> January, 2021. The application was determined by way of written submissions.

Miss Naututu, counsel for the applicant submit that the applicant is dissatisfied with the whole decision of the trial court on quantum and has preferred an appeal. Counsel urge that unless execution is stayed the applicant stands to suffer irreparable loss as the decretal sum is ksh. 1,443,650. The appeal has high chances of success. Counsel referred to the case of KENYA REVENUE AUTHORITY VS SIDNEY KEITANY CHANGOLE & 3 OHTERS (2015) Eklr where the court of Appeal held: -

**This court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”**

Miss Naututu further submits that the respondent’s means are unknown and it is highly unlikely that she will be capable of refunding the decretal amount in the event that the applicant’s appeal succeed. The Respondent has not even filed a replying affidavit to show that she has means of refunding the decretal amount. Counsel relies on the case of EDWARD KAMAU & ANOTHER -V- HANNAH MUKUI GICHUKI & ANOTHER (2015) Eklr where Aburili J held:

**“This court appreciates that the applicants being a party seeking favourable exercise of the court’s discretion is under a legal duty to place some material before the court upon which such discretion should be exercised. In other words, they should prove that the Respondent is impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposited on her affidavit of means.”**

With regard to the issue of the application being filed without unreasonable delay, it is submitted that the memorandum of Appeal was filed within the time limitation of Thirty (30) days. The Judgement was delivered on 21<sup>st</sup> November, 2019. An application for stay pending appeal was filed on 10<sup>th</sup> February, 2020. There was no unreasonable delay in filing the application. On the issue of security, it is submitted that the applicant is willing to deposit the entire decretal sum in court.

Mr. Wanjohi, counsel for the Respondent contend that the current application is an afterthought. Upon delivery of the Judgement, counsel for the applicant filed an application for stay of execution before the trial court. Paragraph 7 of the affidavit in support of the application stated as follows:

**“That for the reason the Defendant/Applicants are seeking a total of 45 days to be able to facilitate payment of the decretal sum and are thus..... humbly praying that this Honourable court be pleased to grant them 45 days stay of execution.”**

It is submitted that instead of settling the decretal sum, the applicant went to slumber until when he was served with warrants of execution. The application was filed after nine (9) months. Counsel maintain that there was unreasonable delay in bringing this application. Mr. Wanjohi relies on the case of ALIYDER TRADING COMPANY LIMITED VS LUCY JEPNGETICH MIBEI (2016) Eklr where Githua J held;

**There was therefore an obvious delay of about 4 months since the date the impugned Judgement was delivered and the filing of the initial application after about 3 ½ months from the date the appeal was filed and the date that application was filed in the court. The application did not attempt to offer any explanation for this delay. I find that unexplained delay of about four months is inordinate and is certainly inexcusable. The application appears to have been filed as an afterthought perhaps to delay the respondent’s realization of fruits of her Judgement.**

It is submitted that the appellant’s appeal is only contesting an award of ksh. 430,000 for future medical expenses. The respondent was awarded general damages of Ksh. 700,000. The total decretal sum is about ksh. 1,313,916. The applicant should be called upon to pay Ksh. 969,916 after deducting 20% agreed liability on the part of the Respondent. Such payment will safeguard the interest of the Respondent.

The Respondent’s claim before the trial court was for special and general damages. Parties recorded a consent on liability at the ratio of 80:20 in favour of the Respondent. The memorandum, of Appeal was filed on 23<sup>rd</sup> December, 2019. The appeal as per the memorandum is against the whole of the Judgement of the trial court. Grounds 2 and 3 of the appeal are against the trial court’s assessment of damages. Only ground 6 of the grounds of appeal relate to the issue of future medical costs. According to the Appellant, the respondent did not plead future medical costs.

In the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417** the court held as follows: -

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**1. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

The application was filed on 12<sup>th</sup> March, 2020 and Justice Sergon dealt with it under certificate of urgency on 13<sup>th</sup> March, 2020. The applicant before the trial court sought 45 days to settle the decretal sum. It is therefore clear to me that the application was not filed after a period of nine (9) months. Considering the circumstances of the case and taking into account the fact that there was a similar application heard before the trial court, I do find that the application was not filed after unreasonable delay.

It is submitted by counsel for the respondent that the applicant had sought a period of 45 days stay of execution so as to settle the decretal sum and therefore the application is an afterthought. The record shows that a memorandum of Appeal was filed on 23<sup>rd</sup> December 2019. The application for Stay of execution before the trial counsel was filed on the same date of 23<sup>rd</sup> December, 2019. The application did not make any reference to the appeal. The applicant opted to pursue an appeal which is his constitutional right. The court cannot ignore the pending appeal and stop the applicant from prosecuting the application on the ground that there was a promise by way of averment in an affidavit to settle the decretal sum within 45 days. The applicant is entitled to pursue his appeal and have it fully heard and determined.

Counsel for the respondent urged the court to order for release of part of the decretal sum to the Respondent as a condition to allowing the application. There is no doubt that courts have made such orders whereby part of the decretal sum is released to the Respondent. It all depends on the circumstances of each case. At times the Respondent, where the case involve a road traffic accident, May have suffered serious injuries which requires daily medical attention. In such cases an order to release part of the decretal sum would be ideal. Such orders

are also informed by the long delays appeal take before being processed and determined by the court. The circumstances of this case do not call for the release of the decretal sum. The Respondent was awarded damages for future medical expenses but is not in dire need of medical attention now.

The applicant is contesting the assessment of damages by the trial court. This is a triable issue. It is also contended that there was no claim for special damages for future medical expenses. These are issues which make the appeal arguable. The appeal is not an afterthought and was filed within time.

Given the circumstances of the case, I do find that the application dated 10<sup>th</sup> February, 2020 is melted and is hereby granted in the following terms.

- 1) Execution is hereby stayed pending the hearing and determination of the pending Appeal.
- 2) The applicant to deposit the entire decretal sum in court within 45 days hereof.
- 3) In default of depositing the decretal sum as ordered herein, the orders of stay of execution shall stand vacated and the Respondent shall be at liberty to execute.
- 4) Costs shall follow the outcome of the Appeal.

**DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY, 2021**

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**S. CHITEMBWE**

**JUDGE**