



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E203 OF 2020

LYDIA MUTUNE.....APPELLANT

VERSUS

MIRIAM WAMBUI.....1ST RESPONDENT

PETER THUKU.....2ND RESPONDENT

RULING

The application dated 10th September, 2020 seeks the following main prayer:-

- 1. Spent**
- 2. Spent**

3. THAT there be a stay of execution of the ex-parte judgment of the Honourable Court delivered on 24th August 2017, pending the hearing and determination of the appeal.

The respondent opposed the application via grounds of opposition dated 12th November, 2020 and a replying affidavit sworn by Roselyn Kihara.

Parties agreed to determine the application by way of written submissions. Mr. Onyango, Counsel for the applicant submitted that ex-parte judgment was entered against the applicant. An application to set aside the judgment and leave to file defence was made but the same was dismissed by the trial court. The appeal is as a result of that dismissal. It is further submitted that judgment was entered irregularly against the applicant as she was not served with summons. At the time the suit was filed, the applicant was neither the actual or beneficial owner of the accident motor vehicle. The third parties who owned the vehicle are known and they are the ones to be held liable.

Counsel for the applicant acknowledges that the court's power to grant or refuse an application for stay of execution depends on the circumstances of the case. Counsel referred to the case of **JAMES WANGALWA & ANOTHER –V- AGNES NALIAKA CHESETO [2012] eKLR** where the court stated:-

“The fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when the execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affair that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

Counsel for the applicant urge that substantial loss will be suffered if the application is not granted as the respondent is likely to execute for a sum of Kshs.531,085/84. The respondent has not demonstrated her means or capacity to reply the sums due. The applicant is willing to provide security as a sign of good faith. Counsel relies on the case of **FOCIN MOTORCYCLE CO. LIMITED -V- ANN WAMBU WANGUI & ANOTHER [2018] eKLR** where the court stated:-

"When the applicant purposes to provide security as the Applicant has done, it is a mark of good faith that the application

for stay is not just meant to deny the respondent the fruits of judgment. It is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore provided the ground for stay"

Mr. Onyango also referred to the case of **RWN –V- EKW [2019] eKLR** where it was held:-

“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances... the court can grant stay of execution orders without demanding that the applicant furnishes the court with security for performance of the order.”

Ms Janmohammed appeared for the 1st respondent. It is submitted that the applicant and the 2nd respondent were duly served with summons but failed to enter appearance and/or file defence within the prescribed time. Judgment was entered and notices of intention to execute dated 5th December 2017 were sent to them. The application is only meant to frustrate the first respondent’s efforts to execute. The applicant has not even offered to deposit the decretal amount in court as security. The 1st respondent will suffer as he spent over Kshs.50,000 tracing the appellant so as to serve him with summons. Counsel contend that the application is brought under Order 42 rule 6 of the Civil Procedure Rules 2010 which states:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 subrule (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; and

(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.”

It is further submitted that the filing of an appeal does not guarantee stay of execution orders being granted by the court. The court has to be satisfied that the applicant will suffer substantial loss if the order is not granted and also the applicant is required to provide security for the due performance of the decree. The applicant has not demonstrated that any substantial loss will be suffered should the decretal sum be released to the 1st respondent and no security has been offered by the applicant.

The only prayer being sought by the applicant is for execution to be stayed pending the hearing and determination of the appeal. The court is being called upon to exercise its discretion. The Court of Appeal in the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR** stated 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.

4. 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.”

Also in the case of **HALAI & ANOTHR –V- THORNTON & TURPIN (1963) LTD, [1990] KLR 365**, the Court of Appeal held *inter-alia*:-

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without

unreasonable delay.”

The Memorandum of Appeal indicate that the appeal is against the trial court’s ruling of 4th November, 2019. The applicant sought to have the default judgment set aside but the trial court dismissed that request vide its ruling delivered on 26th August, 2020. The current application was filed on 16th September, 2020. I do find that the application was filed without undue delay.

The trial court awarded the respondents Kshs.531,085 as damages. The suit before the trial court was filed in 2016. A search from the National Transport and Safety Authority (NTSA) dated 8th February, 2018 indicates that as of that date the applicant was the registered owner of the accident vehicle number KAX 394W. The appellant is attributing negligence to third parties and contend that at the time of the accident she was not the registered owner of the accident vehicle. I do find that the pending appeal and is not frivolous and is only intended to frustrate the respondents from enjoying the fruits of their judgment. Should execution proceed, the applicant is likely to suffer substantial damage or loss.

At paragraph 24 of the supporting grounds of the application, it is indicated that the applicant is able and willing to deposit half the decretal sum in court. This is one of the requirements of order 42 rule (6) of the Civil Procedure Rules. I do find that the applicant has met the conditions necessary for granting orders of stay of execution pending the hearing and determination of an appeal.

In the end, the application dated 10th September 2020 is hereby granted on the following terms:-

- 1) Execution of the ex-parte judgment in Nairobi CMCC 8658 of 2016 is hereby stayed pending the hearing and determination of the appeal.**
- 2) The applicant to deposit a sum of Kshs.350,000 in court within sixty (60) days hereof and in default execution to issue.**
- 3) Costs shall follow the outcome of the appeal.**

Dated and signed at Nairobi this 27th day of **May, 2021**.

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S. CHITEMBWE

JUDGE