



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL APPLICATION NO. E038 OF 2021**

**OBADIAH MUGAMBI.....APPELLANT**

**VERSUS**

**JOYCE NCORO.....RESPONDENT**

**RULING**

1. Before the Court is an application dated 5<sup>th</sup> March 2021 seeking stay of execution of the Judgment and/or Decree delivered on 11<sup>th</sup> February 2021 by Hon. T. Gesora (SRM) in Maua CMCC No. 141 of 2017.

**Applicant's Case**

2. The Application is supported by the grounds on the face of it and by the Applicant's supporting affidavit. The Applicant also filed submissions dated 13<sup>th</sup> April 2021. The Appellant's case is that he has an arguable appeal in that the award made in the lower Court is so inordinately high and does not reflect a just and fair compensation to the Respondent. He contends that should his appeal be successful, and having settled the decretal amount as it presently stands, he will suffer unimaginable prejudice in that the Respondent has not discharged the evidential burden required of him by showing that he is financially stable and capable of repaying any monies that may ultimately be found due to Applicant. He urges that he, the Applicant is a doctor currently offering services to marginalized communities in the North Eastern parts of Kenya and he will be financially crippled if called upon to settle the decretal sum at this stage and that such crippling will substantially affect his source of livelihood and work reputation that he has painstakingly built over time. Citing the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417, he urges that stay should be granted unless there is overwhelming hindrance why it should not be granted. He urges that his application has been brought without unreasonable delay and that he has offered to offer any justifiable security that the Court deems fit. He urges that security may take different forms such including financial insurance or bank guarantees or title deeds. He urges that an order of security should not be one stifle access to justice and that the Court is enjoined by the overriding objective of Section 1A of the Civil Procedure Act to facilitate just, efficient, expeditious, proportionate and reasonable resolution of civil disputes as opposed to imposing punitive terms and conditions for stay. He relies on the case of *Kenya Sharok Kher Mohamed Ali Hirji v Watta Enterprises Limited (Civil Application No. 74 of 2015)*

**Respondent's Case**

3. The application is opposed by the Respondent by her replying affidavit sworn on 9<sup>th</sup> March 2021. The Respondent avers that she has been in court with the Applicant since 2017 as the Applicant knocked her down by his motor vehicle and that despite him having a good insurance cover, he is determined to condemn her even through the instant frivolous appeal. She states that as a result of the accident, she suffered comminuted fracture of supracondylar humerus with olecranon displacement and she lost total use of her affected limb and she has been drawn to total poverty notwithstanding that she is a single parent with 6 children. She urges that even the award of Ksh 1,200,000/- was under assessed as she was never compensated for the diminished use of her affected limb. She urges that if the Court is inclined to award stay, half of the award should be released to her and the other half should be deposited in Court.

**Issue for Determination**

4. The only issue for determination in the instant application is whether or not the Court should grant the Applicant stay of execution pending hearing of the Appeal.

**Determination**

5. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

- a. substantial loss will result to applicant if stay is not granted; and

b. security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and

c. the application has been brought without unreasonable delay.

### **Arguable Appeal**

6. Arguability of appeal as a condition for stay has not been expressly provided for in the Civil Procedure Rules. The same is however a condition for stay under Rule 5 (2) (b) of the Court of Appeal Rules. Nonetheless, this Court has a duty to ensure that any such intended Appeals are indeed arguable and not frivolous. An arguable appeal is not one which must necessarily succeed. The Applicant here intends to appeal against the award of damages from the Judgment and/or Decree of the Chief Magistrates' Court allowing a claim for negligence which led to injuries following a road traffic accident. He attached his Memorandum of Appeal dated 5<sup>th</sup> March 2021 in his supporting affidavit which proves his averments. This is indeed an arguable appeal.

### **Substantial Loss**

7. The first tests under Order 42 Rule 6 is whether the Applicant has demonstrated that he is likely to suffer substantial loss should stay not be granted. To urge his application, the Applicant has averred at paragraph 9 of his supporting affidavit that the Respondent has not demonstrated that she is financially capable of paying any such sums as may ultimately be due to the Appellant. The Respondent in her response did not address this matter. She simply avers that she suffered and is in need of the money. It has been held time and again that in such applications for stay, once an Applicant raises doubt as to the Respondent's ability to settle the decretal sum, the burden shifts to the Respondent to show that she has the means to pay since that is a matter which is peculiarly within his knowledge as per Section 112 of the Evidence Act. See *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* and *Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020*. As the Respondent failed to indicate whether she has the financial muscle to pay, this Court finds that the Applicant has demonstrated the likelihood of suffering substantial loss.

### **Security for due performance of decree**

8. The Applicant has indicated his willingness to offer security for the due performance of the decree, only that the same should be reasonable. The Respondent has asked that half of the amount be released to her and to have the other half be deposited in Court. This Court also finds that it would be in the best interests of justice to allow the application on condition that security is provided.

### **Delay**

9. Judgment in the trial Court was delivered on 11<sup>th</sup> February 2021 and the instant application was brought on 5<sup>th</sup> March 2021, about 21 days later. This Court does not find that there was any undue delay on the part of the Applicant.

### **Orders**

10. Accordingly, for the reasons set out above the court makes the following orders: -

*i. The court grants an order for stay of execution of the Judgment and/or Decree delivered on 11<sup>th</sup> February 2021 by Hon. T. Gesora (SRM) in Maua CMCC No. 141 of 2017 pending the hearing and determination of the appeal.*

*ii. The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 400,000/= being 1/3 of the decretal sum.*

*iii. The Applicant shall within Thirty (30) days deposit the balance of the decretal amount being the sum of Kshs 800,000/= in Court.*

*iv. In default of the payment and deposit as per orders ii) and iii) above, the stay of execution herein granted shall lapse and be of no effect.*

*v. The costs of this application shall abide the outcome of the appeal.*

Order accordingly.

DATED AND DELIVERED ON THIS 24<sup>TH</sup> DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kiautha Arithi & Co. Advocates for the Applicant

