



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL APPLICATION NO. 75 OF 2021**

**AMOS MUTWIRI.....1<sup>ST</sup> APPELLANT**

**PATRICK MWENDA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ESTHER KAMBA GATIMI (Sued as the legal representative of the estate of**

**REUBEN MURIUKI (DECEASED).....RESPONDENT**

**RULING**

1. Before the Court is an application dated 23<sup>rd</sup> June 2021 seeking stay of execution of the Judgment and/or Decree delivered on 21<sup>st</sup> May 2021 in Meru CMCC No. 218 of 2020.

***Applicant's Case***

2. The Application is supported by the grounds on the face of it and by the Applicant's supporting affidavit sworn by his Advocate, Stephen Muriira Thukubu. This Court has previously warned against Counsel swearing affidavits on behalf of their clients except in so far as no factual averments relating to the merits of the case are concerned.

3. The Applicant's case is that he is dissatisfied with the Judgement of the lower Court and has instructed his said Advocate to file the Appeal. That his appeal reasonably has high chances of success as per the memorandum of appeal. That he is exposed unless stay is granted. That the amount involved is colossal and the Respondent may not be able to refund the same in the event the Appeal succeeds. That he is ready to abide by any terms that the Court may impose for performance of the decree. That his application has been brought without undue delay.

***Respondent's Case***

4. The Respondent opposes the application by her replying affidavit sworn on 30<sup>th</sup> June 2021. The Respondent avers that the application is fatally defective, bad in law and an abuse of Court process and that the Applicant's motive behind the application is to deny the Respondent the fruits of her judgment. That the Applicant's application does not meet the threshold for grant of stay. That she, the Respondent is financially endowed and is able to settle the decretal sum and that the allegation that she is unable to refund the same is a disguised attempt at misleading the Court to grant the application.

***Issue for Determination***

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

***Determination***

6. 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**

7. Arguability of appeal as a condition for stay has not been expressly provided for in the Civil Procedure Rules as can be observed above. It is however important for this Court to satisfy itself that any such intended Appeals upon which an application for stay is founded are indeed arguable and not frivolous. An arguable appeal is not one which must necessarily succeed. The intended appeal herein is against a Judgment on liability and quantum following a fatal accident, inviting the Court to consider the principles in **Butt v Khan**. This is indeed an arguable appeal.

### **Substantial Loss**

8. The Judgment being appealed awarded the Respondent a total of Ksh 1,600,000/= for loss of dependency, a total of Ksh 500,000/= for loss of expectation of life, Ksh 100,000/= of for pain and suffering and Ksh 90,000/= special damages. In money decrees, substantial loss is proven by the Respondent's inability to make a refund should the Appeal be determined in the Appellant's favour. Such eventuality renders the appeal nugatory and leaves the Applicant with a Judgment, the fruits of which he cannot enjoy.

9. The Applicant has expressed fears of inability of the Respondent to refund the monies. The Respondent, has responded to this allegation and said that she is in fact able and financially endowed to settle any such sums. This Court finds that even though this was done by a mere averment, the Respondent indeed discharged the burden to rebut any such allegations of inability to pay as was required of her. See case of **Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020**. See also **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**. For this reason, this Court finds that substantial loss has not been proven.

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

10. The Applicant has indicated his willingness to offer security for the due performance of the decree. This Court takes note of the fact that Ksh 2,290,000/= is indeed a substantial sum, it being that the matter involves individuals. This Court finds that it would be in the best interests of justice to allow the application on condition that security is provided.

### **Delay**

11. Judgment in the trial Court was delivered on 21<sup>st</sup> May 2021. The Applicant filed the instant application for stay on 23<sup>rd</sup> June 2021. This was about 32 days later. This period is cannot be termed as inordinate so as to amount to undue delay.

### **Orders**

12. 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 21<sup>th</sup> May 2021 by Hon. L. N. Juma (SRM) in Meru CMCC No. 218 of 2020 pending the hearing and determination of the appeal.**

**ii) The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh.765,000/= being approximately 1/3 of the decretal sum of Ksh.2,290,000.**

**iii) The Applicant shall within Thirty (30) days deposit the balance of the decretal amount being the sum of Kshs.1,525,000/= in a joint interest earning account opened in the names of the parties' respective Advocates.**

**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 29<sup>TH</sup> DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kithome L. Mutinda & Co. Advocates for the Applicant

