



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 05 OF 2020

MTUNJI NATHANIEL KAINGU1ST APPLICANT/APPELLANT

WILSON KIBANOI MOSIRIA aka

WILSON MOSIRIA KIBANOI.....2ND APPLICANT/ APPELLANT

VERSUS

ALICE MUTHINI NDETO & ZIPPORAH NDINDA NDETO

(suing as the legal representatives of the estate of

ELIZABETH KANINI NDETORESPONDENTS

RULING

1. Before me is an application brought by way of Notice of Motion dated 17th February 2020, seeking four (4) orders some of which have been spent as follows –

1) (spent)

2) (spent)

3) That this honourable court be pleased to grant stay of execution of the judgment and decree delivered on 20th December 2019 in Kilungu SRMCC No. 27 of 2019 pending hearing and determination of the appellant's appeal herein.

4) That costs of the application be in the cause.

2. The application is opposed through a replying affidavit sworn on 24th May 2020 by Zipporah Ndinda Ndeto in which it was deponed that the application is not meritorious as it has not met the set criteria in law for the grant of stay pending appeal.

3. The application proceeded through the filing of written submissions. I have perused and considered the written submissions of both the applicant's counsel and the respondents' counsel.

4. This being an application for stay of execution of judgment or decree, it is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the relevant parts of which provide as follows –

6(2) No 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, and

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

5. The applicants have argued through counsel that they have an arguable appeal and thus stay should be granted. The respondents argue that the application has not met the requirements of the law for such an application for stay of execution.

6. The first issue is whether the application was filed without unreasonable delay? This issue does not appear to be in contest. I find that the application was filed without unreasonable delay.

7. The second issue is whether the applicant will suffer substantial loss if the stay orders sought are not granted? The applicants alleges they will suffer substantial loss if the stay orders sought are not granted as their appeal is an arguable appeal and the respondents will not be able to repay the amount, if the appeal succeeds.

8. From the grounds of appeal filed which I have perused, the issue in contest on appeal is the quantum of damages awarded and not the liability. In those circumstances, I find that the applicants will suffer substantial loss only if the amount of award paid to the respondents are not refunded in case the appeal succeeds. However, though I find that the applicants will suffer substantial loss if the stay orders are not granted, I will grant stay subject to payment of the decretal amount as the contest on appeal is not on liability but only on quantum of damages.

9. Has the applicants satisfied the requirement for provision of security as required by Rule 6? In my view, the amount of the decree that the applicants will have to pay the respondents for grant of stay orders herein, will operate as such security. In this regard, I note that the total award by the trial court is Kshs.1,394,240/=.

10. Consequently, I allow the application and grant stay of execution of judgment or decree herein subject to the following conditions –

i. The applicants will pay the respondents Kshs.400,000/= being part of the decretal amount within 30 days from today.

ii. In default of payment of the amount of Kshs.400,000/= as above, the stay of execution orders herein granted will automatically lapse after the 30 days.

iii. Costs of the application will follow determination of the appeal

Delivered, signed & dated this 29th day of July, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE