



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL MISC. CASE NO. EO89 OF 2021

BETWEEN

KUKALKUMAR NAVINTLAL PATEL.....APPELLANT/APPLICANT

AND

JOEL MWONGELA M'TUERANDU.....1ST RESPONDENT

LUCY MAKENA MWONGELA.....2ND RESPONDENT

(administrators and/or personal representatives of the Wycliff Mutabari-deceased)

RULING

Background

1. On the 09th June, 2021, the court in **MERU CMCC NO. E044 OF 2020** entered judgment in favour of the Respondents as against the Appellant/ Applicant for Kshs. 2,134,449/-.
2. By a notice of motion dated 08th July, 2021 and filed on 14th July, 2021, Applicant seeks orders for:

1. This Honourable Court Stay of execution of judgment in MERU CMCC NO. E044 OF 2020 pending the hearing and determination of the appeal

2. Costs be provided for

3. The notice of motion is premised on grounds among others that the Applicant is aggrieved by the judgment of the trial court and has filed an appeal which has overwhelming chances of success.
4. The application is also supported by an undated affidavit sworn by Frankline N.Nyaga, legal officer with UAP Old Mutual, the Applicant's insurer who reiterates the grounds on the face of the application.
5. The application is opposed on the basis of a replying affidavit sworn by the 1st Respondent on 19th July, 2021. He contends that the Applicant has not demonstrated substantial loss in the event that the stay orders are not granted.

Analysis and Determination

6. I have considered the application in light of affidavits on record. Concerning stay of execution, Order 42 (6) of the Civil Procedure Rules provides:

(2) No order for 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
- b. That the application has been made without unreasonable delay; and
- c. 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.

7. There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

8. In Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd, Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”

9. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

10. The Respondent was awarded general damages in the sum of Kshs. 2,134,449/-. The Applicant has not demonstrated that the Respondents are not in a position to refund the said sum in the event that the appeal succeeds. (See Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997).

11. From the affidavit evidence, I am not convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

12. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has not even offered to furnish a security for due performance of the decree herein pending the hearing and determination of the appeal.

13. While it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of *the Act* to afford the Appellant an opportunity to prosecute his appeal.

14. In the end, the notice of motion dated notice of motion dated 08th July, 2021 and filed on 14th July, 2021 is allowed in the following terms:

- i. An order for stay of execution of the Judgment and Decree in MERU CMCC NO. E044 OF 2020 pending the filing, hearing and determination of the Appeal is hereby issued.
- ii. The Applicant shall with fourteen (14) days from the date of this order pay the Respondents a total of Ksh. 500,000/- (Kenya Shillings Five hundred thousand).
- iii. Within 60 days from the date hereof, the Applicant shall deposit the balance of the decretal sum being Ksh. 1,634,499/-, in a joint interest earning account in names of the respective Advocates for the parties.
- iv. In default of compliance with orders ii) and iii) above, the orders for stay shall lapse.
- v. The costs of the applications shall abide the outcome of the Appeal.

DATED IN MERU THIS 29TH DAY OF JULY 2021

T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicants - Ms. Oteko instructed by Kiyuki & Kayika Advocates

