



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPL. NO. E001 OF 2020

AYOTI DISTRIBUTORS LTD.....APPLICANT

VERSUS

FLORENCE AUMA.....RESPONDENT

RULING

The application dated 22nd September 2020 sought 2 substantive reliefs, being leave to appeal out of time, and stay of execution pending the hearing and determination of the appeal.

1. It was the Applicant's case that neither it nor its advocates received any notification from the trial court concerning the date when the Judgment was to be delivered.
2. As the Applicant first became aware of the Judgment when execution was being levied, and because by that time, the period prescribed by law for lodging an appeal had lapsed, it became necessary that the Applicant brings the current application.
3. The Respondent has informed the court that she was not opposing the application. She appreciated the fact that the lack of notice about the date when judgment would be delivered, coupled with the unprecedented curtailment of court operations due to the Covid 19 Pandemic, rendered it difficult for the Applicant to have filed the intended appeal within the prescribed time-lines.
4. The Court commends the Respondent for her objectivity and magnanimity.
5. Accordingly, leave is hereby granted to the Applicant to file its appeal out of time. The Applicant is allowed **TEN (10) DAYS** to file the said appeal.
6. Meanwhile, as regards the question of stay of execution, the Respondent urged the Court to order the Applicant to pay to her three-quarters of the Judgment sum, as a condition for the orders of stay.
7. In her considered opinion, as the Applicant's main complaint in the intended appeal, was with regard to the quantum of damages awarded by the trial court, it would only be fair if the bulk of the money was paid directly to her, instead of being paid into a fixed deposit account.
8. In my considered view, the payment of the decretal amount, or any portion thereof, directly to the decree-holder, goes beyond the requirement that security be provided by the Judgment-Debtor, for the due performance of the decree.
9. Ordinarily, therefore, when security is to be provided, as a condition upon which execution is stayed pending an appeal, the said security would not be paid directly to the decree-holder.
10. If the security is money, it would normally be held in an interest-earning account, in the joint names of the advocates representing the two opposing parties. The practice of depositing the money in a joint interest-earning account is beneficial to all parties, because by the time the appeal is determined, the money deposited in the account would have grown, when the interest earned is credited to the said account.
11. At other times, parties ask that the money be deposited in court. In such instances, it is necessary to always bear in mind the fact that money deposited in court does not earn any interest.
12. Another form of security, that is often applied is a Bank Guarantee. That form of security enables the Judgment-Debtor to continue utilizing his financial resources throughout the period when the appeal was still pending determination. And whilst the cash-flow of the Judgment- Debtor would not be impacted negatively, the decree-holder's interests are fully protected through the bank guarantee.

13. The question that I must now revert to, is whether or not the Court may order the Judgment-Debtor to pay the decretal sum or part thereof, directly to the Judgement-Creditor.
14. I reiterate that payment to the decree-holder is not equivalent to the provision of security.
15. However, I also appreciate the fact that when an Appellant was contesting the quantum of the compensation awarded, it may be reasonable to allow the decree-holder to receive such quantum as the Appellant was not contesting.
16. In this case, the Respondent asked that three-quarters of the award be paid outright to her. However, it is not clear to me how the Respondent arrived at that ratio.
17. On the other hand, the Court ought not to just pick a figure from the air, and order that it be paid to the Respondent.
18. I hold the view that justice demands that any uncontested amount be paid to the Respondent forthwith, so that she may have funds to meet her medical needs. The Applicant would not be prejudiced if the Respondent received the portion of the decretal amount which the Applicant is not contesting.
19. Accordingly, I now order that pending the hearing and determination of the appeal, there shall be a stay of execution.
20. However, before I give the conditions attendant to the order for stay, I will invite the parties to address me immediately after I deliver this Ruling.
21. The conditions thereafter granted, shall be deemed to be part and parcel of the ruling.
22. Finally, each party will bear his or her own costs of the application.

DATED, SIGNED and DELIVERED at KISUMU

This 28th day of July 2021

FRED A. OCHIENG

JUDGE