



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 41 OF 2018**

**JAMES ITHALE AKOTHE.....APPELLANT**

**VERSUS**

**EDWIN SOYA BUSOLO ..... RESPONDENT**

*(An appeal from the Judgement of Hon. R. K. Ondieki, SPM in Kilifi SPMCC. No. 32 of 2016)*

**CORAM: Hon. Justice R. Nyakundi**

**Isaac Onyango for the appellant**

**Sherman Nyongesa for the respondent**

**RULING**

This Court rendered judgement in this matter on 15<sup>th</sup> April 2020 affirming the decision of the trial court to award Kshs.2,000,000 plus costs and interest to the Respondent. The Appellant, by an Application dated 22<sup>nd</sup> May 2020 brought under Certificate of Emergency seeks for Stay of Execution of the Judgement. This Ruling relates to that Application.

The Application sought for orders that:

**1. Spent**

**2. There be a stay of execution of the judgement and decree of this Honourable Court delivered on April 21, 2020 and the judgment of Hon. R. K. Ondieki, SPM in Kilifi SPMCC. No. 32 of 2016 delivered on July 4, 2018 as upheld by this Honourable court pending the hearing and determination of this application.**

**3. There be a stay of execution of the judgement and decree of this Honourable Court delivered on April 21, 2020 and the judgment of Hon. R. K. Ondieki, SPM in Kilifi SPMCC. No. 32 of 2016 delivered on July 4, 2018 as upheld by this Honourable court pending the hearing and determination of the appeal filed in the Court of Appeal.**

The Application was premised on the grounds set out therein and in the supporting affidavit deponed by **Rina Welemba** on the 22<sup>nd</sup> May 2020.

The court, in directions issued on 27<sup>th</sup> May 2020 in chambers directed that the Application be dispensed by way of written submissions with the Respondent at liberty to file a reply. The Respondent subsequently filed a replying affidavit sworn by **Edwin Suya Busolo** on the 2<sup>nd</sup> June 2020. The Appellant/Applicant filed submissions dated 4<sup>th</sup> June 2020. The Respondent filed submissions dated 29<sup>th</sup> June 2020.

**The Summary of The Case**

The Applicant/Appellant contended he was dissatisfied with the judgement and decree of this Honourable Court delivered on April 21, 2020 upholding the judgment of Hon. R. K. Ondieki (SPM) **in Kilifi SPMCC. No. 32 of 2016**. In the decision of the trial court delivered on 4<sup>th</sup> July 2018, the Respondent was awarded Ksh. 2,002,000/= plus interests and costs.

It is contended that the Respondent by his advocates letter dated 7<sup>th</sup> May 2020 claimed a sum of Ksh. 2,638,645.89/= as at 4<sup>th</sup> May 2020.

The Appellant contends that he is dissatisfied by the decision of this court affirming the finding of the trial court and has filed an appeal at the Court of Appeal. It is argued that the appeal is arguable with high chances of success and likely to be rendered nugatory should the respondent be allowed to proceed with execution. That the Respondent has already threatened to proceed with execution and has given a ten-day notice to the Appellant to satisfy the decretal sum payable in the primary suit. That upon orders granted by consent in this appeal on September 20 2018 the entire decretal sum had been deposited in a joint interest earning account in the names of the advocates on record for both parties and that this is still the prevailing position. It is contended that now that the appeal has been dispensed with, the Respondent is likely to extract orders to have the decretal sum released to him despite the pendency of the intended second appeal to the Court of Appeal.

It is further contended that having not exhausted his constitutional right of appeal, any execution would occasion substantial loss and damage to the Appellant since the moneys involved are colossal which the Respondent has no known ability and/or capacity to refund.

The case is made that since the decretal sum has already been deposited in a joint interest earning account, the same would serve as adequate security for any decretal sum eventually found payable.

In support of the averments made in the Application, the Appellant produced a host of documents marked as '**Bundle B**' which include inter alia a Notice of Appeal dated 5<sup>th</sup> May 2020, the consent order issued on 20<sup>th</sup> September 2018, a Fixed Deposit receipt number AA18319LZJF7, a statement of account number 1006270154, an email and letter dated 8<sup>th</sup> May 2020 from the Appellant's insurers and the Respondent's advocates letter/ judgment notice dated 7<sup>th</sup> May 2020.

The Respondent by his replying affidavit avers that the Appellant's Application is fatally defective, frivolous, vexatious, bad in law and a gross abuse of this Honourable Court's process for a number of reasons. He contends that the Application is wrongly filed before this Honourable Court since this Honourable Court is now functus officio and the Appellant can only ventilate his issues before the Court of Appeal. Further, he argues that this Honourable Court exhaustively dealt with a similar application for the Stay of Execution which was compromised by Consent of the parties and the Court cannot be called upon to issue similar orders on the same file. According to the Respondent, the Appellant has filed a Notice of Appeal dated 5<sup>th</sup> May 2020 and the matter is now squarely before the Court of Appeal and this Honourable Court cannot be called upon to deal with an issue that is already before the Court of Appeal.

It is contended that the Appellant has not expressly offered to deposit security of the decretal amount which now stands at Kshs. 2,638,645.89.

According to the Applicant, the affidavit in support of the Application is sworn by a stranger to the proceedings and the contents therein amount to hearsay evidence which is not admissible before this Honourable Court. That the Application is filed in bad faith and is aimed at unfairly blackmailing him into giving up his right to enjoy the fruits of his valid judgment. That the deponent of the Supporting Affidavit has stated in her instructions to the Appellant's advocates to file an Appeal that the insurers intention is "to force some concession from the Plaintiff" to enable them pay a paltry sum of between Kshs.1,200,000/= to Kshs.1,500,000/= all-inclusive thereby depriving the Respondent of a sum of over Kshs.1,200,000/= rightfully awarded by the trial Court and affirmed by this Honourable Court.

The view taken by the Respondent is that the Appellant's intended Appeal has no chances of succeeding. He points out that the Appellant has not even offered to pay Kshs.1,500,000/= pending their intended Appeal as a show of good faith.

The Respondent avers that the severe injuries he sustained in the accident have left him helpless and unable to cater for his basic needs and the continued deliberate delay to pay him by the Appellant and his Insurers continues to cause him untold misery and suffering.

### **The Submissions, Analysis and Determination**

I have considered the Appellant's application for stay of execution pending appeal as well as the Respondent's response thereto and the respective advocates' submissions on the matter which I intend to refer to as necessary in determining the Application.

The Respondent urges that the Court is functus officio with the Appellant having filed a notice of appeal and that the Appellant had filed a similar application that was exhaustively dealt with by this honorable court. On the first issue, **Order 42 Rule 6 of the Civil Procedure Rules** provides for an application such as this therefore the Respondent's argument on this limb fails. Regarding the second contention, this Application is clearly for stay of the decision of this Court rendered on 15<sup>th</sup> April 2020, no other such Application has been filed in this Court. This limb of argument fails too. Onto the substantive issue now.

The operative law in this instance, as correctly pointed out by both Counsel, is **Order 42 Rule 6 of the Civil Procedure Rules** which provides as follows:

*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(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 and that the application has been made without unreasonable delay; and*

*(b) 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.*

In an application such as this, sufficient cause must be shown by the Applicant. There must also be a threat of substantial loss if the order is not granted and the application must have been brought without unreasonable delay. Additionally, there must be such security as directed by the Court. Even with the foregoing, the grant of stay remains a discretionary order that must also consider the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgement. This is in line with the authorities advert to by Counsel for the Applicant to wit: **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** and **Gatobu M'Ibutu Karotho v Christopher Murithi [2008] eKLR**.

The exercise of the court's discretion when considering an application for stay of execution is premised on principles set out in **Butt v Rent Restriction Tribunal [1982] KLR 417** where it was stated: -

*"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

*3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

*4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

It is not contested that the Application was brought without undue delay, therefore this requirement has been satisfied and I need not say more.

Regarding substantial loss, the Appellant cites **Article 50 of the Constitution** and the judicial authorities of **James Wangalwa & Another v Agnes Naliaka Chesoto [2012] eKLR** and **James Ithale Akothe v Abdiwelle Ali Abdi [2020] eKLR** for the supposition that right of appeal is a constitutional right that advances the right to a fair hearing. That the provision for stay is a mechanism for preserving this right and therefore an order of stay ought to be issued where this right has accrued. Further reliance is placed on **Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR** for the contention that the inability of the Respondent to repay the moneys paid out is an aspect of substantial loss and the Appellant stands to suffer should execution be carried out since the Respondent has no known assets capable of being attached to recover the decretal sum should the appeal succeed.

The Respondent on the other hand is vehement that the instant Application is calculated to frustrating the Respondent's right to enjoy the fruits of his judgment. It is contended that the Appellant has not demonstrated what substantial loss would be occasioned should the stay not be granted. Citing **Bake 'n' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR** and **Samwel Kimutai Korir (suing as the personal and legal representative of the estate of Chelangat Silevia v Nyanchwa Adventist Secondary School & Another [2017] eKLR**, it is submitted that no prejudice whatsoever shall be suffered by the Appellant in its satisfaction of the judgment. That if anything, the Respondent will continue to suffer as the injuries he sustained during the accident occasioned by the Appellant have left him helpless and unable to cater for his basic needs rendering him to poverty which state the Appellant is trying to use to strong arm the Court into allowing its Application.

The Court of Appeal in **Kenya Shell Ltd vs Kibiru [1986] eKLR** defined substantial loss in the following manner:

*"Having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.*

*Accordingly, while I have considerable sympathy for Kenya Shell on this application, I consider there is no other course consistent with the material on record, and with the justice of the case, than to refuse the application for a stay made before this court.*

*It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. 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 event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.*

***Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.***

My task is to balance the competing interests of the decree holder as against that of the judgement debtor lest I deny the Respondent of the fruits of their judgement on the one hand, or hinder the Appellant’s right of appeal on the other. The Appellant urges that the Respondent is a man of straw with no known assets and therefore he is not convinced they would be able to repay the decretal sum should the Appeal succeed. The Respondent on the other hand argues that it is as a result of the injuries caused by the accident occasioned by the Appellant that he has been rendered destitute and this should therefore not be used against him.

It is not in doubt that the Appeal before this Court was against the general damages awarded by the trial court amounting to Ksh. 2,000,000/=. It is also not contested that the sum was deposited in a joint interest earning account in the name of both advocates on record. As such, the requirement that security be furnished has been met.

While in his submissions the Applicant opposes a partial payment or release of the funds to the Respondent as this would be tantamount to speculating on the intended Appeal, in the annexures to the supporting affidavit is a letter dated 8<sup>th</sup> May 2020 from his insurers intimating that they would be amenable to paying out a sum of between Ksh. 1,500,000/= to 1,700,000/=. It is this concession that the Respondent asks the Court to consider, urging that this Court direct that the Appellant pays the sum of Ksh. 1,500,000/= plus reasonable costs of Ksh. 200,000/= and the balance be deposited in a joint interest earning account for further order.

In balancing the competing interests of both parties, I am of a mind to strike a middle ground. Since the Appellant in their suit papers has intimated a willingness to part with between Ksh. 1,500,000/= to 1,700,000/= in satisfaction of the decree, I do not see any prejudice that will be occasioned should they be directed to pay a portion of the decretal sum. In fact, it is the course that is the most just in the circumstances as it not only considers the right of appeal of the Appellant but also allows the Respondent to enjoy, albeit partially, the fruits of his judgement.

Consequently, I allow the Applicant’s prayer for stay of execution but on condition that he pays the Respondent Ksh. 1,000,000/= being one half of the Ksh. 2,000,000/= awarded by the trial court and held in the joint interest holding account operated by Counsel for both parties. The remainder of the decretal sum shall remain in the joint interest holding account pending the determination of the intended appeal.

Before I sign off, I must acknowledge the delay in the delivery of this Ruling. I note that initially, the Ruling was drafted, ready and scheduled to be delivered in June 2020 via email due to the prevailing scaling down of court operations owing to the Covid-19 pandemic. This was upon the agreement of both Counsel on record by their respective emails both of 24<sup>th</sup> June 2020. However, due to movement of Court files, the file was inadvertently misplaced and the Ruling was never delivered. It is only upon the matter being brought to the attention of the Court by the advocates on record that the inadvertence on the part of the Court was realized and immediately rectified with the file being located and the Ruling being delivered upon notice to the parties. I sincerely thank Counsel on record for notifying me and enabling the Court to render the Ruling.

In those circumstances, the notice of motion dated 22<sup>nd</sup> May, 2020 be and is hereby allowed on condition that the appellant releases part of the decretal sum of Kshs.1,000,000/= to the respondent within forty-five (45) days from today’s date. The costs of this application to abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED ON 30<sup>TH</sup> DAY OF JULY 2021 AND DISPATCHED VIA EMAIL ON 3RD DAY OF AUGUST 2021**

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**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March, 2021 from the Office of the Chief Justice on the declarations of measures restricting Court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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