



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. E071 OF 2021

JOSELINE SHUTTLE SERVICES.....1ST APPELLANT/APPLICANT

JOSIAH MUMO.....2ND APPELLANT/APPLICANT

-VERSUS-

RUTH MWELU KYALO & ANOTHER

(Suing as a legal representative and administrator of the Estate of

RICHARD KYALO MUTUA (Deceased).....RESPONDENT

(Being an appeal from the Judgement on quantum of Hon. C. Ocharo (SPM)

in Machakos CMCC No. 927 of 1013 dated and delivered on 6th May, 2021)

RULING

1. This is an application by the Appellants/Applicants dated 17/5/2021 wherein they seek an order of stay of execution of judgement and decree in **Machakos CMCC No. 927 of 2013** pending the hearing and determination of the appeal herein.
2. The application is supported by an affidavit of Kelvin Ngure, Deputy Claims Manager of the Applicants/Appellant insurer. The deponent averred inter alia; that the appellants are dissatisfied by the judgement and decree of the lower court and have already filed an appeal as herein and that the same will be rendered nugatory if the order of stay is not granted as the respondents are likely to execute the decree; that the application has been made without undue delay; that the respondents have not disclosed or furnished with the court the evidence of their financial standing and hence the appellants stand to suffer prejudice as the respondents might not be in a position to refund the decretal sums in the event of success of the appeal; that the appellants are ready and willing to abide by conditions to be imposed by the court such as furnishing of security for the due performance of the decree as shown by an annexed copy of a bank guarantee of Kshs 30,000,000/.
3. The application is opposed. The Respondents filed a replying affidavit dated 24/5/2021 where they averred that the appellants have not shown what substantial loss they will suffer if the order of stay is not granted. It was further averred that the appellants are not challenging the trial court's finding on liability. The respondents maintained that they own ten (10) acres of land and many herd of cattle and are in a position to refund the decretal sums in the event of success of the appeal. It was finally contended that the appeal has no chances of success as it is not an arguable one.
4. The Application was canvassed by way of written submissions. The appellants' submissions are dated 16/7/2021 while those of the respondents are dated 6/7/2021.
5. The applicant's counsel placed reliance on **Order 42 Rule 6** of the Civil Procedure Rules and submitted that on the issue of stay of execution, they have provided sufficient reason to warrant grant of the order sought and in rejoinder reiterated a willingness to offer security as the courts may direct.
6. The Respondent in opposing the application submitted that the Applicants/Appellants have taken the court for a ride and have not demonstrated that they fit within the conditions set under Order 42 Rule 6 of the Civil Procedure Rules. Counsel sought that the application dated 17/05/2021 be dismissed.

7. I have considered the rival affidavits and the submissions. The issue for determination is whether the application has merit.

8. The application basically seeks for an order of stay of execution pending appeal. Order 42 Rule 6 of the Civil Procedure Rules is the law applicable law guiding the same. In the case of **Antoine Ndiaye V African Virtual University [2015] EKLR** the court gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit,

i. The Application was brought without undue delay,

ii. Substantial loss occasioned to the applicant if the order is not granted.

iii. Security for performance of the decree.

9. I have looked at the application herein, and with regard to the condition of undue delay, as analyzed above, the delay is not inordinate as the same was filed within eleven days from the date of delivery of the judgement by the trial court. With regard to the issue of substantial loss, I am unable to find the substantial loss that the Applicants/Appellants shall suffer save that their right to be heard on appeal will be extinguished if the order is not granted. The appellants contend that the respondents are not likely to refund the decretal sums in the event of success of the appeal as they have not furnished the evidence of financial means. Indeed, the respondents merely claimed that they have ten acres of land and herd of cattle and will be able to refund the sums. The respondents were expected to go further than that by availing the evidence but they did not. Granted that the respondents are entitled to enjoy the fruits of the judgement the appellants also have a right to ventilate their appeal. This was observed in the case of **Port Reitz Maternity V. Karanga Kabia Civil Appeal No.63 of 1997** where the court held that the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgement delivered in his favour and that there must be a just cause for depriving the plaintiff of that right. Hence the court must do a balancing act to ensure that the rights of the parties are taken care of. The decretal sum is indeed a tidy sum by any standards and that in the event of success of the appeal the applicant might be compelled to pursue the respondent for the refund of the money and hence the likelihood of substantial loss on the part of the applicant. This is the state of affairs to be taken care of by an order of stay at this stage. On the issue of security for performance, the Applicants/Appellants have indicated willingness to deposit security as the court directs and have proposed to furnish a bank guarantee for the entire decretal sum. Therefore, I am satisfied that the applicant has met the basic requirements for grant of this order.

10. A perusal of the lower court's Judgement reveals that liability had been arrived at 100% wholly against the Applicants/Appellants. The appeal therefore is only on quantum of damages. The Applicants/Appellants seem to attack the award of damages under the Law Reform Act of **Kshs. 210,000/=** and on the loss of dependency of **Kshs. 3,000,000/=**. It is thus obvious that the Respondents are not likely to come out empty handed at the end of the determination of the appeal. Consequently, an order that a sum of Kshs 500,000/= be paid to the Respondents while the balance be deposited into an interest earning account in the joint names of the advocates for the parties or alternatively a bank guarantee thereof be furnished will be appropriate in the circumstances as it takes care of the parties' concerns.

11. Consequently, I find merit in the Appellant's/Applicant's application filed on 18/05/2021. The same is allowed in the following terms:

*(i) Pending the hearing and determination of the appeal herein an order of stay of execution of the judgement and decree in **Machakos CMCC No. 927 of 2013** is hereby granted upon the Applicants paying the respondents a sum of **Kshs 500,000/=** and deposit the balance of the decretal sums into an interest earning account in the joint names of the advocates for the parties or alternatively a bank guarantee thereof within Fourty five (45) days from the date of this ruling failing which the stay shall lapse.*

(ii) The costs hereof shall abide in the appeal.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE