



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. E067 OF 2021

STEJES AGENCIES LIMITED.....APPELLANT/APPLICANT

-VERSUS-

BENJAMIN MALONZA PAUL.....RESPONDENT

(Being an appeal from the judgement and Decree of the Hon. Benard Kasavuli (PM) at

Chief Magistrate's Court at Mavoko CMCC No. 876 of 2019 delivered on 1st April, 2021)

RULING

1. The Appellant herein has filed an application dated 18/6/2021 seeking principally an order for stay of execution of judgement and decree entered against it and delivered on **01/04/2021** in **Mavoko Civil Suit No. 876 of 2019** pending the hearing and determination of the appeal.
2. The Application is supported by an affidavit of Sarah Weru, a senior legal officer of Saham Assurance Company who are the insurers of the Applicant/Appellant. She averred that the appellant will suffer substantial loss if the stay is not granted as the respondent will not be in a position to refund the decretal sums and hence render the appeal nugatory. She also averred that the applicant is willing to abide by such conditions to be imposed and that the Applicant is ready to furnish an insurance bond as security for the due performance of the decree.
3. The Application is opposed. The Respondent filed a replying affidavit dated 29/6/2021 wherein he averred that the Applicant/Appellant has not demonstrated that the Appeal has any chances of success as it lacks merit and arguable grounds. The respondent contends that if the court is inclined to grant an order of stay then half of the decretal sums should be released to the respondent's advocates while the balance be deposited in a joint interest earning account of both advocates on record till the final determination of the appeal.
4. The Application was canvassed by way of written submissions. The applicant's submissions are dated 17/7/2021 while those of the respondent are undated but filed on 23/7/2021.
5. I have considered the rival affidavit and the submissions by learned counsels. It is not in dispute that the respondent has already obtained a judgement in his favour from the lower court while the appellant has lodged a memorandum of appeal which is pending determination. The respondent's interest is to execute the decree while the appellant seeks to ventilate his appeal. This is a simple application for stay of execution pending appeal in which the applicant is under obligation to furnish sufficient reasons why it should be granted the said order of stay pending appeal. The said conditions are found in Order 42 Rule 6(2) of the Civil Procedure Rules. The singular issue for determination is whether the application has merit.
6. As regards the stay of execution, it has been submitted by learned counsel on behalf of the Applicant, that the Applicant will suffer substantial loss as there is a likelihood that it will not recover the decretal amount from the Respondent whose means are unknown as no documentary evidence has been attached to prove his financial standing. To rebut the Applicant's assertion, the Respondent avers that his financial incapability alluded to by the Applicant has no justification since the Applicants have not placed any evidence to prove substantial loss and further that the execution process has not been put in motion.
7. The applicant's application is premised on **Order 42 Rules 6** of the Civil Procedure Rules, 2010 which stipulates 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.

8. Order 42 Rule 6 of the Civil Procedure Rules provides three conditions to be met by an Applicant seeking an order of stay of execution pending appeal namely: that the application has been made without unreasonable delay; that substantial loss may result to the applicant unless the order for stay of execution is made; that security is furnished for the due performance of the decree.

9. As regards the issue of whether the application was filed timeously, it is noted that the judgement complained of was delivered on the 01/04/2021 and the appeal lodged by the **03/05/2021**. The present application was filed on **25/06/2021** which is just within the stipulated period. I find there was no inordinate delay by the applicant and hence that threshold has been met by the Applicant.

10. On the issue of substantial loss, the applicant has averred that it stands to suffer loss and damage if it is compelled to pay up Kshs. 811, 600.00/= before the appeal is canvassed. Indeed, the decretal amount is a tidy sum by any standards. The loss of such a sum will definitely cause a dent on the Applicant's Insurer's finances. I note that the Respondent has claimed that he is being prevented from accessing the fruits of the judgement. However, the Respondent has failed to show that he has the means to refund the sums in the event the appeal succeeds. Since the applicant has thrown the ball onto his court regarding his inability to refund the decretal sum in the event of success of the appeal, it was thus incumbent upon the respondent to rebut the said allegation but he did not do so. It is highly likely that the applicant will be put to great trouble instituting proceedings to pursue the respondent with a view to recovering the said monies upon success of the appeal and this is the substantial loss intended to be prevented. Hence I find the Applicant has met the threshold. As regards the respondent's right to enjoy the fruits of the judgement, an order that a portion of the decretal sum be paid upfront while the remainder be deposited into an interest earning account in the joint names of the advocates for the parties would take of those concerns. Suffice here to add that the appellant's appeal is only on quantum of damages and hence at the end of the determination of the appeal the respondent is not likely to come out empty handed.

11. On the issue of security, the applicant has stated that it is ready and willing to abide by conditions to be imposed by the court. Indeed, security is a pre-requisite for a grant of stay of execution of a judgement or decree. The Applicant's Memorandum of Appeal is mainly on the issue of quantum of damages but not on liability. If that is the case, then I find that the Respondent is not likely to leave the court empty handed at the determination of the Appeal. The Respondent has sought for the release of half of the decretal sum to be released to the Applicant/Respondent's Advocates on record while the balance is to be deposited into a joint interest earning account in the names of both Advocates. The Applicant did not file a further affidavit in response to the said suggestion. The applicant's proposal to give an insurance bond as security is not appropriate in the circumstances of the respondent. However, that notwithstanding, I find the amount suggested by the Respondents counsel to be on the higher side since the appeal is yet to be heard and determined. Further it can go either way in that the quantum might be reduced somewhat and hence a reasonable figure ought to be given. I find a sum of Kshs. 300,000/= would be adequate as security and which is to be deposited with the Applicant/Respondent's Advocates on record while the balance be deposited into a joint interest earning account in the names of both Advocates pending the determination of the appeal. That arrangement takes care of the concerns of the parties.

12. In the result, I find the Applicants applications dated 25/06/2021 has merit. The same is allowed in the following terms:

i. An order of stay of execution of judgement and decree in Mavoko Civil Suit No. 876 of 2019 is hereby granted upon the Applicant depositing the sum of Kshs. 300,000/= with the Applicant/Respondent's Advocates on record while the rest of the decretal sums be deposited in a joint interest earning account in the names of both Advocates for the parties within the next forty (45) days from the date of this ruling failing which the stay shall lapse.

ii. The costs of the application shall abide in the appeal.

It so Ordered.

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

D. K. Kemei

Judge