



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCA NO 3 OF 2021

ANTHONY MBUGUA.....1ST APPELLANT/APPLICANT

GEORGE KAMAU KANTUNGI.....2ND APPELLANT/APPLICANT

VERSUS

VICTORIA NJERI CHEGE (suing as the legal representative of the estate of)

GACHANJA MUCHIRI KAMAU (deceased)..... RESPONDENT

RULING

1. This is a ruling on application dated 18th January 2021 seeking the following orders:-

a. Spent

b. Spent

c. That this Honourable Court be pleased to order a temporary stay of execution of the judgment and Decree issued in Nakuru Cmcc No. 1312 of 2018 together with the resultant orders of the ruling delivered on the 17th December 2020 pending the hearing and determination of the appeal herein.

d. That the costs of this application be provided for.

2. Grounds on the face of the application are that on 26th October 2018, the respondent herein filed a suit in NAKURU CMCC NO. 1312 of 2018 (primary suit) on behalf of the estate of the deceased for compensation as a result of an accident that occurred on 19th June 2018 involving the deceased and the Applicants' vehicle; that on 6th May 2020 judgment was delivered in the primary suit and a net award of Kshs. 1,808,464.00/= made; that the trial court applied a multiplicand of Kshs. 118,145.00 yet in the primary suit, the respondent had pleaded and prayed that the deceased income was Kshs. 54,681.70/=.

3. The applicant averred that upon getting the copy of the aforesaid judgment filed an application dated 8th May 2020 seeking review of the judgment and on 17th December 2020 a ruling of the aforesaid application dated 8th May 2020 was delivered dismissing the application without the Honourable court analyzing all the tissues that had been raised by the parties.

4. The applicant averred that the Appeal will be rendered nugatory and applicant will incur a substantial loss if an order for stay of execution is not granted and is ready, willing, and able to abide by any reasonable terms including furnishing of security as this Honourable Court may deem just to order for the due performance of the decree as may ultimately be binding on them; that the applicants are willing to offer a Bank guarantee and/or deposit the decretal amount in fixed deposit in the joint names the counsels for the Applicants and Respondent.

5. The application is supported by the affidavit of **Anthony Mbugua**. He restated the grounds in the application.

6. In response, the respondent filed an affidavit sworn by **Victoria Njeri Chege** who averred that the application is frivolous, bad in faith, vexatious, malicious, and gross abuse of the court process, and the same ought to be dismissed; that the application does not meet the threshold of the orders sought.

7. She averred that she erroneously tabulated the loss of the dependency using the multiplicand of Kshs. 54,681.70 but she attached a payslip

of the deceased for June 2018 and the court in awarding judgment exercised its discretionary powers and considered the correct multiplicand of Kshs118, 145/= based on the deceased net income at the time of his demise.

8. She further stated that the trial court elaborated how the multiplicand of Kshs. 118,145 was arrived at in the ruling of the application for review and that she is entitled to the benefits of the fruits of the judgment which will only be realized through execution; execution will not amount to substantial loss or render the appeal nugatory. She stated that there has been no compliance of the judgment with the undisputed figure and execution is a lawful process anchored by a statute.

9. She averred that the applicant has not demonstrated to the court the loss she is likely to suffer if the orders sought are not granted; that she is not a woman of straw and attached her bank statement to prove she can satisfy the decree of the court if the appeal is successful. She added that the deceased was survived by school-going children who are in urgent need of school fees. She urged this court to dismiss this application.

APPLICANT'S WRITTEN SUBMISSIONS

10. Counsel for the applicant submitted that the application meets the threshold for granting a stay of execution under Order 46 Rule 6(2) of the Civil Procedure Rules. Further, the appeal has a higher chance of success as there is an error apparent on the face of the record. He restated grounds on the face of the application and submitted that parties are bound by their pleadings and thus the plaintiff should be estopped by law from pleading Kshs118,145/=

11. The applicant cited the case of *Associated Electrical Industries Ltd vs. William Otieno (2004) eKLR*, wherein the court held as follows:

“I entirely agree with the Appellant Counsel’s submissions. Parties are bound by their pleadings. The Respondent here pleaded one thing and sought to prove another. In such a Situation the Defendant/Appellant was highly prejudiced. It sought to defend the case against it as stated in the Plaintiff, and the case stated in the Plaintiff was never proved. The Respondent having found himself at variance made no application to amend the Plaintiff. The trial magistrate also noted the disparity between what was pleaded and still went ahead to enter Judgment, which was wrong in law. Phipson on Evidence 13th Edition, at page 40 states:

“In the absence of leave to amend, the parties are bound by their particulars, and the court cannot award more than these disclose...”

Accordingly, and for reasons outlined, this appeal is allowed with costs, both an appeal and in the lower court.”

12. The applicant submitted that there is no delay in filing the appeal and the decretal sum being colossal sum, he will suffer substantial loss if a stay is not granted as the respondent has not proved she can refund the sum paid out if the appeal succeeds. The applicant cited the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike Court of Appeal Civil Application No. 238 of 2005*: -

“This court has said before and it would bear repeating that while

the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

13. The applicant restated willingness to furnish security for performance of decree and urged this court to find in favor of the applicant and award costs for this application.

RESPONDENT'S SUBMISSIONS

14. The respondent submitted that whereas the application is brought timely, it has failed to meet the other two conditions for granting stay as provided by **Order 42 Rule 6(2) of the Civil Procedure Rules**; that substantial loss is not substantiated by mere assertions and must be supported by evidence and stated that the applicant has failed to demonstrate how they stand to suffer a substantial loss and the mere apprehension of the inability of a decree-holder to pay back the decretal sum is not a ground to deny the Respondent the fruits of their judgment and cited the case of *Victory Construction vs. BM (a minor suing through next friend one PMM) [2019] eKLR where the court held as follows:*

“What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case, in my view even if it were shown that the respondent is a man of lesser means that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success since lack of means per se is not necessarily a ground for granting a stay...”

15. The respondent submitted that she has discharged the burden of proving she can pay the decretal sum if the appeal is successful by attaching her bank statements and urged this court to find that the applicant has not satisfied the court that they stand to suffer any loss if the stay of execution is not granted.

16. The respondent further submitted that if the court is to exercise its discretion and allow the stay of execution order, the same be limited to the contested loss of dependency which the appeal seeks to address and not the entire decretal amount; that the applicant should make good the uncontested amount of the decretal sum as well as costs of the suit; that if stay order is issued, it be limited to a sum of Kshs. 945,413/= and the contested amount be deposited in a joint interest-earning account in the names of both advocates and the Respondents be awarded costs.

ANALYSIS AND DETERMINATION

17. I have considered averments herein, grounds in support of the application, and submissions by parties herein. The application is brought under **Order 42, Rule 6 (1), (2) of the Civil Procedure Rules** which provide 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 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 the application being made, to consider such application and to make such order thereon as it may 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.

18. The guiding principles for grant of stay of execution pending appeal were set out in the case of **Butt –vs.- Rent Restriction Tribunal [1979] eKLR** as follows:-

“i) The power of the Court to grant or refuse an application for a stay of execution is discretionary. The discretion should be exercised in such a way as not to prevent an appeal.

ii) 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.

iii) 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.

iv) The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement.”

19. The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his right of appeal are safeguarded. The court in exercising its discretion should ensure that no party suffers prejudice that cannot be compensated by an award of costs.

20. It is not disputed that the application was filed timeously. The appellant is also agreeable to depositing security in court pending the hearing and determination of the appeal. I now wish to consider whether the appellant will suffer substantial loss if the stay of execution is not granted.

21. From the grounds herein, the applicant disputed assessment on loss of dependency, no issue has been raised in respect to awards under the other headings. There is therefore no reason why the respondent should be denied the amounts not disputed. In respect to the disputed amount, the respondent has availed bank statements to demonstrate that she will be able to refund the amount paid to her as damages in the event the appeal succeeds. In **Antoine Ndiaye –vs.- African Virtual University [2015] ECLR**; had the following to state:-

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; it follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

22. The purpose of a stay of execution is not to deny any party the right to enjoy the fruits of the judgment. The respondent should not be denied the undisputed amount. The issue of assessment of damages disputed is a matter to be dealt with in the appeal and I will not delve into it at this stage. In respect to the disputed amount, although the respondent has availed bank statements it is unlikely that the refund will be immediate in respect to the whole amount. In my view, it would be safe to deposit the disputed amount in a joint interest-earning account in the joint names of both counsels.

23. FINAL ORDERS

1) Stay of execution do issue on condition that respondent is paid awarded amount less award under loss of dependency.

2) The disputed amount to be deposited in a joint interest-earning account in the names of both Advocates.

3) 1 & 2 above to be complied within 45 days.

4) Costs of this application in the cause.

RULING dated, signed and delivered via zoom at **Nakuru** This **28th** day of **October**, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Ms. Obura counsel for Appellant

Mr. Ouma holding brief for Mrs. Mukira counsel for Respondent