



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E175 OF 2020

REGINA WANJEMA GITAUAPPELLANT/APPLICANT

VERSUS

JEREMIAH KANDITHI MUCHERU.....RESPONDENT

RULING

The appellant filed a notice of motion dated 5/10/2020 brought pursuant to **Section 3A of the Civil Procedure Act, Order 42 Rule 6 (1) (2) and (3), Order 51 Rules 2010** seeking orders

a. Spent

b. That this honorable court be pleased to stay any further proceedings in Milimani Chief Magistrates Court Civil Case No. 11107 of 2018 and in particular execution of decree issued on 2/10/2020 pending the hearing and determination of this application

c. That this honorable court be pleased to stay any further proceedings in Milimani Chief Magistrates Court Civil Case No. 1107 of 2018 and in particular execution of decree issued on 2/10/2020 pending the hearing and determination of the appeal herein

d. That the costs of this application be in the cause

e. Any other orders that this honorable court deems fit

The application was supported by the affidavit of Kevin Ngure sworn on 5th October, 2020. The respondents filed a replying affidavit sworn by Jeremiah Kandithi Mucheru on 12th November, 2020.

The appellant submitted that on 2/10/2020 judgement was delivered in the subordinate court in favour of the respondent whereby liability was granted at 80%, general damages at Kshs 1,600,000, special Damages at Ksh. 359,552, Future Medical Expenses at Kshs 120,000 costs and interest.

Counsel for the appellant submitted that the application was filed on 2/10/2020 barely a week after delivery of the judgment and therefore the application was filed expeditiously. On substantial loss the appellant indicated that the respondent did not furnish the court with any documentary evidence to prove her financial standing or even statements to show the financial status of her business. Therefore, the respondent would not be able to refund the decretal sum. The applicants advocate on 14/7/2021 informed the court that the respondent had already filed a declaratory suit seeking to have the applicant's insurer compelled to settle the decretal sum which is a mode of execution and enforcement of a decree and should the respondent be allowed to proceed with the said declaratory suit then the application herein and appeal will be rendered nugatory.

On whether the appeal is arguable, counsel for the appellant argued that in application for stay pending appeal it is not a requirement to show that the appeal has a high chance of success and the appellant only need to show that he has an arguable appeal and in support cited the case of **Bake 'N' Bite (Nrb) Limited V Daniel Mutisya Mwalonzi [2015] eKLR** where the court held as follows;

“This court has pronounced itself in several decisions that under Order 42 Rule 6 (2) of the Civil Procedure Rules, the applicant in seeking orders of stay pending appeal from the subordinate court to the High Court, the applicant is not required to prove that they have an arguable appeal, unlike if it was an application before the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. This is exemplified in several decisions including Nakuru HCC 211/98- Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others and the appellant's own authorities cited in support of this application namely, Equity Bank Ltd vs West Link Mbo Ltd

(supra).”

The appellant contend that indeed the appeal is arguable as the learned magistrate erred in law and fact in awarding damages that were excessive in the circumstances and raise serious questions of law that ought to be critically examined on appeal. The appellant is ready and willing to furnish reasonable security as may be ordered by the court.

The application was opposed by the replying affidavit of Jeremiah Kadithi Mucheru dated 12/11/2020. The respondent contended that the appellant’s application is lacking in substance and cannot be the basis for granting the orders sought. That the applicant obtained *ex-parte* orders herein by misleading the court as the date of judgement was 21/7/2020 and not 2/10/2020 as indicated by the appellant. Therefore, having approached this court with unclean hands the *ex-parte* orders should be discharged.

Counsel for the respondent submitted that it is uncontroverted that the respondent is a man of means as a businessman at Ongata Rongai capable of refunding the decretal amount if the appellant is successful in her appeal. It was also pointed out that Judgement was delivered on 21/7/2020 in favor of the respondent and decree extracted on 2/10/2020 which action triggered the application herein. Counsel indicated that a scrutiny of the memorandum of appeal dated 3/8/2020, the appellant is only challenging the award for general damages of Kshs. 1,600,000. Therefore, the awards for special damages and further medical costs are not subject to the appeal and should therefore be paid.

Counsel for the respondent also submitted that there was unreasonable delay as the application was presented three months after judgement was delivered on 21/7/2020. That the appellant has not demonstrated what substantial loss she is likely to suffer if the orders sought are not granted. Counsel referred to the case of **Justus Kyalo Musyoka v John Kivungo [2019] eKLR** where Odunga J held;

“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 stay. As was held in Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.”

Analysis and Determination

The issue for determination is whether the order of stay of execution should be granted. A Grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules**, the relevant part of which states 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 appeal case of 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 subrule (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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

In **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417**, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an

application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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. Finally, 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 requirements.

On the issue of substantial loss, the appellant maintain that the respondent did not furnish the court with any documentary evidence to prove his financial standing. Therefore, there is no way of knowing whether he will be able to refund the decretal sum if the appeal herein succeeds. The appellant additionally contended that the respondent has filed a declaratory suit and unless a stay is granted, judgement will be executed which would render the appeal herein nugatory.

Judgement was passed on 21/7/2020 and the decree was issued on 2/10/2020. The application herein was filed on 12/10/2020 about three months after judgement. I am therefore satisfied that the current application has not been brought after a long period of time considering the circumstances under which the court were operating since the announcement of the presence of Covid 19 in March 2020.

There is the requirement for security to be provided as a pre-condition to the granting of orders of stay of execution. This requirement serves the interest of justice in that the respondent will be denied the fruits of its judgment but will be in a position to know that should the appeal be unsuccessful, there will be no need to pursue execution afresh. The applicant should not have a blanket order staying execution without providing security unless it can be established that the applicant is an institution or person who is financially sound and capable of settling the decretal sum whenever called upon to do so.

From the rival pleadings and submissions, I do find that justice demand that the applicant be in a position to pursue its appeal. The application dated 5/10/2020 is hereby granted as prayed on the following conditions: -

- 1. Execution is hereby stayed pending the hearing and determination of the pending Appeal.**
- 2. The applicant to deposit Kshs 1,280,000 the decretal sum in a joint interest earning account of both counsels within 45 days hereof.**
- 3. In default as ordered herein, the orders of stay of execution shall stand vacated and the Respondent shall be at liberty to execute.**
- 4. Costs shall follow the outcome of the Appeal.**

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE