



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL NO. E024 OF 2021

MUINDE MULATYA..... 1ST APPELLANT

STEPHEN MWANZIA2ND APPELLANT

VERSUS

ROSEMARY MUTETHYA KYALO AND STELLA VIATA WYCLIFF (Suing as the Legal

Representative of the Estate of **WYCLIFF JOHN SYENGO(DECEASED)**..RESPONDENTS

(Being a matter arising out of judgment in Kitui Chief Magistrate's Court Civil Suit No. 176 of 2019

R U L I N G

1. By a **Notice of Motion** dated 30th April 2021, the Applicants herein, Muinde Mulatya and Stephen Mwanzia have invoked the provisions of **Sections 1A, 1B, 3A of Civil Procedure Act and Order 42 Rule 6 (i) and (2) of Civil Procedure Rule** in seeking the following reliefs namely: -

i. Spent

ii. That pending the hearing and determination of this application, there be a stay of execution of judgment or decree in Kitui Chief Magistrate's Court Civil Case No. 176 of 2019.

iii. That pending the hearing and determination of the appeal herein, there be a stay of execution of judgment in Kitui Chief Magistrate's Court Civil Case No. 176 of 2019.

iv. That this court makes any such orders it deems fit.

v. That costs be in the cause.

2. The Applicants have listed 16 grounds as the basis of this application which can be summarized as follows: -

3. That the subordinate court entered an *ex parte* judgment in favour of the Respondents to the tune of Kshs 5, 599,390/- on 12th May 2020. That upon delivery of the judgment, the Respondents wrote to the Applicants' insurance company, Direct line Assurance on 20th May 2020 informing them of the court's judgment. That the insurance company then informed the Applicants of the trial court's determination and essentially the existence of the suit.

4. That the insurer also instructed advocates to file an application seeking to set aside the *ex parte* judgment as well as seek orders to have the suit begin *denovo* but the application was dismissed on 16th April 2021. The Applicant claims that dismissal of the suit triggered commencement of the execution process which placed the Applicants' properties at risk of being sold via public auction.

5. The Applicants have also filed a Supporting Affidavit sworn by Muinde Mulatya on 30th April 2021 where the deponent has reiterated the grounds stated in the application.

6. The Applicants also filed a Supplementary Affidavit sworn by Muinde Mulatya on 11th May 2021 in response to the Respondent's Replying Affidavit. In the Supplementary Affidavit, the Applicants seek to explain the delay in filing of the present application which they

state was occasioned by delay in exchange of correspondence between their advocates and their insurer. The Applicants also take issue with the fact that the Respondents have not demonstrated that they can refund the decretal amount if their appeal is successful.

7. In their submissions dated **17th June 2021**, the Applicants submit that they have met the threshold required for issuance of orders of stay. On substantial loss, they submit that the execution process has commenced and their vehicles are at risk of being sold at a public auction. The Applicants submit that they are in the transport business hence the sale of their vehicles will cripple their day-to-day operations.

8. They further submit that the Respondents have not proven that they have the financial ability to refund the decretal sum of Kshs 6,578,173. They submit that the evidential burden of proving that the Respondents are financially capable lies on the Respondents themselves. They have placed reliance on the case of *Allan Ngala Mwendwa v Margaret Wilson & Anor (2017) eKLR* where the court referred to the case of *ABN Amro Bank N.V vs Le Monde Foods Limited Civil Application no. NAI 15 of 2002* and maintained that the evidential burden with regards to financial ability to refund decretal sums shifts to the Respondents once the Applicant swears that the Respondent cannot refund the same.

9. On the issue of time taken to file this application, the applicants submit that this application was brought on 17 days after delivery of the trial court's decision. They explain the delay by stating that their advocates had to render an opinion to their insurers on the effect of the trial court's decision and that process took time and contributed to the slight delay.

10. On security, the applicants submit that they are willing to abide by any terms that may be imposed by this court.

They have also placed reliance on the case of *Butt vs. Rent Restriction Tribunal [1979] eKLR*.

11. The Respondents have opposed this application through a replying affidavit sworn on 4th May 2021, by Rosemary Mutethya Kyalo. The Respondents faults the Applicants for having a habit of coming to court at the last minute.

12. She further avers that she is a woman of means and is capable of refunding the amount awarded to her if the appeal succeeds. She, therefore, disputes the narrative that the Applicants stand to suffer irreparable loss.

13. The 1st Respondent further avers that, her husband died close to 3 years' ago in the accident, the subject matter of the suit at the trial and that no attempt has been made to compensate her.

14. She insists that her late husband was a passenger in the ill-fated vehicle. She further insists that the Applicants were duly served with the summons to enter appearance and plead but ignored to file any defense.

15. According to the Respondents, the sole purpose of this application is to punish them by prolonging the proceedings and delay/deny them fruits of judgment. They deny that the appeal filed has a high chance of success. They rely on *Murandula Suresh Kantaria versus Suresh Nanalal Kantaria (Civil Appeal 225/05)*.

16. In their submission dated 29th June 2021 by the Respondents have submitted that the conditions required for issuance of orders of stay have not been met by the Applicants. They submit that the applicants have not indicated what substantial loss would be suffered if the orders sought are not granted.

17. They have relied on the case of *Meteine Ole Kilelu & 19 others v Moses K. Nailole [2009] eKLR* where the Court of Appeal in dismissing stated that where the appeal is on a money decree, the appellant needed to show either that once the execution is done, they may never get the money back or that the decretal amount is so large that execution would ruin his business or status.

18. They have also relied on the case of *Kenya Shell Limited vs Benjamin Karuga Kibiru & another [1986] eKLR* where the Court of Appeal dismissed an application for stay following the applicant's failure to demonstrate the extent of the substantial loss they were bound to suffer if the orders were not granted.

19. On security, the Respondents submit that the applicants have failed to offer any security as such the orders sought should not be granted.

20. This court has considered this application and the response made. This is an application for stay pending appeal and the provisions of **Order 42 Rule 6(1) and (2)** covers parameters of this relief well. The provisions provide: -

21. 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 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 make such orders 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.

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.

22. The above provisions clearly show that an appeal in itself does not operate as an automatic stay. An Applicant must satisfy conditions laid out which can be summarized as follows: -

i. A demonstration of sufficient cause for example shows that the appeal is not frivolous but arguable with demonstrating chances of success.

ii. Convince the court that a substantial loss will be occasioned unless a stay is granted.

iii. Timely filing of the application for stay with an offer for security for the due performance of such decree or order that may ultimately be binding to the Applicant.

23. This court has gone through the Ruling of the trial court, the subject of the appeal herein and the memorandum of appeal filed to establish if the Applicants have satisfied the first condition of demonstrating sufficient cause. This court notes that the Applicants are aggrieved by the judgment entered against them ex parte after they failed to enter appearance and defense on time or at all. The question of service is highly contested and is a subject of this appeal. It would be rather premature for me to delve into the issue at this stage but it suffices to state that every party/litigant in court deserves a chance to be heard or at the very least have unhindered access to justice. To that extent, this court finds that the Applicant has demonstrated good cause for a stay of execution because they have demonstrated that their grievances are not frivolous and deserve a chance.

24. The second and important consideration which is whether the Applicants have demonstrated that a substantial loss is likely to occur unless a stay is granted is that the court has looked at the amount awarded which is Kshs. 5,578,173. That amount in my view is considerably large, and though the 1st Respondent has averred that she is a woman of means and can refund the money she has not demonstrated that ability. It is true that while she did not have the burden of prove, the burden shifted to her when the allegations of her inability to refund were made on oath by the Applicants. In *Peter Kaeka Mutie & Anor. versus Patricia Ndunge Mwanzia [2020] eKLR*, the court held as follows: -

“Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.

The law, however, appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum...

While the general rule is that poverty of the judgment creditor is not necessarily a ground for granting a stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account.”

25. The position above is shamed by this court and I am persuaded in the premises to preserve the subject of the appeal herein in order not to render the appeal nugatory.

26. The Applicants have not made any offer of security though they have stated that they are willing to abide by any terms that This court is alive to the fact that a grant of stay is a discretionary matter which must be exercised judiciously taking into consideration competing interests of both the parties in an application for stay. The competing interests are interests of a party who wants to pursue an appeal and is therefore desirous of preservation of the subject matter of appeal so as not to render appeal nugatory and the opposite party who is a successful litigant in litigation and is desirous of enjoying fruits of judgment without unnecessary delay. It is my considered view that the exercise of discretion of any court is dependent on merit of each particular case and facts obtaining in situations such as in this instance where the subject of the appeal is an exparte judgment, a court is more likely inclined to preserve the subject of the appeal to give parties a chance to ventilate their respective cases even without imposing conditions but it might make more sense to impose conditions in situations where the judgment being challenged on appeal had gone through all the process with the participation of all the parties.

27. This court based on the above is persuaded to allow the application dated 30th April 2021 in the following terms namely:-

a. A stay of execution of the judgment in **Kitui Chief Magistrate’s Court Civil Suit No. 176 of 2019** is granted pending the hearing and determination of the appeal herein.

b. As a condition of stay, the Applicants are directed to deposit a security of half decretal amount either by depositing the amount in court or providing a bank guarantee within 30 days from the date of this ruling.

c. The Appellants are directed to fasttrack the appeal herein timely without any delay. Towards that end a mention date be taken in this matter immediately after the delivery of this ruling to ensure that the appeal filed is disposed of timely as provided under **Sections 1A & 1B of the Civil Procedure Act.**

DATED, SIGNED, AND DELIVERED AT KITUI THIS 18TH DAY OF OCTOBER 2021

HON. JUSTICE R. K. LIMO

JUDGE