



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E622 OF 2021

KENYA RED CROSS SOCIETY.....APPELLANT/APPLICANT

VERSUS

KENNEDY AJAMI BENDE.....RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated 5th October 2021 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order for stay of execution of the judgment delivered on 8th September, 2021 pending the hearing and determination of the appellant's Appeal.
2. The respondent opposed the Motion by filing the replying affidavit he swore on 1st November 2021.
3. When the Motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.
5. A brief background of the matter as seen in the record is that the respondent instituted a suit before the Chief Magistrate's Court against the applicant vide the plaint dated 26th July 2013 and sought for general damages and special damages of Kshs.3000 together with costs arising from an industrial accident in the course of his employment as a manual worker in Industrial area.
6. Upon hearing the parties, the court vide the judgment delivered on 8th September 2021 awarded the respondent an aggregate sum of Kshs.1,003,000/= as damages plus costs of the suit and interest at court rates. Being aggrieved by the aforementioned decision, the applicant appealed to this court against the lower court's judgment.
7. In her affidavit filed in support of the motion dated 5/10/2021, Ms. Cynthia Njagi, the legal Officer of the Appellant/Applicant stated that the Appeal stands high probability of success and that it will be rendered nugatory if the stay of execution of the judgment is not granted.
8. She contends that the appellant is going to incur substantial loss in the event the stay is not granted as the respondent is likely to execute and as it stands the Respondent's advocate has written to the Appellant's advocates on record demanding for payment of the decretal sum and legal costs.
9. She avers that the Respondent is a person of unknown means and that the Appellant is apprehensive that if the decretal sum is paid out then the Appeal will be rendered as an academic exercise as they will not be able to recover the decretal sum in the event the Appeal is successful.
10. She further stated that the appellant is willing and able to offer security within reasonable time as shall be deemed fit by the court.
11. In response, Mr. Kennedy Ajami Bende stated that the Memorandum of Appeal has no chances of success as it is just an abuse of the court process and that the application is brought in bad faith as it wants to delay this matter further and deny him from enjoying the fruits of the judgment.

12. He avers that the applicant has not attached the receipts to confirm whether it has paid the decree and the absence of any attachment of receipt is a clear indication of lack of seriousness in this matter.

13. He contends that he sustained serious injuries and needs the decretal sum to enable him seek treatment. He further contends that in the alternative half of the decretal sum be deposited in court as security and half be released to him to enable him go for medication.

14. I have considered the grounds stated on the face of the application plus the facts depend in rival affidavits.

15. The principles guiding the grant of an application for stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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.

16. In the Court of Appeal decision in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR (supra)** as followed by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR (supra)** it was held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 lack of them. Once an applicant expresses 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.”

17. In the case at hand, the Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. Indeed the Respondent’s averment that he is in dire need of money to continue with treatment for the serious injuries received in the accident can only confirm that he will not be able to refund the decretal sum were the Applicant’s appeal to succeed.

18. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

19. Was the application filed without unreasonable delay? The application has been filed one month after the delivery of the judgement. It is noted that the appeal was filed on 28th September, 2021 soon after the delivery of judgement thus signaling the Applicant’s interest in pursuing the appeal. It is only after the Respondent’s counsel wrote to the Applicant’s counsel on 14th September, 2021 about the intention to execute that the Applicant found it necessary to file the instant application. There is thus no inordinate delay on the part of the Applicant.

20. The Applicant has indicated its readiness to furnish security for the due performance of the decree. The Respondent asserts that he is entitled to equal treatment before the law. The answer to the Respondent’s concern is that his interests will be taken care of by the Applicant depositing the decretal amount. Once the appeal is determined, the winner will have ready access to the money.

21. A perusal of the memorandum of appeal shows that the Applicant is appealing against the decision on liability and quantum. He says he needs the money for treatment. His proposal that he gets half the decretal amount is not acceptable because there is no guarantee that the respondent is in a position to refund should the appeal turn successful.

22. In the end the motion dated 5th October 2021 is found to be meritorious. It is allowed. Consequently, an order for stay of executions pending appeal is granted on condition that the appellant deposits the decretal sum in an interest earning account in the joint names of the advocate or firms of advocates appearing in this appeal within 45 days. In default the stay application automatically lapses. Costs of the motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent