



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL APPLICATION NO. E115 OF 2021

HARRISON MBAABU MARETE...APPELLANT/APPLICANT

VERSUS

JANET NKIROTE MUTHOMI.....RESPONDENT

RULING

The Application

1. Before the Court is an application dated 19th August 2021 seeking stay of execution of the Judgment delivered on 21st July 2021 in Nkubu PMCC No. 27 of 2017. In the Judgment, the trial Court awarded the Respondent damages of Ksh 1,141,800/= being damages under the Law Reform Act, the Fatal Accidents Act and special damages.
2. The Memorandum of Appeal annexed to the Applicant's supporting affidavit reveals that the intended appeal seeks to challenge both quantum and liability.

Applicant's Case

3. The application is supported by the Applicant's supporting affidavit sworn on 19th August 2021. It is majorly premised on the grounds that the appeal has reasonable chances of success and that the Respondent has no known assets and will not be able to refund the decretal sum if paid to her, in the event of a successful appeal. The Applicant has indicated willingness to offer security as may be required by the Court.
4. In response to the Respondent's replying affidavit, the Applicant filed a further affidavit sworn on 6th October 2021. He urges that while it is true that the matter has been in Court since 2009, the delay was occasioned by the fact that all matters relating to BlueShield Insurance Company which went into statutory management were stayed for a long period. He urges that there is still a moratorium staying the payment of all claims against BlueShield Insurance Company.
5. He urges that it is at the discretion of the Court to order for provision of security which may take various forms including cash, bank guarantee or title deeds. He also filed written submissions dated 13th October 2021 to support his application. He relies on *Butt vs Rent Restriction Tribunal* (1982) KLR 417. He urges that security should not be such as to stifle access to justice. He cites *Kenya Sharok Kher Mohamed Ali Hirji vs Watta Enterprises Limited* (2015) eKLR.

Respondent's Case

6. The Respondent has opposed the application by her replying affidavit sworn on 22nd September 2021. She urges that the Applicant has been riding on stay orders which were granted on 25th August 2021 with no intention of prosecuting his application and the Applicant only served her on 8th September 2021. That the Applicant's appeal does not have a high chance of success. That she has been following up her case since 2009 and it is only fair that she is compensated. That is the Court if inclined to grant stay, then the Applicant should be ordered to pay half the decretal sum to her and the balance thereof be deposited in a joint interest earning account.
7. The Respondent also filed submissions dated 15th November 2021. She urges that there were no warrants of attachment and thus stay was not mandatory. She urges that the application is calculated to delay the justice. She urges that she is entitled to enjoy the fruits of her judgment. That the application has not met the threshold for stay.

Determination

Stay of Execution/Implementation of Grant

8. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

- a. substantial loss will result to applicant if stay is not granted; and
- b. security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
- c. the application has been brought without unreasonable delay.

Substantial Loss

9. To urge his claim for substantial loss, the Applicant claims that the Respondent has no known assets and if paid the decretal sum, he may not recover the same, should his appeal be successful. The Respondent in her response did not address this matter. She simply avers that she the matter has been pending since 2009 and that she is entitled to enjoy the fruits of her judgment.

10. This Court has previously held that in such applications for stay, once an Applicant raises doubt as to the Respondent's ability to settle the decretal sum, the burden shifts to the Respondent to show that she has the means to pay since that is a matter which is peculiarly within her knowledge as per Section 112 of the Evidence Act. See *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* and *Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020*. As the Respondent failed to indicate whether she has the financial ability to pay, this Court finds that the Applicant has demonstrated the likelihood of suffering substantial loss.

Security

11. The Applicant has indicated his willingness to offer security for the due performance of the decree, only that the same should be reasonable so as not to stifle access to justice. The Respondent has asked that half of the amount be released to her and to have the other half be deposited in a joint interest earning account. This Court considers that despite the likelihood of suffering substantial loss, it is unlikely that the Respondent may not get any award following the appeal. It would thus be fair to order for some amount to be paid and the rest to be deposited in a joint interest earning account.

Undue Delay

12. Judgment in the trial Court was delivered on 21st July 2021 and the instant application was brought on 19th August 2021, slightly less than a month later. This Court does not find that there was any undue delay on the part of the Applicant. The Court has considered the Respondent's claim that the Applicant has been sitting on stay orders, but this Court considers that the justice of the case calls for grant of stay pending the hearing and determination of the appeal.

ORDERS

13. Accordingly, for the reasons set out above, this Court makes the following orders: -

- i. The court grants an order for stay of execution of the Judgment and/or Decree delivered on 21st July 2021 by Hon. J. Irura (PM) in Nkubu PMCC No. 27 of 2017 pending the hearing and determination of the appeal.**
- ii. The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 380,600/= being 1/3 of the decretal sum.**
- iii. Within the said thirty (30) days in ii) above, the Applicant shall deposit the balance of the decretal sum being Ksh 761,200/= in a joint interest earning account in names of the respective Advocates for the parties.**
- iv. In default of the payment and deposit as per orders ii) and iii) above, the stay of execution herein granted shall lapse and be of no effect.**
- v. The costs of this application shall abide the outcome of the appeal.**

Order accordingly

DATED AND DELIVERED ON THIS 25TH DAY OF NOVEMBER, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kiautha Arithi & Co. Advocates for the Applicant

M/S Mbaabu M'Inoti & Co. Advocates for the Respondent

M/S Mbogo & Muriuki Advocates for the 2nd Respondent