



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO.E075 OF 2021

ESTHER KEMUNTO MAERAAPPELLANT

VERSUS

MADISON INSURANCE CO. LTD.....RESPONDENT

RULING

The application dated 29th March, 2021 seeks the following orders:

- 1. THAT there be a stay of execution of the Decree herein pending the hearing and determination of the Appeal.**
- 2. THAT in the event the court is minded to make an order as to security for costs, the Applicant be granted leave to deposit an insurance bond or a bank guarantee as security in lieu of cash deposit.**

The affidavit of Moses Mwariri sworn on 29th March, 2021 supports the application. The respondent filed grounds of opposition dated 16th July, 2021. The application was determined by way of written submissions.

Counsel for the appellant submitted that the court is being asked to exercise its discretion and stay execution pending the determination of the appeal. The application was filed without undue delay. The appeal was filed on 18th March, 2021 and the application followed on 7th April, 2021. Counsel contend that the applicant is likely to suffer substantial loss as the respondent's means are unknown and it is highly unlikely that any sums paid out to her can be recovered. The decretal sum is Kshs.344,298 and no affidavit of means has been filed. On the issue of security, it was submitted that the applicant is prepared to provide security.

Counsel for the respondent opposed the application. Counsel submitted that Order 40 Rule 6 of the Civil Procedure Rules provide for the conditions to be fulfilled by an applicant seeking orders of stay of execution. The conditions share an inseparable bond such that the absence of one will affect the exercise of discretion of the court in granting the orders of stay of execution. Counsel relies on the case of **JENY LUESBY –V- STANDARD GROUP LIMITED (2014) eKLR** where it was held:-

"Granting of stay pending appeal is at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the applicant ".....sufficient cause being a technical as well as a legal requirement will depend entirely on the applicant satisfying the court that the substantial loss may result to the applicant" It is not enough for an applicant merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur....." substantial loss" is a relative term and more often than not can be assessed by the totality the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum".

It was submitted that the applicant has not explained what loss it would suffer should the decretal sum be paid to the respondent. The fact that the execution process has been put on motion does not amount to substantial loss. Execution is a lawful process. According to counsel, the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of being a successful appellant. The applicant has to explain any peculiar circumstances that necessitate the withholding of the decretal sum from the respondent decree holder.

The issue for determination is whether execution of the decree should be stayed pending the hearing and determination of the Appeal. The impugned decision was delivered on 5th March, 2021. The Appeal was filed within the 30 days' period on 18th March, 2021 as required under Section 79G of the Civil Procedure Code. The application was filed on 7th April, 2021. I do find that the application was filed without undue delay.

Order 42 Rule 6(1) and 6(2) (a) and (b) 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 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.

In the case of **RWN –V- EKW (2019) eKLR** the court explained the purpose of an order of stay of execution as follows:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417**

established the parameters that can guide the court in dealing with applications seeking orders staying execution and held as follows:-

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

2. 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.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The respondent was awarded Kshs.344,298 by the trial court. In its defence dated 14th July 2020 the applicant denied that it had insured the accident motor vehicle registration number KAK 839F. All along the applicant has maintained that the defendants in the original suit number **140 of 2017 (Esther Kemunto Maera –V- Akech Odhiambo & Peter Mutuma)** were strangers to them. The appellant would like to pursue its appeal. I do find that the appeal is arguable.

The appellant contend that should the decretal sum be paid to the respondent, it shall suffer substantial loss as the respondent’s means are unknown. It is true that the respondent is the decree holder. In my view, payment of the decretal sum to a decree holder without any indication from such decree holder that he/she is capable of refunding the decretal sum should the appeal succeed qualifies for the grant of orders staying execution. The court cannot just hear and determine the Appeal for the sake of determining the parties’ rights and thereafter make a successful appellant not recover the decretal sum. As stated in the case of **RWW –V- EKW** (supra), the purpose of the orders of stay of execution is to preserve the subject matter. That is why Order 42 requires the applicant to provide security. Should the respondent insist on receiving the decretal sum while the appeal is pending, he/she too must convince the court that he is in a position to refund the decretal sum should the Appeal succeed. The amount of money involved in the decree does not matter. It does not need to be a decree involving millions for the applicant to establish a substantial loss. Any amount paid to a decree holder which cannot be recovered amounts to substantial loss. The respondent has not established how she will be able to refund the sum of Kshs.344,298 should it be paid to her and the Appeal succeed.

In the end, I do find that the application dated 29th march, 2021 is merited and the same is granted in the following terms:-

1. Execution of the Ruling/Decree in Milimani CMCC 2715 of 2020 is hereby stayed pending the hearing and determination of the Appeal.
2. The applicant do provide a bank guarantee for the entire decretal sum of Kshs.344,298 within 45 days hereof.
3. In default of satisfying order two (2), the orders of staying execution shall stand vacated.
4. Costs of the application shall abide the outcome of the Appeal.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021

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S. CHITEMBWE

JUDGE