



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. E252 OF 2021

BENSON M. NDUNGU.....APPELLANT

VERSUS

LUCY WAITHIRA KIBIRI.....RESPONDENT

RULING

The appellant filed a notice of motion dated 17th May 2021 brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for Orders that

1. Spent

2. Spent

3. There be stay of execution of the aforesaid Judgement/Decree pending the hearing and determination of the preferred appeal therefrom to the High Court.

4. The costs of this application be provided for.

The application was supported by the affidavit of Benson M Ndungu who stated that the judgement from which this appeal emanates from is Milimani CMCC No. 6305 of 2019 which was delivered on 16th April 2021 by Hon. E. Wanjala, Principal Magistrate. Upon delivery of the judgement the terms were relayed to him and his insurer being dissatisfied with the same promptly instructed his advocates to lodge an appeal.

Counsel referred to Section 79G of the Civil Procedure Act which states:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

It was argued that the appellant filed this application on 17th May 2021 and was thus without unnecessary delay. That the respondent is free at any time to execute the judgement in total detriment of the applicant thereby rendering the appeal nugatory. The appellants also stands to suffer irreparable loss as the respondent is a man of straw and may not be able to pay back the decretal sum if the appellant succeeds in the appeal. That further the memorandum of appeal herein has raised several arguable issues with high chances of success. The applicants indicated that they are also willing to furnish security in terms of a bank guarantee for the decretal sum pending the determination of the appeal.

The application was opposed by the respondent’s replying affidavit dated 20th July 2021 where she indicated that the application herein seeks orders that are prejudicial to her in view of the appellant’s failure to settle the judgement award which she is entitled to in full. The trial court conducted a fair trial and delivered a well-reasoned and balanced judgement and therefore the chances of it being overturned are extremely slim and the entire appeal process is an exercise in futility

The respondent contended that she sustained very serious injuries which left her with permanent incapacity of 40% which rendered her

unable to find any gainful employment from the time of the accident till now and for many years she has struggled to obtain her daily sustenance. She needs to enjoy the fruits of her judgement.

Analysis and determination

I have examined the application, affidavits, submissions and the record in its entirety and the issue that has arisen for determination is whether execution should be stayed pending the hearing and determination of the appeal?

The principles guiding the grant of a 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.

In the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417** the court 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.”

Judgement was delivered on 16th April 2021 while the present application was filed on 17th May 2021. It is therefore clear that there was no unreasonable delay in filing the application. The applicant was outside the appeal window by one day.

On the issue of substantial loss, the appellant has argued that the respondent is a man of straw and may not be able to pay back the decretal sum if the appellant succeeds in the appeal. Additionally, the appellant contend that he is willing to furnish security in terms of a bank guarantee for the decretal sum.

The court, in **RWW vs. EKW [2019] eKLR**, addressed its mind on the purpose of a stay of execution order pending appeal and stated:-

“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.”

I am satisfied that the appellant has met the requirements for the grant of stay of execution. The respondent has not explained how the decretal sum will be refunded if the appeal is allowed. The delay was not inordinate. The upshot is that the application dated 17th May 2021 is merited and is granted in the following terms;

1. Execution is hereby stayed pending the hearing and determination of the pending Appeal.

2. The appellant to provide a bank guarantee for the entire decretal sum within 45 days hereof or in the alternative deposit the decretal sum in court within 45 days.

3. In default of the above, 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 18TH DAY OF NOVEMBER, 2021

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S. CHITEMBWE

JUDGE