



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CIVIL APPEAL NO. E027 OF 2021

DANIEL OMARI.....1ST APPELLANT/APPLICANT

MOIZ MOTORS LIMITED.....2ND APPELLANT/APPLICANT

- V E R S U S -

MARTHA KWAMBOKA ONKOBA

(Suing as a Personal Representative and Administrator of the Estate of

MARCUS ONKOBA OKARI (Deceased).....RESPONDENT

R U L I N G

1. By Notice of Motion dated 29/9/2021, the Applicants are seeking stay of Execution of the *ex parte* judgment/decree dated 7/9/2021 in KERICHO CMCC No. 466 of 2019 pending the hearing and determination of this application and also pending *inter partes* hearing of KERICHO HIGH COURT APPEAL NO. 27 of 2021.

2. The Applicants are also seeking for orders that they furnish security in the form of a Bank Guarantee for the sum of Kshs. 3,000,000/= pending the hearing and outcome of the said Appeal.

3. The Application is based on the grounds on the face of it and supported by the Affidavit of the 1st Appellant/Applicant dated 30/9/2021 in which it is deposed as follows:-

(i) THAT the Applicant is aggrieved with the Judgment delivered in KERICHO CMCC No. 466 of 2019 and has filed an appeal against the same.

(ii) THAT the Respondent may levy execution against the Applicant and the same will render the appeal nugatory and cause the Applicant to suffer irreparable loss and damage.

(iii) THAT if the decretal sum is paid to the Respondent, she would not be in a position to refund the same if the appeal is successful.

(iv) THAT the Applicant is ready and willing to furnish reasonable security in the form of a Bank Guarantee for the decretal sum of Kshs. 3,000,000/= or as the Court may deem fit to order.

4. The Respondent opposed the Application and filed Replying Affidavit dated 14/10/2021 in which it is deposed as follows:-

(i) THAT the Plaintiff's party and party costs have not been assessed nor agreed upon and therefore there is no imminent execution.

(ii) THAT the award being challenged is based on sound evidence and lawful principles of law.

(iii) THAT the blanket "Bank Security" or Guarantee renewable yearly being offered is not appropriate in this case.

(iv) THAT the Respondent proposes a deposit of half of the decretal sum.

(v) THAT the Applicant did not call any witnesses in the Lower Court hence the only issue in dispute is the quantum payable.

5. The parties filed written submissions and authorities which I have duly considered.
6. The Applicants submitted that the judgment subject of the instant application was delivered on 7/9/2021 against the applicants. The appellants/applicants herein were held 100% liable and the plaintiff /respondent was awarded damages of Kshs. 3, 062, 330/= by the trial court. The applicants were dissatisfied with the judgment and filed an appeal on both liability and quantum vide Kericho HCCA No. 27 of 2021.
7. The Applicants submitted that they had an arguable appeal against the decision of the trial court, they were appealing liability and quantum of damages, the plaintiff/respondent failed to prove her case on a balance of probability and that the award by the trial court was excessive and disproportionate to the loss suffered by the estate of the deceased. Further to this, that the appeal raised serious issues of law that warranted the court's intervention on appeal, notably that the trial court had awarded damages for loss of consortium an award that is foreign to the Fatal Accidents Act. The applicants cited the case of **Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Ors (2015) eKLR**.
8. The Applicants submitted they would suffer substantial loss from the refusal to grant stay, they submitted that the Respondent's means are unknown and that it was highly unlikely that the Respondent would be capable of refunding the decretal amount in the event that the Applicants' appeal succeeds. The Applicants submitted that the Respondent did not furnish the court with any documentary evidence to prove her financial standing and that the Respondent in her Replying Affidavit did not dispute this and/or show she has the means to pay the decretal amount a colossal sum of Kshs. 3,062.033/= in the event that judgment was entered in favour of the Applicants on appeal. They cited the following cases **Edward Kamau & Anor vs. Hannah Mukui Gichuki & Anor (2015) eKLR**, **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike, Court of Appeal Civil Application No. 238/2005**, **Tabro Transporters Ltd vs. Absalom Dova Lumbasi (2012) eKLR**.
9. The Applicants submitted that the instant application was done without unreasonable delay and that they were willing to furnish security by providing a bank guarantee for the decretal sum of Kshs. 3,000,000 pending hearing and determination of the appeal and given the fact that the Respondent had filed a cross appeal aggrieved by the judgment in the trial court, it was prudent for the court to adopt the security proposed by the applicants in order to preserve the substratum of the appeal and to allow for hearing and canvassing of the appeal on merit. The applicants cited the case of **Selestical Limited vs. Global Rock Development (2015) eKLR**.
10. The applicants submitted that they had satisfied all the conditions set out in Order 42, Rule 6 and prayed that the court grants an order of stay of execution pending hearing and determination of the appeal.
11. The Respondent submitted that the appeal lodged by the Applicants was against an award of Kshs. 3, 062,330/= granted in the lower court arising out of a fatal road accident and that during proceedings in the lower court, the Appellants/Applicants herein filed a joint statement of defence and failed to call witnesses to support their defence and further that the defence case was closed without calling any witnesses to testify.
12. The Respondent submitted that the Applicants had not demonstrated evidence of substantial loss in the event that the stay was not granted and as such it was unfair to deny the Respondent her fruits of the judgment and it was insufficient to merely state that a sum of Kshs. 3,062,330/= is colossal.
13. The Respondent submitted that stay of execution pending appeal is a discretionary relief and that both parties had rights that need to be considered and/or protected.
14. The Respondent submitted that based on the contents of the memorandum of appeal dated 9/9/2021 the Applicants were seemingly concerned with the assessment of damages and not apportionment of liability.
15. The Respondent submitted that the bank guarantee proposed by the Applicants herein was not a suitable security given the circumstances of the case, further that the purported bank guarantee was incomplete, with no approval date and valid for a duration of twelve (12) months with option to renew, they contested its validity and stated that even if it was valid it was likely to expire before the instant appeal is determined. Further, that the Applicants had not exhibited any evidence of the request for proceedings and judgment so as to fast track the appeal to be determined within twelve (12) months which would be within the duration of the bank guarantee.
16. The Respondent further submitted that the Applicants cannot dictate to court conditions to impose in the event that if finds the application herein merited.
17. The Respondent submitted that the application did not warrant orders sought, however, that if the court is inclined to grant orders sought by the applicants it should give reasonable conditions and the Respondent proposed that half the decretal amount Kshs. 1,500,000 be paid to the Respondent and the other half of the decretal amount Kshs. 1,500,000 be deposited in a joint interest earning account of both advocates for the parties pending hearing and determination of the appeal and that the applicants' process, file and serve the record of appeal within forty five (45) from the date of the ruling in order to expedite the instant appeal.
18. The Respondent submitted that she relied on the decision of **Mbukoni Services Limited & Anor vs. Mutinda Reuben Nzili & 2 Ors [2021] eKLR** which fortified her submissions.
19. The issues for determination in this Application are as follows:-

(i) Whether the Applicant's Application dated 29/9/2021 satisfies the conditions for stay of Execution pending appeal.

(ii) *Whether the Applicant will suffer substantial loss if stay of Execution is not granted.*

(iii) *Who pays the costs of the Application?*

20. The power of the court to grant stay of execution of a judgment/decreed pending appeal is discretionary. However, the discretion should be exercised judiciously. See **BUTT VS. RENT RESTRICTION TRIBUNAL [1928] KLR 417.**

21. On the issue as to whether the Application satisfies the conditions for stay of Execution pending appeal, the Provision governing the same is Order 42 rule 6 which 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 appeal case of 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 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. In **ANTOINE NDIAYE VS. AFRICAN VIRTUAL UNIVERSITY [2015] eKLR** Gikonyo J. held *inter alia*; *“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that: (a) The application is brought without undue delay; (b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and (c) 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”.*

23. In the High Court case of **KENYA COMMERCIAL BANK LTD VS. SUN CITY PROPERTIES LTD & 5 ORS [2012] eKLR** it was held that: *“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”*

24. The Court of Appeal in **SWANYA LTD VS. DAIMA BANK LTD CIVIL APPLICATION NO 45 OF 2001** stated that; *“Whilst it is true that this Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending an appeal, it is equally true that when a party is appealing, exercising his undoubted right of appeal, this Court will see that the appeal, if successful, is not rendered nugatory. It is, however, in the discretion of the Court to grant or refuse a stay.”*

25. I find that the Court is duty bound to balance the competing rights of the parties. The Applicant has a right to appeal while the Respondent has a right to enjoy the fruits of her Judgment.

26. I allow the Application dated 29/9/2021 on the following conditions:-

(i) **THAT the Appeal is filed within thirty (30) days of this date.**

(ii) **THAT the Applicant deposits half the decretal sum in an interest earning account held by both Counsels for the parties within sixty (60) days of this date.**

(iii) **THAT the Applicant pays the costs of the Application.**

DELIVERED, SIGNED AND DATED AT KERICHO THIS 17TH DAY OF DECEMBER 2021.

A. N. ONGERI

JUDGE