



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.374 OF 2019

AGNES WANGARI WAINAINA & PAUL

KIARIE GICHANA (suing as the legal

representatives of JOHN WAINAINA WANGARI.....APPELLANT

VERSUS

DAVID SHIKOMELA.....1ST RESPONDENT

MULTIPLE HAULIERS EA LIMITED.....2ND RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 3rd November 2021 brought by the Respondents herein and supported by the grounds set out on its body and the facts stated in the affidavit of Ahmed Hussein Ibrahim. The applicants sought for the substantive orders of stay of execution of the judgment and decree issued on 26th August 2021 until the party and party costs in this matter are assessed and also to direct the Appellant to file the party and party Bill of Costs for taxation by the Deputy Registrar within such time as it deems fit.
2. The appellants/respondents opposed the Motion by filing the Grounds of Opposition dated 10th June, 2020.
3. When the Motion came up for interparties hearing before this court, the advocate to the Respondents chose to rely on the averments in their Supporting Affidavit.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavit supporting it; the Grounds of Opposition and the brief oral arguments.
5. In brief, the applicants contends that on August 26, 2021, a judgment was made in which the decree holder, who are the Appellant in this case, were awarded Kshs.4,960,000/=, and the 2nd Respondent's insurance settled the limit of the cover allowed, which was Kshs.3,000,000/=, with the Respondents covering the rest. The Respondents attempted to settle the outstanding decretal money, but the Appellants refused due to purported costs amounting to Kshs.686,021/= and have threatened to attach and auction the Respondents' motor vehicle.
6. The Respondents state that the Appellants' advocate is in possession of two cheques dated 26th November 2021 and 27th November both for Kshs.686,021/= in settlement of the balance of the decretal sum and that there is no reason why the Appellant should proceed with the execution because the costs are yet to be assessed.
7. The respondents are apprehensive that the Appellant may execute the decree by this Court and at the same time he shall suffer substantial loss should the Appellant carry out execution proceedings as threatened.
8. In response, Mr. Rabala stated that the costs were agreed upon between the firm of Ochieng Opiyo & Co. Advocates for the Respondents and Rabala & Co. Advocates for the Appellant which firms were properly on record for the parties.

9. The Appellants aver that the Respondents have provided postdated personal cheques which have no guarantee of being honoured and that they are apprehensive that should the cheques bounce the execution process will be thrown in limbo and start all over again.

10. The Appellants stated that they were never consulted when the post-dated cheques were delivered to them, that there was no agreement on payment, and that the stay should be withdrawn so that they can proceed with the execution.

11. 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.

12. On the issue of substantial loss, which is the cornerstone in an application for stay. The Respondents in this matter aver that they shall suffer substantial loss should the Appellant carry out execution proceedings and that there was no agreement as to costs.

13. The Appellants aver that the previous advocate on record for the Respondents and their advocate Rabala & Co. Advocates had already agreed upon the costs and this application seeks to take parties back and delay the Appellants from enjoyment of their fruits of litigation.

14. The Respondents in this instance have not proven/shown any considerable damage they would suffer because the expenses have already been agreed upon, and they should not be concerned about execution if they have already given the post-dated cheques that are intended to close the case. Having considered the rival arguments, I find that the respondents motion to be lacking in merit.

15. The same is dismissed with costs being awarded to the appellants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent