



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CIVIL APPEAL NO. E051 OF 2021

BETWEEN

NEW NAIROBI UNITED SERVICES LTD.....1ST APPELLANT

STEPHEN NJUGUNA.....2ND APPELLANT

AND

SIMON MBURU KIIRU.....RESPONDENT

(Being an Appeal arising from the judgement and Decree of the Honourable Y.M. Barasa SRM delivered on 02/09/2021 in Naivasha CMCC No. 190 of 2020).

RULING

1. The instant appeal arose from the **Chief Magistrate's Court at Naivasha Civil Case No. CMCC No. 190 of 2020** wherein the Plaintiff (Respondent herein) sought legal redress for damages sustained from a road accident that occurred on 07/03/20 along Kenyatta Avenue in Naivasha involving motor vehicle registration No. KCF 310N and motor vehicle registration number KCH 640E.

2. The record before court yields little as the proceedings of the lower court are absent save for a copy of the impugned judgment attached as an annexure which forms the basis of the gleanings in paragraph 1 above. There lies a Memorandum of Appeal dated 16/09/2021.

3. What has come up for determination is the Notice of Motion Application dated 15th October, 2021. It is brought under *Sections 3A, 79G and 95 of the Civil Procedure Act, Order 22, Order 42 Rule, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law*. The Appellants (Applicants seek the following condensed orders:

a) For a stay of execution of the Judgment/decree issued electronically on 2nd September, 2021 Senior Resident Magistrate Ho. Y.M. Barasa in Naivasha Civil suit 190 of 2021 pending the outcome of the instant appeal.

b) That the Applicants be allowed to place a bank guarantee from DTB Bank or Family Bank.

c) That costs of application abide the outcome of the appeal.

4. The application is premised on the grounds on the face of it and supported by the Affidavit of Stephen Njuguna, the 2nd Appellant herein sworn on 15/10/2021.

5. The deponent deposes that he is the owner of motor vehicle registration number KCH 640E insured by direct line assurance at the time of the accident and at the time of filing the suit he was the Defendant therein and the 2nd Appellant herein. He adds that the Respondent who was the Plaintiff in the suit was awarded general damages of Kshs 600,000/=, future medical expenses of Kshs 200,000/= and special damages Kshs 83,729/= and 10,550/= plus interests and costs. That the award gave rise to the instant appeal.

6. It is deposed that the appeal is arguable and has high chances of success and that if the stay of execution is not granted the appeal would be rendered nugatory. Further, it is argued that the judgment is of substantial amount and if the Respondent is paid the judgment sum he may deal with it in a manner prejudicial to the Appellants should the appeal be successful. This is in view that the Appellants may not be able to recover the sum from the Respondent as the Respondent has not furnished any evidence of his financial standing.

7. It is also averred that the Appellants' financial status has been compromised by the Corona virus pandemic as a result of which they can only offer a bank guarantee as security in satisfaction of the decree.

8. They have attached a copy of a draft bank guarantee from Diamond Trust Bank and Family Bank demonstrating the availability of security.

9. The Appellants further averred that the judgment sum was excessive in the circumstances which is one of the grounds for the appeal. In this regard, it is argued that there is eminent danger of execution of the decree if the stay is not granted.

10. Finally, the Appellants state that no prejudice shall be suffered by the Respondent if a stay is granted as in any event the damages can be compensated by way of costs.

11. In opposing the application, the Respondent filed a Replying Affidavit sworn by Benjamin G. Wainana, counsel on record for the Respondent sworn on 15th October, 2021. He alludes that the application is frivolous, has no merit and is otherwise an abuse of court process. He adds that the Appellants have not satisfied any of the conditions for grant of stay of execution under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules 2010**. He denies that if the Respondent is paid the decretal sum, the appeal would be rendered nugatory and that the Applicants would suffer irreparable loss and damage. He refers such assertions as not valid ground for grant of stay of execution pending the hearing and determination of the appeal. He adds that the cornerstone for grant of stay of execution is a demonstration of substantial loss that the Applicants stands to suffer. It is his view that the Applicants have not demonstrated they stand to suffer any substantial loss if the application is not granted. Furthermore, that the Applicants are guilty of delay having brought the application 45 days after the judgment. That accordingly, it is in the interest of justice that the Respondent be allowed to enjoy the fruits of his judgment.

12. It is further the view of the Respondent that should the court be inclined to grant a stay it should order that the Appellants be paid half of the decretal sum inclusive of costs while the balance of the decretal sum be deposited in a joint interest earning account as security.

Submissions

Appellant's submissions

13. The Appellants filed their written submissions on 26/11/2021 which the court condenses into two clusters, namely:

- (a) Whether a stay of execution of the lower court Judgment should issue pending the outcome of the Appeal and
- (b) Whether a Bank Guarantee is sufficient Security for grant of stay.

Whether a stay of execution of the lower court Judgment should issue pending the outcome of the Appeal

14. Under this head, the Appellants submitted that it is not a requirement to show that the appeal has a high chance of success and only needs to show that the appeal is arguable. Reliance was put on the case of ***Bake N Brite (NRB) Limited vs Daniel Mutisya Mwalonzi [2015] eKLR*** where the Applicants moots that it was held that indeed an Applicant is not required to have an arguable appeal unlike in the Courts of Appeal.

15. The Applicant further contended that the discretion to grant a stay should be exercised in a manner that avoids injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In this regard, reliance was had on the case of ***Shah vs Mbogo and Another (1967) E.A. 116***.

16. As to Stay of Execution the Appellants contended that they had met all the requirements for grant as provided under **Order 42 Rule 6(1)** of the **Civil Procedure Rules** which are that—

- (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.

17. Further reliance has been put on **Order 22 Rule 22(1)** which provides for when a court may stay the execution upon sufficient cause being shown. With this argument the Appellants submitted on the case of ***Tabro Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR*** in which sufficient cause was distilled as substantial loss that may occur unless the order is made; application has been made without unreasonable delay and security has been given by the Applicant.

18. The Appellant contends that substantial loss will occur as supported by the affidavit of Stephen Njuguna who stated that unless stay is granted the Respondent will proceed and execute, attaching the Appellants' property causing the Appellants loss. It was further argued that the Respondent's financial means are unknown making it unlikely he would refund the decretal sum in the event that the Applicant's appeal succeeds. In this regard, the Appellants have queried the amount of damages as being excessive of KShs.883,729/- ; and in the event that the Respondent is unable to pay the decretal sum the appeal would have been rendered nugatory and Applicants would be exposed to irreparable damage.

Whether a Bank Guarantee is sufficient Security for grant of stay.

19. It was the further submission of the Appellants that pursuant to the order given on 17th October, 2021 that the Appellants deposit Ksh. 400,000/, the said sum ought to be considered as sufficient security pending the hearing and determination of the appeal.

Respondent's submissions

20. The Respondent in his written submissions dated 28th October, 2021 submitted that no substantial loss has been proven or shown that it shall be suffered by the Applicants should the application fail and therefore have failed to prove that they are entitled to the orders of stay of execution.

21. The Respondent relied on Kenya Shell Limited vs Benjamin Karuga & Ruth Wairimu Karuga (1982-1988) KAR 1018 where it was held that if there is no substantial loss to the Applicants it would be a rare case when an appeal would be rendered nugatory by some other event where the onus of proving substantial loss is borne by Applicant.

22. The Respondent further relied on the authority of Machira T/A Machira & Co. Advocates vs East African Standard (No.2) (2002) eKLR where the court stated that merely stating that substantial loss would be suffered is not enough but the Applicant must be specific in details and particulars of such loss. The persuasive authority of Nairobi HCCA No. 542 of 2012 SocFinac Company Ltd vs Nelphat Kimotho Muturi was cited where learned Odunga, J. stated that the mere fact that an Appellant does not know the Respondent's financial capability does not give rise to the presumption that the Respondent will be unable to repay the sum.

23. Further reliance was put on the HC Civil Application No. 621 of 2014 Factory Guards Ltd vs Abel Vundi Kitungi ([2014] eKLR) where the court stated that it would be unfair to deny a party the fruits of his lawfully obtained judgment merely because his financial status was unknown.

24. The Respondent leaned on the authority of Machakos HCCA No. 186 of 2007 Standard Assurance Co. Ltd vs Alfred Mumema Komu ([2008] eKRL) in which the court pronounced that the proof of loss must be substantiated by the one who alleges it and that it would be unfair to deny a Respondent the fruits of a regular judgment just because the Applicant has filed an appeal.

25. The Respondent, in light of the cited authorities asked for orders that a half of the decretal sum inclusive of costs be paid to the Respondent and the balance of the decretal sum be deposited in a joint interest earning account. On this, he relied on the case of Factory Guards Ltd vs Abel Vundi Kitungi [2014] eKLR and in Nairobi HCCC No.288 of 2011 Jason Ngumba Kagu (suing as the personal representative of Nancy Nyawira Ngumba) (Deceased) & 2 Others vs Intra Africa Assurance Co. Limited [2014] eKLR where the respective courts, in balancing the right to appeal by the Appellant and the right to the Respondent in enjoying a lawfully obtained judgment directed that ½ of the decretal sum be paid to the Respondent and the balance be held in a joint interest earning account in the name of the advocates for the parties.

Analysis and Determination

26. I have carefully considered the application, the Supporting Affidavits thereto, the Respondent's response and the parties' respective submissions. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.

27. Stay of execution pending appeal is governed by **Order 42 Rule 6** of the Civil Procedure Rules which provides that:

“(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 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.

28. From the foregoing, it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the court on sufficient cause being shown by an Applicant that **substantial loss** may result to the Applicant if the order is denied; **the application is made without unreasonable delay** and **on provision of such security as the court may impose** for the due performance of any decree or order as may ultimately be binding on the Applicant. (See James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR). It is also noteworthy that the three (3) conditions must be met simultaneously as they are conjunctive and not disjunctive.

29. On the likelihood of suffering substantial loss, it is evident that the decretal sum of KShs.883,729/- is no mean amount of money. The Appellants have raised reasonable grounds that the Respondent will not be able to refund the said sum, or at least has not demonstrated that he would be able to refund the sum in the event that the appeal succeeds. It is the argument of the Appellants that in that case, if a stay of

execution is not granted the appeal is likely to be rendered nugatory.

30. Whilst I would agree that a successful party should not be denied the fruits of his/her judgment, it is incumbent that the party rebuts the assertion that it would not be in a position to repay the sums paid in the event that the appeal is successful.

31. On this, the Respondent did not rebut the assertion that he cannot refund the money save to state that the Appellants stand to suffer no harm if the monies are paid. In lieu, the Respondent failed to file an affidavit of means to demonstrate his ability to refund any sums that may be paid to him in case the appeal succeeds.

32. With this in mind, it is my view that that Appellants have, *prima facie*, been able to demonstrate they stand to suffer irreparable loss if the stay is not granted.

33. In the case of **G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR**, the Court stated as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

34. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**, the Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

35. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellants have satisfied me that they stand to suffer substantial loss if any decretal sum is paid to Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled the first condition.

36. Furthermore, the Appellants dispute the sums awarded as excessive which makes the appeal arguable.

37. On whether the application was brought without undue delay, it is notable that the impugned judgment was delivered on 2nd September, 2021 whilst the instant application was filed on 15th October, 2021. I am satisfied that there was no delay in bringing the application.

38. On security, this condition is already partially satisfied as the sum of Ksh. 400,000/ has already been deposited in a joint interest earning account. The Appellants have indicated that they are ready and willing to provide security in the form of a bank guarantee. This would then only apply to the balance of the decretal sum of Ksh. 483,729/. The Appellants propose two banks which would offer the guarantee, namely Family Bank and Diamond Trust Bank. None has been contested by the Respondent. I will exercise my discretion and order that the bank guarantee be executed by Diamond Trust Bank.

39. I have taken note that the Respondent pleads that half of the decretal sum should be released to him whilst the balance be deposited in a joint interest earning account in the names of the counsel for both parties. This therefore calls for the court to balance the interests of the Respondent who is entitled to the fruits of his judgment and the Appellant who has a constitutional right to appeal against the trial court's assessment of damages.

40. I have thoroughly read the Memorandum of Appeal filed on 23rd September, 2021. In totality, the same challenges the quantum as little is said of liability. Although the quantum on future medical expenses is challenged, the gist of the entire appeal is the alleged excessive grand quantum awarded. My view then is that the Respondent should not be denied to enjoy part of the quantum awarded as he awaits the conclusion of the appeal. This is more so, having regard to the long delays that appeals take before being processed and determined. (See **Joseph Mutuku Ndavi v Zipporah Syombua Mwangangi [2021] eKLR**). This case cannot be different.

Disposition

41. The upshot is that the Appellants' Notice of Motion application dated 15th October, 2021 is merited. There shall be a stay of execution of the judgment and decree of Hon. Y.M. Barasa delivered on 2nd September, 2021 in **Naivasha CMCC No. 190 of 2020** pending the hearing and determination of the Appellants' appeal on the following conditions:-

i The sum of Ksh. 400, 000/ deposited in court shall forthwith be released to the Respondent's counsel for onward transmission to the Respondent.

ii The remaining part of the decretal sum being Kshs. 483,729/shall be secured by way of a bank guarantee executed by the Appellants with Diamond Trust Bank Limited within 21 days of this ruling.

iii In the event of failure to comply with Order (ii) above, the stay of execution orders shall automatically be vacated and the Respondent shall be at liberty to proceed with execution of the decree.

iv The costs of this application are awarded to the Respondent.

Dated and Delivered at Naivasha this 16th day of December, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Miss King'e h/b for Ms. Macharia for the Appellants.*
2. *Mr. Wainaina for the Respondent.*