



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 50 OF 2019

THOMAS NGUNYI THEURI.....APPELLANT

V E R S U S

PWN Alias PWN (A minor suing thro Next Friend of NMN.....RESPONDENT

RULING

1. The applicant Thomas Ngunyi Theuri has filed a Notice of Motion dated 15/7/19 and seeking orders that:-

a. That this matter be certified urgent and the same be heard ex-parte in the first instance due to its urgency.

b. That there be a stay of execution of the Judgment in Kerugoya CMCC No. 245 of 2017 delivered on 14th day of June 2019, the subject of this appeal, pending the hearing and the determination of this application inter parties.

c. That there be a stay of execution of the Judgment in Kerugoya CMCC No. 245 of 2017 delivered on 14th day of June 2019, the subject of this appeal, pending the hearing and determination of this Appeal.

d. That costs of this application be in the cause.

2. It is based on the grounds that the respondent intends to execute the Judgment and the appeal shall be rendered nugatory as the chances of recovering the money shall be slim since the income of the respondent is unknown. The applicant may suffer substantial loss. Finally, that the applicant has moved the court for orders without unreasonable delay and is ready to abide by any conditions for the due performance of the decree as the court may set.

3. The application is supported by the affidavit of Christopher N. Chengecha. He deposes that the appeal is arguable and has very high chances of success and since there is no order of stay of execution, the respondent is likely to execute with the consequence that the appeal will be rendered nugatory. The applicant further deposes that the financial means of the respondent are unknown meaning that if stay is not ordered and appeal succeeds, they will not be able to recover the decretal sum and will therefore suffer substantial loss. He further deposes that they are willing to provide such security as the court may order. That it would be fair and just that the applicant be granted stay of execution.

4. The respondent opposed the application and filed a replying affidavit sworn by Nancy Maregu Njeru. The respondent deposes that the applicant is to blame for having failed to attend court for Judgment. That the appeal has nil chances of success, the court will not interfere with the Judgment considering the medical report. She contends that she can refund the decretal sum if the appeal succeeds.

5. The application was canvassed by way of written submissions. The applicant submits that there are four issues which are:-

a. Whether the applicant is keen on the appeal?

b. Whether substantial loss would ensue from a refusal to grant a stay?

c. Whether the application was done without unreasonable delay?

d. Whether the appeal has a chance of success?

6. On the first issue he submits that they are keen on the appeal which they have already filed on time and have applied for proceedings and Judgment and the record of appeal has already been filed.

On the 2nd issue he relies on **Order 42 rule 6(1) of the Civil Procedure Rules** which provides:-

“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.”

He submits that he has demonstrated that substantial loss may result and they are ready to provide security. The decretal sum is Kshs 1,006,710/- and the respondent has not provided proof of employment or income. He relies on **National Industrial Credit Bank Ltd Vs. AQUINANS FRANCIS WASIKE COURT OF APPEAL CIVIL APPLICATION NO. 238/2005**, the Court of Appeal held:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. 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.”

7. It is further submitted that the appeal was filed without unreasonable delay and they are ready to provide security.

8. Though the court was informed that parties had filed submissions I did not find any submissions on record filed by the respondent. I have considered the application the averments on the affidavits and the submissions. The issue which arises for determination is stay of execution. This is provided for under **Order 42 rule 6 Civil Procedure Rules** which I have quoted above. The question is whether the application meets the threshold for the grant of stay of execution.

9. The applicant submits that they have filed an appeal on which the stay of execution can be anchored. The applicant has filed a memorandum of appeal and the record of appeal. There is therefore valid appeal on record.

10. The second issue is substantial loss being suffered by the applicant. The decretal sum is Kshs One Million plus. The respondent had not demonstrated that she will be able to refund the decretal sum in the event that the decretal sum is paid and the appeal succeeds. The applicant alleges that the respondent will not be able to repay the decretal sum. This is all what the applicant needed to do. The burden shifted to the respondent to prove that she has the means to refund the decretal sum. The respondent did not discharge this burden. No attempt was made to demonstrate to this court that the respondent has the ability to repay. The respondent did not file an affidavit of means for the court to be able to determine her ability to repay. There is no material laid before me to disapprove the contention by the applicant that she will not be able to repay. The amount involved is colossal and the applicant has discharged the burden to prove that he is likely to suffer substantial loss.

11. On the issue of security. It is the court which decides the appropriate security. It is sufficient for a party to state that they are ready to provide security. The appeal and the present application were filed without unreasonable delay. I find that the application meets the threshold for the grant of orders of stay of execution.

12. In determining the security, the court has to strike a balance on the interests of the appellant and those of the respondent. The court has discretion and has to ensure that none of the parties is prejudiced. The applicant relied on the case of **Charles Kimtai Korir (Suing as the legal Representative of estate of Chelegat Silevia) –v- Nyanchina Adventist Secondary School and Another. H.C Kisii C.C. 229/10** where the court stated that the court is minded to strike a middle ground and balance the competing interests of both parties. She then proceeded to order that the respondent be paid half the decretal sum as security and balance deposited in an interest earning account. This ensure that the needs to balance the interests of both parties.

In Conclusion:-

The application for stay has merits. I order that:-

1. There be stay of execution pending the hearing and determination of the appeal.

2. The applicant to pay the respondent Kshs 200,000/- out of the decretal sum. The balance be deposited in an interest earning account in a reputable Bank in the joint names of the Advocates of the parties. This be complied with within 30 days.

3. Costs shall be in the cause.

Dated at Kerugoya this 30th day of January 2020.

L. W. GITARI

JUDGE

30/1/2020.