**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 509 OF 2018**

**GITONGA SHELMITH.................................................................1ST APPELLANT**

**JULIUS NDICHU.........................................................................2ND APPELLANT**

**VERSUS**

**KALAMBA MUSYOKI and KAVITI KALAMBA (Legal representatives of the**

**Estate of Julius Munywoki Kalamba deceased)............................RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellants' Notice of Motion application dated 29th March 2019 and filed on 1st April 2019 was brought pursuant to the provisions of Order 42 Rule 6 and 7, Order 51 Rule (1) of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all enabling provisions of Law. Prayer Nos (1) and (2) were spent. It sought the following remaining prayers:-

**1. Spent.**

**2. Spent**

**3. THAT this Honourable Court be pleased to order a stay of execution pending the hearing and determination of Nairobi High Court Civil Appeal No 509 of 2018.**

**4. THAT the court also be pleased to set aside the orders made by the lower court on 22/2/2019 dismissing the application for stay pending appeal.**

**5. THAT this Honourable Court be pleased to set aside orders of stay made by the lower court and in lieu thereof make orders that there be stay of execution of the Decree in Nairobi CMCC No 1914 of 2016 pending the hearing and determination of this appeal against the said Decree.**

**6. THAT such other additional, suitable and or alternative orders be made as are just and expedient all circumstances of the case and this application be considered.**

**7. THAT the insurer of the Applicants Monarch Insurance Company Limited be allowed to deposit in court an insurance Bond equivalent to the judgment /decree herein pending the hearing and determination of the appeal.**

**8. THAT the costs of this application be borne by the Appellant.**

2. Their Written Submissions were dated 6th May 2019 and filed on 7th May 2019 while those of the Respondents were dated and filed on 18th June 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their

entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANTS' CASE**

4. The Appellants' present application was supported by the Affidavits of their advocate and that of the Claims Manager of Monarch Insurance Company Limited, Philomena Theuri. Both Affidavits were sworn on 29th March 2019. He also swore a Supplementary Affidavit on 6th May 2019. The same was filed on 7th May 2019.

5. They stated that judgment was entered against them in favour of the Respondents herein for a sum of Kshs 1,534,520/= including interest and costs of the suit, which award was manifestly excessive. It was their contention that their Appeal had overwhelming chances of success because the Learned Trial Magistrate had proceeded on the wrong legal principles and further failed to take into account their submissions at the time of making the said award. They added that they were not snatching the fruits of judgment from the Respondents but rather, they were exercising their legal right to appeal against the said decision.

6. They also averred that they were apprehensive that they would suffer substantial loss if an order for stay of execution of the judgment was not granted because the Respondents might not be financially sound to refund them the decretal sum in the event they were successful in the Appeal herein. They were emphatic that the Respondents had not sworn an affidavit of means to demonstrate their ability to pay back the decretal sum.

7. They pointed out that their Insurer M/S Monarch Insurance Company Limited was ready and willing to deposit in court an Insurance Bond equivalent to the judgment sum as security for due performance of the judgment/decree pending the hearing and determination of the Appeal herein.

8. It was also their contention that this court had jurisdiction to hear and determine their present application because the one in the lower court was dismissed on a technicality on the ground that the said Philomena Theuri was the one who had sworn the affidavit in support of the said application.

9. They therefore urged this court to allow their application as prayed.

**THE RESPONDENTS' CASE**

10. In response to the said application, on 24th April 2019, the Respondents filed Grounds of Opposition dated 23rd April 2019. The Grounds of Opposition could be summarised as follows:-

> **1. The application was *res judicata*, a similar application having been dismissed by the lower court.**
>
> **2. The Applicants had demonstrated that there was imminent threat of execution.**
>
> **3. The Applicants had not demonstrated that they had an arguable appeal, that their Appeal would be rendered nugatory or that they would suffer substantial loss in the event the order for stay of execution pending appeal was not granted.**
>
> **4. The Applicants' application was intended to deny them the fruits of judgment and hence litigation must come to an end.**

**LEGAL ANALYSIS**

11. This court noted that the issues that had been placed before it for determination were whether or not the present application was *res judicata* and whether or not the Applicants were entitled to the orders for a stay of execution pending appeal as they had sought. It therefore deemed it prudent to address the question of whether or not the present application was *res judicata* as a preliminary issue as it had the potential of disposing of the said application without delving into the merits of the same.

**I. WHETHER THE PRESENT APPLICATION WAS *RES JUDICATA***

12. It was the Respondents' submission that the present application was *res judicata* and relied on the provisions of Section 7 of the Civil Procedure Act and the case of **Henderson vs Henderson (1843-60) ALL ER 378** in this regard. They argued that where it is stipulated that where a party raises issues in a subsequent suit wherein he ought to have raised the issues in the previous suit as between the parties, the doctrine of *res judicata* should be invoked.

13. They also referred this court to the cases of **Brinks- MAT Limited vs Elcombe (1988) 3 ALL ER 188**, **GOTV Kenya Limited vs Royal Media Services Limited & 2 Others [2015] eKLR** and several other cases to support their argument that the Appellants were undeserving of the orders they had sought as they had failed to disclose to this court that their application seeking an order for stay of execution pending appeal was dismissed by the lower court.

14. On the other hand, the Appellants denied that their present application was *res judicata*. They placed reliance on Order 42 Rule 6 and the case of **New Wide Garments EPZ (K) Limited vs Ruth Kanini Kioko [2019] eKLR** where Odunga J held that the High Court has original jurisdiction to hear and determine an application for stay of execution pending appeal.

15. Section 7 of the Civil Procedure Act provides as follows:-

**"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

16. In pronouncing itself on the doctrine of *res judicata*, in the case of **Henderson vs Henderson** (Supra), the court therein stated as follows:-

***"……where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."***

17. Having said so, Order 42 Rule 6 of the Civil Procedure Rules further provides as follows:-

**"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** (emphasis court)**, 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."**

18. It was therefore immaterial that the lower court had dismissed the Appellants' application for an order for stay of execution pending appeal because it still had a life line in this court. The present application was thus not *res judicata* and thus the case of **Henderson vs Henderson** (Supra) that was relied upon by the Respondents was not relevant herein as it was distinguishable from the facts of this case herein.

19. Going further, the cases the Respondents relied upon to buttress their argument that the Appellants were guilty of non-disclosure were irrelevant as in Paragraph 11 of the Affidavit of Philomena Theuri, she had disclosed that the Appellants' application in the lower court had been dismissed because she was the one who swore the supporting affidavit.

**II. MERITS OR OTHERWISE OF THE APPLICATION**

20. The Appellants relied on the case of **Housing Finance Company of Kenya vs Sharokkher Mohamed Ali Hirji & Another [2015] eKLR** where it was held that in considering whether or not to grant an order for stay of execution, a court has to balance the applicant's rights not to be denied a hearing and the respondent's right not to be denied the fruits of her judgment.

21. They further relied on the case of **Focin Motorcycle Co Limited vs Ann Wambui Wangui & Another [2018] eKLR** where the court found that the applicant therein had met the threshold of being granted an order for stay of execution pending appeal.

22. It was their submission that they had met all the conditions for being granted an order for stay of execution pending appeal and that it was not necessary that they had to demonstrate the merits or otherwise of their appeal.

23. They stated that they filed the present application without undue delay. They relied on the case of **Tononoka Rolling Mills Limited vs James Kilonzo Peter [2019] eKLR** where it was held that the evidentiary burden shifts to the respondent to prove that he is capable of refunding the decretal amount.

24. It was their further submission that they were willing and ready to offer security for the due performance of the judgment in the form of a bond for the entire decretal sum. In this regard, they relied on the case of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR** where they stated that the court therein held that security must be one that a respondent would be able to access with no hardship such as going to court in the event the appeal was unsuccessful. It was their argument that the Respondents would suffer no prejudice if the decretal sum was deposited in an insurance bond.

25. On their part, the Respondents were emphatic that there was no imminent execution as they were yet to extract the warrants of attachment and sale. They called upon this court to balance their interests of having been successful in the lower court while safeguarding the Appellants' right of appeal.

26. Order 42 Rule 6(2) of the Civil Procedure Rules 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".**

27. This means that an applicant has to demonstrate:-

**a. That he will suffer substantive loss if the order of stay was not granted;**

**b. That he had filed his application for a stay of execution timeously; and**

**c. That he was willing to provide security**.

28. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"**. It connotes that all three (3) conditions must be met simultaneously.

29. In respect of the first condition of proving substantial loss, this court concluded that the Appellants had satisfied the same as the Respondents opted not to adduce affidavit evidence. They instead filed Grounds of Opposition only.

30. A perusal of the affidavit evidence shows that judgment was delivered on 28th September 2018. It was not clear when the application seeking a stay of execution of appeal was filed in the lower court. What was evident was that the said application was dismissed on 22nd February 2019. The present application was filed on 1st April 2019.

31. A delay of about two (2) months could not be said to have been inordinate. In that regard, the Appellant had also satisfied the second condition of being granted an order for a stay of execution pending appeal.

32. In respect of the third condition, the Appellants had indicated that they were ready and willing to deposit security pending the hearing and determination of the appeal herein. As they ably argued, security should be easily accessible to whichever party that would be entitled to the same after the determination of the appeal without resorting to the rigours of litigation to recover the same as this very court held in the case of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another** (Supra).

33. As M/S Monarch Insurance Company Limited was the Appellants' insurer, it was the considered view of this court that an insurance bond would not be good security. In line with the holding in the case of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another**(Supra), there was possibility in the Respondents suffering in trying to recover the decretal sum in the event the appeal herein was unsuccessful.

34. The said monies ought to be deposited in court or deposited into a joint interest earning account so as to safeguard the Respondents' interests in the event the Appeal was unsuccessful.

**DISPOSITION**

35. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application dated 29th March 2019 and filed on 1st April 2019 was merited and the same is hereby allowed in terms of Prayer (3) only of the said application as the other prayers appeared to be duplicated and thus covered by the said Prayer No (3) on the following conditions:-

**1. THAT the Appellants shall deposit into a joint interest earning account in the names of their advocates and those of the Respondents the sum of 1,534,520/= within thirty (30) days from the date of this Ruling i.e. by 28th February 2020.**

**2. THAT in default of Paragraphs 35 (1) hereinabove, the conditional stay of execution pending appeal shall automatically lapse.**

**3. Either party is at liberty to apply.**

**4. Costs of the application will be in the cause.**

36. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28th day of January 2020**

**J. KAMAU**

**JUDGE**