



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 625 OF 2019**

**HUSSEIN BUILDERS LIMITED.....APPELLANT**

**VERSUS**

**JOSEPHAT NZIVE KYOVA**

**JULIANA SYOMBUA NZIVE (Suing as legal representatives of the**

**Estate of Hastings Muendo Nzive- Deceased).....RESPONDENTS**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated and filed on 14<sup>th</sup> November 2019 was filed pursuant to the provisions of Order 42 Rule 6(2), Order 22 Rule 22 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and all other enabling provisions of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT there be a stay of execution in Milimani CMCC No 4661 of 2016 Joseph Nzive Kyova & Another vs Hussein Builders Limited pending the hearing and determination of the appeal from the judgment herein being Nairobi Civil Appeal No 625 of 2019.**

**4. THAT the costs of this application be provided for.**

**THE APPELLANT'S CASE**

2. The Appellant's present application was premised on the Affidavit of the Legal Officer of its insurer, APA Insurance Co Ltd, Sylvia Imbusi, that was sworn on 14<sup>th</sup> November 2019. It was also supported by another Affidavit that was sworn by its advocate, Anthony Maina Macharia, on 17<sup>th</sup> December 2019 and filed on even date.

3. Through the aforesaid Sylvia Imbusi, the Appellant stated that the matter arose out of an alleged industrial accident in its premises on 11<sup>th</sup> February 2013 and the deceased thereafter succumbed to TB on 24<sup>th</sup> July 2013. It was its contention that the judgment in the sum of Kshs 2,346,630/= general damages that was delivered in favour of the Respondent herein was excessive and as a result, it instructed its advocates to appeal against the said judgment.

4. It averred that the stay of execution of thirty (30) days that was issued in **Milimani CMCC No 4661 of 2016 Joseph Nzive Kyova & Another vs Hussein Builders Limited** had since lapsed and if an order for stay of execution was not made, then its Appeal would be rendered useless as the money would have been paid or execution commenced.

5. It pointed out that it was ready to abide by any condition that may be set by the court for the granting of the said application. It therefore urged this court to grant its application as prayed.

## THE RESPONDENTS' CASE

6. In opposition to the said application, on 26<sup>th</sup> November 2019, the 1<sup>st</sup> Respondent swore a Replying Affidavit on 25<sup>th</sup> November 2019. The same was filed on 26<sup>th</sup> November 2019.

7. He termed the present application an abuse of the court process and lacking in merit. He pointed out that the Applicant failed to utilise the fourteen (14) days it had been granted to file its Memorandum of Appeal and had in fact, failed to give a reason to justify the failure to do so.

8. It was his contention that the Applicant was playing delaying tactics to deny him and the estate of the deceased, the fruits of judgment. He averred that in the event this court was inclined to grant it the orders, then it should order that half of the decretal sum be deposited while the balance be deposited in an interest earning account pending the hearing and determination of the Appeal herein. He also asked this court to direct the Appellant to file a Record of Appeal within a specified time failing which execution should issue. He added that the Appellant had not settled their costs that were ordered to be paid by the court on 24<sup>th</sup> October 2019.

## LEGAL ANALYSIS

9. Order 42 Rule 6(2) of the Civil Procedure Rules. The same 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.**

10. Order 46 Rule 6 (2) of the Civil Procedure Rules, therefore provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

**1. Substantial loss may result to the applicant unless the order was made;**

**2. The application was made without unreasonable delay; and**

**3. 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.**

11. 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.

12. It was the considered view of this court that substantial loss does not have to be a colossal amount of money. It is sufficient if an applicant seeking an order for stay of execution demonstrates that it will go through hardship such as instituting legal proceedings to recover the decretal sum it 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.

13. Notably, the Respondents herein did not file an Affidavit of means to demonstrate that they were in a good financial position to repay the Appellant the decretal sum in the event it was successful in its appeal. In fact, in his Replying Affidavit, the 1<sup>st</sup> Respondent was silent on how he would repay the Appellant half of the decretal sum it would pay him and the 2<sup>nd</sup> Respondent before its Appeal could be heard and determined.

14. This therefore left the court in a quagmire especially as regards the ability of the Respondents to pay back the decretal sum in the event the Appellant was successful in its Appeal herein. In the absence of proof of his ability to pay back the said sum, this court was satisfied that the Appellant would suffer substantial loss.

15. In that regard, court came to the conclusion that the Applicant had satisfied the first condition of demonstrating that it would suffer substantial loss if the order for stay of execution pending appeal was not granted.

16. In respect of filing the present application without undue delay, this court noted that on 29<sup>th</sup> October 2019, the Appellant was granted fourteen (14) days to file its Memorandum of Appeal. It filed its Memorandum of Appeal dated 29<sup>th</sup> October 2019 on 30<sup>th</sup> October 2019. It filed its present application on 14<sup>th</sup> November 2019.

17. On 17<sup>th</sup> December 2019, the Appellant filed a Certificate of Urgency of even date indicating that one of the conditions that was set in granting a stay of execution within twenty one (21) days was that the appeal was to be filed within a certain period of time. It stated that it fixed the matter for directions on 26<sup>th</sup> November 2019 but that when the Respondents failed to attend court, the court directed that fresh dates be taken at the Registry and failed to extend the interim orders that had been granted by Githua J.

18. This court carefully perused the court record and noted that there was no record of orders for an interim order for stay of execution

having been granted by Githua J. In addition, contrary to the Appellant's assertions, Njuguna J directed it to take fresh dates at the Registry because there was no Affidavit of Service to show if the Respondents had been served with the Hearing Notice for 26<sup>th</sup> November 2019. The Appellant was therefore not being candid in this matter.

19. Having said so, in view of the fact that the orders by Githua J for filing a Memorandum of Appeal, presumably in a miscellaneous file, appear to have been granted on 24<sup>th</sup> October 2019, the filing of the present application showed that the same was filed without undue delay and consequently, the Appellant had thus satisfied the second condition for the granting of a stay of execution pending appeal.

20. As regards the third condition, the Appellant had stated that it was ready and willing to deposit the decretal sum in a joint interest earning account in the names of its counsel and counsel for the Respondents. Notably, the Respondents were not vehemently opposed to the order for stay of execution being granted save that they had contended that the Appellant should release half the decretal sum to them and deposit the balance in a joint interest earning account.

21. As this court observed hereinabove, the Respondents did not demonstrate their financial ability to refund the Appellant half the decretal sum in the event it was successful in its appeal. It was also difficult to know how much to order to be released to the Respondents without knowing how much the Appellant had submitted was reasonable compensation because that would have been a good guide for this court in ascertaining the amount it had not contested. Further, the issue of apportionment of liability was a ground of appeal making it difficult for this court to determine what amount should be released to the Respondents herein and what amount should be deposited in a joint interest earning account.

22. This court found and held that the Appellant had thus satisfied the third prerequisite of being granted an order for stay of execution and that it was not mandatory that it had to release half the decretal sum to the Respondents before it could grant the order for stay of execution pending appeal as they had contended.

23. In this regard, this court had due regard to the case of **Gitahi & Another vs Warugongo [1988] KLR 621**, which was authoritatively cited in the case of **Mathu vs Gichimu [2004] eKLR** where the court therein adopted the principles set out in Rosengren's case where Parker LJ at page 200 had remarked as follows:-

**“The process of giving security is one which arises constantly... So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is least disadvantageous to the party giving that security...”**

24. Accordingly, having considered the affidavit evidence, Written Submissions and the case law the parties herein relied in support of their respective cases, it was the considered view of this court that as the Appellant was entitled to exercise his right of appeal, having been granted leave to file an appeal out of time, it was in the interests of justice that a stay of execution pending the hearing and determination of the Appeal of the Learned Trial Magistrate's judgment be granted so as not to render its appeal nugatory.

#### **DISPOSITION**

25. Accordingly, the upshot of this court's ruling was that the Appellant's Notice of Motion application dated and filed on 14<sup>th</sup> November 2019 was merited and the same is hereby allowed in the following terms:-

**1. THAT there shall be a stay of execution of the judgment that was delivered by Hon D.Ocharo, SRM in Milimani CMCC No 4661 of 2016 Joseph Nzive Kyova & Another vs Hussein Builders Limited pending the hearing and determination of the appeal on condition the Appellant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondents, the sum of Kshs 2,346,630/= within the thirty (30) days from the date hereof i.e. by 27<sup>th</sup> March 2020.**

**2. For the avoidance of doubt, in the event the Appellant shall default on Paragraph 25(1) hereinabove, the conditional stay of execution shall automatically lapse.**

**3. Costs of the application herein shall be in the cause.**

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

26. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of February 2020**

**J. KAMAU**

**JUDGE**