



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NUMBER 135 OF 2019

BELINDA JEMOSOP KIRUI1ST APPELLANT

PETER NJENGA2ND APPELLANT

-VERSUS-

ELMERIDA KWAMBIKA ALIAS IMELDA KWAMBOKA.....RESPONDENT

(Appeal from the judgment and decree of J B Kalo CM in Nakuru CMCC 1147 of 2017 delivered on 16th July 2019)

JUDGMENT

1. By a judgment dated 16th July, 2019 the Chief Magistrate J. B. Kalo awarded General Damages of Kshs. 1,200,00/= to the respondent herein together with Special Damages of 139,564/= plus costs and interest. Liability had been agreed at 80:20.
2. On 16th August, 2019 the applicant filed Memorandum of Appeal challenging the award of Kshs. 1,200,000/- as being in error of fact and law by the learned trial magistrate.
3. On 4th October, 2019 the applicant filed Notice of Motion dated 30th September, 2019 brought under **Order 22 rule 22, Order 45 rule 6 and 7, Order 51 rule 1** of the **Civil Procedure Rules 2010 and Section 3 & 3A of the Civil Procedure Act and all enabling provisions of the law** seeking orders;

1. Spent

2. Spent

3. THAT the Honourable Court be pleased to order a stay of execution of the judgment/decree dated 16th July, 2019 in the Civil Case Nakuru CMCC No. 1147 of 2017 pending the hearing and determination of the Civil Appeal herein.

4. THAT the insurer of the Appellant Monarch Insurance Company limited be allowed to deposit the judgment sum in court as security in the form of an insurance bond which is equivalent to the decretal amount as security for due performance of the judgment/decree herein pending the hearing and determination of the appeal.

5. THAT the costs of this application be in the cause.

The grounds for the application are set out on the face of the application basically;

- That the applicant will suffer irreparable loss if the stay is not granted, that the appeal will be rendered nugatory; that if the respondent is paid the decretal sum, the applicant will never recover the sums should the appeal succeed.
- That the applicant is ready to deposit the Judgment debt sum as security or abide by any other orders that may be made.

4. The application is supported by the affidavit of Peter Njenga, the 2nd appellant.

5. In response Elmerida Kwamboka swore an affidavit on 4th November, 2019 opposing the application on grounds that;

- It is defective, unmerited, and incompetent and does not meet the threshold for orders of stay and should be struck out with costs.
- That as a successful litigant she will suffer prejudice by being denied the fruits of her judgment.
- That the appellants have not demonstrated that they will suffer substantial loss, or that the appeal will be rendered nugatory and that as a person of means she will be able to refund the sums if they succeed.

6. Both parties filed written submissions through their respective counsel.

7. Having considered the submissions the issue for determination is whether the application meets the threshold for orders of stay of execution as required by **Order 42 rule 6 Civil Procedure Code and Section 79 (G) of the Civil Procedure Act.**

- Whether the application was filed in time.
- Whether the applicant will suffer substantial loss, whether applicant has offered security for the performance of the decree.

8. The appellant relies on **Focin Motorcycle Company Limited vs Ann Wambui Wangui & Another [2018] eKLR** where the court allowed a similar application and in **HFCK Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** where the court stated;

“Similarly in **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** the Court of Appeal held **“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, which at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance tilts in favour of the applicant in this application.”**

9. Finally that the appellant be ordered to deposit 1/3 of the decretal sum as security so that he or an insurance board equivalent to the decretal sum as security.

10. The respondent relied on **James Wangalwa & Another v Agnes Naliaka Chesero** on the proposition that the applicant was obligated to demonstrate by way of facts that if the *status quo* was not preserved, the kind of loss the applicant would suffer would be so dire that the appeal would be useless.

11. I have carefully considered the affidavits, the submissions and authorities cited.

12. Has the applicant established substantial loss? Here the applicant has merely made sweeping statements in the supporting affidavit. This position was decried by *Odunga J* in **Kenya Shell Limited v Benjamin Karuga Kibiru [1986] KLR 410** and **Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema [2012] eKLR** in this latter case of **Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema (supra)** when he said that if the applicant has not demonstrated to the court sufficient cause to enable it to exercise its discretion then it should not grant the order of stay, because that would amount to maintaining the status quo BEFORE the judgment, denying the successful litigant enjoyment of the fruits of judgment. Have the applicants demonstrated that in this case, the answer unfortunately is no. See also **Meteine Ole Kilelu & 10 Others v Moses K. Nailole Civil Appeal No. 340 of 2008.**

13. It was also submitted that the respondent would not be able to refund the money if it was paid. That it was up to the respondent to demonstrate that she was not a woman of straw and she had not done that. The applicant should not just make the claim. Once again, no evidence of this was established. See **Equity Bank Limited v Taiga Adams Company Limited.**

14. Regarding security the applicant offered to deposit the judgment debt in an interest earning account though in the submissions, they proposed 1/3 of the decretal sum or insurance bond equivalent to the entire decretal sum. Hence the respondent’s submissions that such an offer was not made do not hold water.

15. The respondent proposes that should the court grant stay than half (1/2) the decretal sum should be paid to the respondent and other half (1/2) deposited in interest earning account in the names of both counsel in a reputable bank.

16. In this case the liability was agreed by consent at 80:20. The only contest is on the sum of General Damages assessed by the trial magistrate. I do not have the benefit of proposals made in the lower court by the applicant as those proposals were not cited by the learned trial magistrate in his judgment.

17. I have considered the submissions and the affidavits, there is no evidence of the loss that the appellant would suffer rendering the appeal nugatory neither is there evidence that the respondent would not be able to refund the money if it was paid to her. Nevertheless, since the appellant is entitled to an appeal, without feeling that they are fighting for ‘nothing’ so to speak, and since they conceded liability at 80%, it would be prejudicial to the respondent to deny her the whole sum yet she was only 20% to blame for what happened. In the circumstance I find that the following orders would suffice:-

i) **That there be conditional stay of execution pending the hearing and determination of the appeal herein.**

ii) **That the 80% of Special Damages that are not in dispute assessed at Kshs. 139,564/= i.e. Ksh. 111,651 be paid to the respondent within 45 days hereof.**

iii) That 50% of the decretal sum at Kshs. 480,000/= be paid to the respondent within 45 days herein.

iv) The balance of 480,000/= plus costs and interest be deposited in a joint interest earning account pending the hearing and determination of this appeal.

v) In default of (ii) (iii) and (iv) the stay to lapse and execution to issue.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant Edna

Ms Githae for Obura for respondent

Mr. Mwangi for Mr. Muli for applicant