



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CIVIL APPEAL NO. 91 OF 2019**

**1. TOM MWONYA**

**2. TIKRI CONSTRUCTION LIMITED....APPLICANTS/APPELLANTS**

**-VERSUS-**

**1. MILICENT ANYANGO NYANDIGA**

**2. MERESA ANYANGO NYANDIGA.....RESPONDENTS**

**(Being an appeal from the judgment and decree by Hon. R. K. Langat Senior Resident Magistrate in Rongo Magistrate's Civil Suit No. 375 of 2017 delivered on 9/7/2019)**

**RULING**

1. The Applicants herein, **Tom Mwonya** and **Tikri Construction Limited**, filed a Notice of Motion dated 03/10/2019. The application was filed on 04/10/2019. The Applicants sought the following orders: -

- 1. THAT this application be certified as urgent and service be dispensed with in the first instance.**
- 2. THAT the honourable Court be pleased to grant an Order for stay of execution of the judgment of the trial court delivered on 9<sup>th</sup> July, 2019 and all the consequential Orders and Decree pending further Orders of the Court.**
- 3. THAT the honourable court be pleased to grant an Order for stay of execution of the judgment of the trial court delivered on 9<sup>th</sup> July 2019 and all the consequential Orders and Decree pending interpartes hearing and determination of the application.**
- 4. THAT the honourable court be pleased to set aside the Orders for stay of execution issued by the trial Court on 10<sup>th</sup> September 2019.**
- 5. THAT the honourable court be pleased to grant an Order for stay of execution of the judgment of the Court delivered on 9<sup>th</sup> July 2019 and all the consequential Orders and Decree pending the hearing and determination of the appeal herein.**
- 6. THAT the honourable court do grant any such Orders as may be deemed just and reasonable in the circumstances.**
- 7. THAT costs of this application be provided for.**

2. The application was premised on the grounds appearing on its body and was supported by the Affidavit of the first applicant herein, Tom Mwonya, sworn on 03/10/2019.

3. The Respondents strenuously opposed the stay application. They filed a Preliminary Objection dated 15/10/2019 and a joint Replying Affidavit sworn on 17/10/2019 and filed in Court on 22/10/2019.

4. The stay application was heard by way of written submissions where both parties duly complied.

5. The brief background to the application is that the Respondents filed *Rongo Senior Resident Magistrate's Court Civil Case No. 375 of*

2017 (hereinafter referred to as '**the suit**') against the Applicants. The suit arose from an accident that involved the husband to the Respondents one *Jeremiah Nyandiga* on 23/02/2016 along Rongo – Awendo road. As a result of the accident *Jeremiah Nyandiga* sustained fatal injuries. The suit was therefore brought by the Respondents as the legal representatives of the estate of their husband.

6. The suit was heard. Judgment was rendered on 09/07/2019. The Applicants were found jointly and severally wholly liable for the accident. A sum of Kshs. 3,861,000/= was awarded on damages with costs and interest.

7. The Applicants preferred an appeal by filing a Memorandum of Appeal dated 23/07/2019 on 24/07/2019. The Applicants then filed a Notice of Motion dated 25/07/2019 before the trial court. They sought for stay of execution of the decree pending the determination of the appeal. The court in a ruling delivered on 10/09/2019 granted a conditional stay of execution. The Applicants were ordered to pay one-half of the decretal sum to the Respondents and the other half was to be deposited in an interest-earning joint account in the names of the parties' Counsels within 30 days.

8. The Applicants again felt aggrieved and filed the current application under consideration.

9. As said, the Respondents vehemently opposed the application. They filed a Notice of Preliminary Objection where they argued that the application was *res judicata*, that the Court lacked jurisdiction to entertain the application, there were no new matters to be litigated upon and that the application was misconceived, bad in law and an abuse of the process of the court. They prayed that the application be struck out with costs.

10. Directions were taken. The parties proposed, and the Court agreed, that the application be heard by way of written submissions. The Applicants submitted that the application was not *res judicata* and that this Court has the jurisdiction to deal with the application courtesy of **Order 42 Rule 6(1)** of the **Civil Procedure Rules, 2010**. On the effect of failing to comply with the conditions set by the trial court the Applicants relied on a persuasive decision in ***Kenyatti & Another vs. Njoroge (2004) eKLR*** in buttressing the position that Court appealed to still has jurisdiction to entertain the second application. The Applicants prayed that the objection be overruled.

11. The Applicants further submitted that they had satisfied all the conditions for the grant of stay of execution order pending the determination of the appeal. On the issue of substantial loss, the Applicants posited that this was a money decree and the Respondents did not demonstrate ability to repay the colossal sums in the event the appeal succeeded. The Court of Appeal decision in ***National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another [2006] eKLR*** was referred in support of the submission.

12. The Applicants also offered security in the form of deposit of the vehicle registration book for Motor Vehicle registration No. KCC 834W make Mercedes Benz and Trailer registration number ZB 5979 both registered in the name of the second Applicant. Both were valued at Kshs. 5 Million.

13. The Respondents on their part submitted that the Applicants failed to demonstrate any loss likely to occur in complying with a lawful court judgment. On the security offered, it was submitted that the documents were not authenticated as a way of demonstrating good faith. The decisions in ***First Assurance Co. Ltd vs. Joshua Mutual Mwololo (2019) e KLR***, ***Arun C. Sharmavs. Ashana Raikundalia t/a Raikunda & Co. Advocates, Ernie Campbell & Company Ltd vs. Githunguri Dairy Plant Co. Ltd & Another (2009) eKLR*** and ***Amal Hauliers Ltd vs. Abdulnasir Abubakar Hassan (2017) eKLR*** were referred to in opposition to the application.

14. I have carefully perused the lower court record, the application, the response thereto, the parties' submissions and the decisions referred thereto and I fully understand the purport of the application.

15. I will first deal with the Preliminary Objection. To that end, I will ascertain whether the application was *res judicata* given that a similar application was filed, heard and determined before the trial court. I recently dealt with the issue in ***Migori Civil Appeal No. 95 of 2019 Pamela Adhiambo Gogo t/a Alpha Joli Hardware -versus- Kenya Women Microfinance Ltd*** (unreported) where I expressed myself thus: -

**25. I recall to have previously dealt with the jurisdictional aspect of the High Court in respect to Order 42 Rule 6(1) of the Civil Procedure Rules. As I still hold that position, I will reiterate what I stated in a ruling in *Migori High Court Civil Appeal No. 27 of 2017 South Nyanza Sugar Company Limited vs. Joshua Ondara Ondigi (2017) eKLR*. I rendered myself thus: -**

12. .... **Order 42 Rule 6(1)** of the Civil Procedure Rules is tailored as follows: -

**'6(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 order set aside.**

13. The above provision provides two important aspects of stay of execution applications. The first one relates to the original and special jurisdiction of the High Court to entertain an application for stay of execution when a like application was initially heard in the lower court but disallowed. In such a case the High Court, although sitting as an appellate Court, is vested with such a special and original jurisdiction in law to consider a like application regardless of the fact that the earlier one was disallowed by the court appealed from. Therefore, the [filing of the] *application before the High Court will neither be caught up by the doctrine of res judicata nor be regarded as an abuse of the process of the Court.*

14. The second aspect relates to what happens when the court appealed from allows the application for stay but the Applicant or Respondent is aggrieved by that order. In such a case, an Applicant is still at liberty to file a fresh application before the High Court or the Court appealed to or may apply to vary or set-aside that order. An aggrieved Respondent may also apply to the Court appealed to for setting aside such an order.

15. It is however important to take note of the conduct of an Applicant who is granted a conditional stay in the court appealed from and fails to comply with those orders and instead rushes to the Court appealed to and files a fresh application. The Court appealed to cannot just close its legal eyes to what happened before the court appealed from. What happened before the court appealed from forms part of the record of the Court and the Court appealed to must consider that background in light of the fresh application. In such a scenario, the Court of Appeal has pronounced itself that such a party is in clear abuse of the process of the Court. The Court in the case of Patriotic Guards Ltd v James Kipchirchir Sambu (2017) eKLR held as follows: -

**‘As we have already shown in this ruling the applicant applied for, and was granted by the trial court a stay of execution pending appeal. A condition was given in that the entire judgment sum be deposited in an interest earning account in the name of the advocates of the parties. That condition has not been met by the applicant and no explanation has been offered why the applicant has not complied with the condition. The applicant chose to apply for a stay of execution of the judgment of the trial court and received favourable orders by that court but instead of complying with orders given chose to file an application for stay of execution to this Court. Although we recognize that we have our jurisdiction on such an application, is original we cannot be blind to the fact that an applicant who is armed with orders of a lower court but who chooses to file a similar application for stay of execution may very well be abusing the process of the court.....’**

16. The Court of Appeal in dealing with that aspect further in the case of Hunker Trading Company Limited v. Elf Oil Kenya Limited (2010) eKLR stated as follows: -

**‘As stated above, no notice of appeal has been lodged in this Court against the order of stay of execution on terms given by (Koome, J) which order although granted on different grounds to those applicable to an application for stay of execution in this Court and the order has since lapsed, this is a factor which this Court cannot fail to take into account because the non-compliance with the order has a bearing on the provisions of Section 3A of the Appellate Jurisdiction Act. Moreover, the disobedience of the order in our view has an impact on the management of the Court resources.**

**Sections 3A and 3B of the Appellate Jurisdiction Act and also in the context of the High Court section 1A and 1B of the Civil Procedure Act, have in the recent past generated what appears to have the markings of enlightened jurisprudence touching on the management of civil cases and appeals and therefore as the sections have been extensively reproduced in many recent decisions we need not reproduce them here except the material part in the Act because the two sets of sections are in pari materia. Section 1A (3) of the Civil Procedure Act reads: -**

**‘A party to civil proceedings, or an advocate for such party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the direction and, orders of the Court.’**

**As the applicant has admitted having failed to comply with the order of stay by (Koome, J) we find that it is in breach of section 1A (3) of the Civil Procedure Act and also section 3A (3) of the Appellate Jurisdiction Act.**

**We do not think that the fact that the orders has since lapsed has in any way eroded the relevance of the disobedience of the order to the operation of the overriding objective. The thrust of the applicant’s application to this Court under Section 3A is substantially to seek similar orders to those he was granted in the superior court and failed to obey. Under section 1A (3) the applicant has a duty to obey all court processes and orders.**

**In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another case has been baptized the (double “O” principle”) and in this case, we have chosen to call it (“the O2 or the oxygen principle”) because it is intended to re-energise the processes of the court’s and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this court’s resources (time) and also an abuse of its process. The fact that the notice of appeal under rule 5(2)(b) and is directed at the judgment of (Lesiit,J), would still not take the matter outside the provisions of Section 3A which is a provision of an Act of Parliament.**

**As the applicant did not appeal against the order of stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of Rule 5 (2) (b) and Section 3A and is therefore incompetent. The order of stay of execution on terms was subsequent to the decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to this Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources.**

**The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the “O2” principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court.”**

17. Although the foregone decisions of the Court of Appeal dealt with stay of execution applications under the Court of Appeal Rules, the legal arguments and findings therein encapsulate the applicable principle in law on stay of execution applications made before the court appealed from and the court appealed to hence to that extent the decisions are binding on this Court.

16. The above analysis settles the issue of *res judicata* and jurisdiction. The application is not *res judicata* and the High Court has jurisdiction over the matter.

17. I will now deal with the issue as to whether the application is merited. The legal basis for stay of execution application has already been laid bare as **Order 42 Rule 6(1)** of the **Civil Procedure Rules**. Three conditions must be positively demonstrated in favour of the Applicants for the order to issue. The first condition is whether the Applicants stand to suffer irreparable loss unless the order is made.

18. The decree in this matter is a money decree. The Court of Appeal settled the burden of proof in such instances. In **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another** case (supra) the Court stated that once an Applicant deponed that the Respondent was unlikely to repay the sums once paid then the evidential burden of proof shifted to the Respondent to prove that it was able to reimburse the sums in case the need to do so arose. The reason being that it will be far too unfair to expect an Applicant to know the Respondent's means and resources.

19. The Respondents' demonstrated their ability to repay the sums ordered to be paid to them in *paragraph 8* of their joint Replying Affidavit as follows: -

**THAT we know of our own knowledge that we are businesswomen and large scale sugarcane farmers within Migori County therefore very capable and the Applicant's fear that vagaries of life may make it impossible to retrieve the half the decretal sum if the appeal succeeds does not hold any water.**

20. I note that apart from the foregone averments, the Respondents did not attach any evidence of their ability to repay such sums when called upon to do so. However, on the other hand the appeal is only on the quantum of damages and not on liability. It therefore means that in any event the Respondents remain entitled to compensation. The question is how much. The issue of inability to refund the sums must hence be weighed against the fact that the appeal is only on quantum of damages. To that end, if the sum of money to be paid to the Respondents is a reasonable amount then the aspect of loss does not arise.

21. Whereas the sum of one-half of the decretal amount may appear to be high given that the Respondents did not indicate their ability to refund, one-third of the decretal amount cannot in any way be deemed to be colossal in view of the fact that liability is not challenged.

22. On security, the High Court in the **Kenyatti & Another vs. Njoroge** case (supra) rightly held that security may take many forms and that such security ought to be least disadvantageous to the party giving it.

23. Among the prayers sought in the application was for the setting aside of the conditions granted by the trial court as precedent to grant of the stay. Having considered the matter carefully I am persuaded that this is a matter which calls for this Court's intervention. I also remain alive to the calling that I should put in place mechanisms for the quickest possible determination of the main appeal.

24. Having said so, the following orders do hereby issue: -

**a. There shall be a stay of execution of the decree in Rongo Senior Resident Magistrate's Court Civil Case No. 375 of 2017 on the following new conditions. For clarity, the condition set by the trial court are hereby reviewed as follows: -**

**i. The Applicants shall pay the sum of Kshs. 1,200,000/= to the Respondents instead of one-half of the decretal sum;**

**ii. The Applicants shall avail a Bank Guarantee from a reputable bank agreeable to the Respondents for the balance of the decretal sum;**

**iii. The orders in (i) and (ii) above shall be complied within 21 days of this ruling and in default of any of the said orders the stay orders shall lapse and the Respondents shall be at liberty to levy execution of the entire decretal sum.**

**b. The Appellants shall file and serve the Record of Appeal together with their written submissions within 45 days of this ruling. Once served, the Respondent shall file and serve its written submissions within 14 days of service.**

**c. The appeal is hereby fixed for highlighting of the written submissions on 20/05/2020.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 27<sup>th</sup> day of February, 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open court and in the presence of: -**

**Mr. Otinga** Counsel instructed by the firm of Messrs. S. N. Otinga Advocates for the Applicants.

**Miss Kuke** Counsel instructed by the firm of Messrs. Everlyne Kuke & Company Advocates for the Respondents.

**Evelyne Nyauke** – Court Assistant.