



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 348 OF 2019

IRUNGU WAMBUI IRENE.....1ST APPELLANT

RICHARD KURIA.....2ND APPELLANT

VERSUS

JAMES JULIUS OMENO.....RESPONDENT

RULING

1. In their Notice of Motion application dated and filed on 3rd July 2019, the Appellants sought an order for stay of execution of the judgment that was delivered in **Nairobi CMCC No 1363 of 2018 James Julius Omeno vs Irungu Wambui Irene & Richard Kuria** pending hearing and determination of the appeal herein. Their said application was supported by the Affidavit of the Head of Legal Claims UAP, the insurers of their Motor Vehicle Registration Number KBV 551J, Frankline N Nyaga. The same was sworn on 3rd July 2019.

2. They were emphatic that they had an arguable appeal and that if an order for stay was not granted, it would prejudice their right of appeal.

3. In opposition to the said application, on 8th July 2019, the Respondent swore a Replying Affidavit. The same was filed on 12th July 2019.

4. He averred that the Appellants had not met the threshold of being granted an order for stay of execution pending appeal. He stated that they had not demonstrated how their Appeal would be rendered nugatory. It was his contention that execution was a lawful process and he should be allowed to enjoy the fruits of his judgment.

5. All the parties were agreed on when the court could exercise its discretion to grant an order for stay of execution pending appeal. Indeed, for an applicant to succeed in being granted an order for stay of execution, he has to demonstrate the following conditions as has been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

a. That substantial loss may result unless the order is made.

b. That the application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

6. 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.

7. The court carefully considered the Written Submissions and the case law that each of the party relied upon and determined that the Respondent had not filed an Affidavit of Means to demonstrate that he was financially able to refund the Appellants the decretal sum if the same was paid to him before the Appeal herein could be heard and determined.

8. In the absence of proof to demonstrate his ability to refund the Appellants the decretal sum, this court was satisfied that they would suffer substantial loss. They had thus satisfied the first condition of being granted a stay of execution pending appeal.

9. The decision the Appellants intended to appeal against was delivered on 12th June 2019. They filed their Memorandum of Appeal dated 24th June 2019 on 25th June 2019. The present application was filed on 3rd July 2019. A period of about three (3) weeks could not be said to have been inordinate.

10. This court therefore took the view that the present application was filed without undue delay and hence the Appellants had satisfied the second condition for the granting of an order for stay of execution pending appeal.

11. The Appellants had indicated that they and their underwriter were ready, able and willing to abide by any conditions that the court could deem fit to secure the decree including depositing the decretal sum in a joint interest earning account in the name of their advocates and those of the Respondent.

12. It was therefore the considered opinion of this court that the Appellants had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

DISPOSITION

13. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application that was dated and filed on 3rd July 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

1. THAT there shall be a stay of execution of the decree in Nairobi CMCC No 1363 of 2018 James Julius Omeno vs Irungu Wambui Irene & Richard Kuri pending the hearing and determination of the Appeal on condition the Appellants shall deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent, the sum of Kshs 255,550/= within the thirty (30) days from the date of this Ruling i.e. by 10th April 2020.

2. For the avoidance of doubt, in the event, the Appellants shall default on Paragraph 13(1) hereinabove, the conditional stay of execution shall automatically lapse.

3. Either party is at liberty to apply.

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

14. It is so ordered.

DATED and DELIVERED at NAIROBI this 10th day of March 2020

J. KAMAU

JUDGE