



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 104 OF 2020

MOHAMED MAQSOOD MUGHAL.....1ST APPELLANT

FARHAN NIWAS MIZA.....2ND APPELLANT

-VERSUS-

KEVIN MASHETI ASILA.....RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 3rd March 2020 in which the appellants are seeking for *inter alia*, an order for stay of execution pending appeal of the decree issued pursuant to the judgment delivered on 18th February 2020. The motion is supported by the affidavit of Farhan Niwas Mirza. When served, the respondent filed the replying affidavit of Kevin Masheti Asila to oppose the motion.
2. When the motion came up for interpartes hearing, this court issued directions to have the same disposed of by written submissions. At the time of writing this ruling, the appellants/ applicants were the only parties who had filed their submissions.
3. I have considered the grounds stated on the face of the motion dated 3rd March 2020 plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the appellants' submissions. It is the submission of the appellants that they are apprehensive that the respondent may execute the decree issued pursuant to the judgment delivered by the trial court on 18th February 2020. They further argued that unless the order for stay is granted the appeal will be rendered nugatory yet it has high chances of success.
4. The appellants averred that they are willing to provide security for the due performance of the decree. They offered to deposit a reasonable amount of the decretal sum in an interest earning account in the joint names of the advocates appearing in this matter.
5. I have already stated that the respondent filed a replying affidavit he swore to oppose the motion. He pointed out that the appellants have not met the conditions necessary for the grant of an order for stay of execution. He averred that he is a man of means hence he will be in a position to refund the decretal sum if the appeal turns successful. The respondent also averred that the appellants have not shown the substantial loss they would suffer if the order for stay is denied.
6. The respondent further proposed that if this court is minded to grant the order for stay, then half of the decretal sum should be paid to him while the balance should be deposited in an interest earning account in the joint names of the advocates appearing in this appeal.
7. On 18th February 2020, Hon. Orange K. I., leaned Senior Resident Magistrate delivered a judgment in favour of the appellants in the sum of ksh.1,400,000/=. The appellants being aggrieved have now approached this court seeking to upset the aforesaid decision on appeal. They are now before this court seeking for an order for stay of execution of the decree pending appeal.
8. The principles to be considered in an application for stay pending appeal are well settled. First, an applicant must show that unless an order for stay is granted, he would suffer substantial loss. Secondly, if the court is satisfied that there is need to issue the order for stay, then there must be a provision for security for the due performance of the decree. Thirdly, that the application for stay should be filed without an unreasonable delay.
9. It is apparent that the decision sought to be impunged on appeal was delivered on 18th February 2020 and the application seeking for stay was filed on 3rd march 2020. I am convinced that the motion was filed without unreasonable delay.
10. The main question to be considered is whether the appellants have shown the substantial loss they would suffer if the order for stay is denied. It is the submission of the appellants that if the decretal sum is paid to the respondent it would be very difficult for the respondent to refund the amount since he is unemployed nor engaged in any economic activity.

11. The respondent on the other hand is of the submission that he is a man of means hence he is in a position to refund the decretal sum when required.

12. I have considered the competing arguments. The respondent merely averred in his replying affidavit that he is capable of refunding the decretal sum. He has however failed to tender any credible evidence to establish his financial capability to make a refund. I am therefore not convinced that the respondent is in a financial position to make a refund when required. With respect, I am persuaded by the appellants' that they would suffer substantial loss if the decretal sum is paid to the respondent since the respondent is not in a position to refund the amount if the appeal turns successful.

13. The appellants have proposed to deposit half of the decretal sum in an interest earning account in the joint names of the advocates appearing in this matter.

14. The respondent proposed that he be paid half of the decretal sum while the other half should be deposited in an interest earning account in the joint names of the advocates appearing in this appeal.

15. Having considered the competing arguments, I have come to the conclusion that the parties have not presented plausible reasons to convince this court why the decretal sum should be split. I think the appropriate decision is to have the decretal sum deposited as whole unit.

16. In the end, I am convinced the motion dated 3rd March 2020 has merit. Consequently an order for stay of execution of the decree is granted on condition that the decretal sum of kshs.1,400,000/= is deposited in an interest earning account in the joint names of advocates and or firms of advocates within 45 days from the date hereof. In default, the motion will be treated as having been dismissed. Costs of the application to await the outcome of this appeal.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 29th day of May, 2020.

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J. K. SERGON

JUDGE

In the presence of:

C. W. Ngala for the Appellants/Applicants

..... for the Respondent