



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 206 OF 2019

RANJEET SINGH CHODAAPPELLANT

VERSUS

FREDRICK KANGETHE KINUTHIA.....1ST RESPONDENT

DAVID MBUGUA WAWERU.....2ND RESPONDENT

MOSES NJORGE.....3RD RESPONDENT

RULING

1. In his Notice of Motion application dated and filed on 12th April 2019, the Applicant sought an order for stay of execution of the decree emanating from the judgment that was delivered on 14th March 2019 in **Milimani CMCC No 6098 of 2011 Fredrick K Kinuthia vs Ranjeet Singh Choda & 2 Others** pending hearing and determination of the appeal herein. He swore his Affidavit in support of the said application on 12th April 2019.

2. He stated that he did not know the financial status of the Respondents and in the event they moved to execute against him, his Appeal would be rendered nugatory. He added that he was not certain that they would be able to refund him the decretal sum if he succeeded in his Appeal. He also stated that he was ready, able and willing to provide security for the due performance as may be ordered by the court. He therefore urged this court to allow his application as prayed.

3. In opposition to the said application, the 1st Respondent swore a Replying Affidavit on 28th May 2019. It was not on the court record but was alluded to in his Written Submissions.

4. He stated that he was a man of means employed at the leading advertising firm Magnate Ventures Limited and earning a monthly salary of Kshs 33,668.25 as was evidenced in the payslip that he had annexed to his Replying Affidavit. He was therefore emphatic that he could not therefore be described as a person of unknown means.

5. In opposition to the said application, the 3rd Respondent swore a Replying Affidavit on 31st May 2019. The same was filed on 3rd June 2019. The same was on the court file but alluded to in the Written Submissions.

6. The Applicant submitted that he had already banked a sum of Kshs 931,658/= in the Judiciary Revenue Account and urged this court to allow him bank the remaining amount in a joint interest earning account. He argued that notwithstanding the order that was made by Thuranira Jaden J, the court was required to determine the merits of the application before it. He referred this court to the case of **National Credit Bank Limited vs Aquinas Francis Wasike & Another [2006] eKLR** in support of his case.

7. In his Written submissions, the 1st Respondent did not appear to be averse to the Appellant herein being granted an order for stay of execution pending appeal provided that half of the decretal sum of Kshs 875,750/= was released to him with the balance being deposited in a joint interest earning account. He also prayed that the costs of the suit be released to him.

8. In this regard, he placed reliance on the cases of **Gatongu Farmers Co Ltd vs Avtar Singh Chauhan [2010] eKLR** and **Jubilee Insurance Co Limited vs Samuel Kimani Thumbu [2010] eKLR** where the common thread was that when considering an application for an order for stay of execution, the court has to balance the interests of both parties.

9. On his part, the 3rd Respondent submitted that the Appellant had failed to comply with the court order to pay half the decretal sum to the 1st Respondent and the balance be deposited in a joint interest earning account and hence, he was undeserving of the orders that he was seeking.

10. He relied on the cases of Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Another [2005] I KLR, Kenya Shell Limited vs Kibiru [1986] KLR 410 and Machira t/a Machira & Co Advocates vs East African Standard (No 2) [2002] KLR 63 to argue that the Appeal would not be rendered nugatory as the decree was monetary in nature and that in any event, the Appellant had not met the threshold of being granted an order for stay of execution pending appeal.

11. This court carefully considered the rival submissions by all the parties and noted that they were all in agreement on the conditions an applicant must meet before an order for stay of execution could be granted. What they were not agreed upon was whether the application ought to be allowed and/or the terms of the deposit of the decretal sum.

12. In her order of 15th April 2019, Thurairaja J granted the following order:-

“THAT temporary stay of execution be and is hereby granted of Decree emanating from the judgment that was delivered on 14th March 2019 in Milimani CMCC No 6098 of 2011 Fredrick K. Kinuthia vs Ranjeet Singh Choda & Others for thirty (30) days on condition that ½ the Decretal sum is deposited in court and security proposed for the other half.”

13. It appeared from the parties’ Written Submissions that the decretal amount was colossal in which case, in the event the Appellant was successful in his Appeal, there would be some difficulties in him recovering the same if it was released to the 1st and 3rd Respondents. The 1st Respondent had averred that he was earning a monthly salary of Kshs 33,668.25. There was no indication of what the 3rd Respondent earned. This court was therefore persuaded to find and hold that the Appellant would suffer substantial loss if half of the decretal sum was released to the 1st and 3rd Respondents herein.

14. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if 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.”

15. As was rightly pointed out by the 3rd Respondent, the Appellant only indicated having deposited part of the decretal amount in court in his submissions. There was no evidence that he had done so yet he could have sought leave to file a Supplementary Affidavit. In the absence of any evidence that he had done so, which this court did not even find in the court file, and to avoid giving conflicting orders of Thurairaja J of 15th April 2019 who was a judge of equal and competent jurisdiction as this court, this court only limited itself to addressing the furnishing of security of the other half of the decretal sum as it could not purport to sit on appeal on her order. Notably, there was no indication of what the decretal sum, it was difficult to give exact figures of what ought to be deposited.

DISPOSITION

16. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Notice of Motion application dated and filed on 12th April 2019 be and is hereby allowed in terms of Prayer No (3) in the following terms:-

1. THAT an order for stay of execution be and is hereby granted of Decree emanating from the judgment that was delivered on 14th March 2019 in Milimani CMCC No 6098 of 2011 Fredrick K. Kinuthia vs Ranjeet Singh Choda & Others pending the hearing and determination of the Appeal herein on condition that the Appellant shall deposit into court half of the decretal sum and deposit the other half of the decretal sum into a joint interest earning account in the names of his advocates and those of the 1st and 3rd Respondents within thirty (30) days from the date of this Ruling.

2. THAT in the event that the Appellant shall have already deposited the sum of Kshs 931,658/= into the Judiciary Revenue Account as had contended, then the remainder of the decretal sum shall be deposited into a joint interest earning account in the names of his advocates and those of the 1st and 3rd Respondents within thirty (30) days from the date of this Ruling.

3. For the avoidance of doubt, in the event, the Appellant shall default either on Paragraph 16(1) or Paragraph 16(2) hereinabove, whichever will be applicable in the circumstances of this case, the conditional stay of execution shall automatically lapse.

4. Either party is at liberty to apply.

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

17. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May 2020

J. KAMAU

JUDGE