



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 52 OF 2020

MOMAI INVESTMENT LIMITED.....APPELLANT

VERSUS

FRED KIOKO.....RESPONDENT

RULING

1. In its Notice of Motion application dated 12th February 2020 and filed on 13th February 2020, the Appellant herein sought an order of stay of execution pending the hearing and determination of the Appeal herein. Its application was supported by the Affidavit of its Administrative Manager, Absalom Ondara Omari, that was sworn on 12th February 2020.
2. The Appellant contended that it was aggrieved by the Judgment of Hon Orenge K.I. Senior Resident Magistrate and that it wished to appeal against both on liability and quantum.
3. It was its averment that in the event the order of stay of execution pending appeal was not granted, it stood to suffer substantial loss and may not recover the decretal from the Respondent in case he executed against it and it was successful in its Appeal which would render its Appeal nugatory.
4. It pointed out that it filed its Memorandum of Appeal and the present application expeditiously and without delay and added that it was ready and willing to provide security for the due performance of the decretal sum by depositing a reasonable amount as the court would deem fit in an interest earning account in the names of its advocates and those of the Respondent herein. It thus urged this court to allow its application as prayed.
5. In opposition to the said application, on 3rd March 2020, the Respondent herein swore a Replying Affidavit. It was filed on 5th March 2020. He stated that the present application was not made in good faith and termed it an abuse of the court process which was intended to derail him enjoying the fruits of his judgment. He averred that he had been relying on third parties for handouts.
6. He urged this court to dismiss the present application with costs to him and/or without prejudice to the foregoing, that it directs that the Appellant release half the decretal sum of Kshs 700,564.50 and direct that the other half be deposited into an interest earning account in the names of his advocates and those of the Appellant.
7. Both parties were agreed on the conditions that must be met before an order for stay of execution pending appeal can be granted. In this regard, the Appellant relied on the cases of **Beauttah Anselimo Maali vs Ethiopian Airlines Enterprises [2013] eKLR**, **M.A. Koinange vs Joyce Gachunku & 2 Others [2015] eKLR** to support its case that it ought to be granted an order for stay of execution pending appeal.
8. On his part, the Respondent referred this court to the case of **Antoine Ndiaye vs African Virtual University [2015] eKLR** amongst other cases he did not attach to his Written Submissions to argue that the Appellant ought not to be granted the orders it had sought herein.
9. Having carefully considered the respective parties' affidavit evidence and Written submissions, this court found that both parties were agreeable to half the decretal sum being released to the Respondent and the other half being deposited into a joint interest earning account. There was therefore no value to be added in analysing if the Appellant had met the conditions that had been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 before being granted an order for stay of execution pending appeal as.
10. Having said so, this court noted that while the Respondent had asked that the sum of Kshs 700,564.50 be released and that a sum of a similar amount be deposited in an interest earning account as aforesaid, the Appellant had asked that the sum of Kshs 750,000/= be released to the Respondent and a similar sum of Kshs 750,000/= be deposited as aforesaid. The court adopted the Appellant's figure as it would not have proposed a sum that prejudiced it.

DISPOSITION

11. Accordingly, for the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 12th February 2020 and filed on 13th February 2020 be and is hereby allowed in the following terms:-

1. THAT there shall be an order for stay of execution of the Ruling of Hon Orege K. I. SRM, that was delivered on 24th January 2020 in Nairobi Milimani Civil Suit No 5554 of 2016 Fred Kioko vs Momai Investment Limited pending the hearing and determination of the Appeal on the following conditions:-

a. THAT the Appellant shall release to the Respondent the sum of Kshs 750,000/= within thirty (30) days from the date of this Ruling.

b. THAT the Appellant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the Respondent, the balance of the decretal sum of Kshs 750,000/= within thirty (30) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 11(1)(a) and (b) 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.

12. It is so ordered.

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

J. KAMAU

JUDGE