



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 563 OF 2019

J. MWANGI KARIUKI.....1ST APPELLANT/APPLICANT

ANAS MOTOR LIMITED.....2ND APPELLANT/APPLICANT

-VERSUS-

ROSEMARY WANJIKU MUNGAI (Suing as the personal representative

of the estate of ANDREW MACHARIA-Deceased).....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 9th March, 2020 taken out by the 1st and 2nd appellants/ applicants herein, in which they sought for an order for stay of execution of the judgment/decree delivered by the trial court on 6th September, 2019 pending appeal.
2. The Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of advocate **Wanjiku Caroline**.
3. Going by the record, the respondent indicated that she put in a replying affidavit to oppose the Motion; however, at the time of writing this ruling, this court had not seen a copy of the same since it had not been made available in the court file.
4. When the Motion came up for interparties hearing before this court, the parties were directed to put in written submissions.
5. In their submissions dated 29th June, 2020 the applicants argue that their memorandum of appeal raises arguable grounds of appeal with reasonable chances of success.
6. The applicants further argue that the application has been brought without unreasonable delay and that any evident delay was necessitated by the mistake of their advocate and should not be visited upon them. In this respect, the applicants cited the following decision made by the Court of Appeal in the case of **Belinda Murai & 9 others v Amos Wainaina [1978] eKLR**:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
7. It is the submission of the applicants that unless the order for a stay of execution sought is granted, they are apprehensive that the respondent may proceed to execute the judgment in her favour, thereby rendering the appeal nugatory.
8. The applicants went further on to submit that the burden of proof of ability to refund the decretal sum shifted to the respondent as soon as the applicants raised the issue that the respondent was not capable of refunding the same, and made reference to the case of **Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & another [2014] eKLR** where the court echoed the above legal position in the manner hereunder:

“...the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds, shifts to the Respondent the moment Appellant states that it is unaware of Respondent’s resources.”

9. In response, the respondent contends that the application and the appeal are purely intended to frustrate her efforts to realize the fruits of her judgment. The respondent went a step further to contend that the applicants have not shown the substantial loss they stand to suffer in line with the decision of the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** when it held that an

applicant ought to establish additional factors that demonstrate the substantial and irreparable loss he or she stands to suffer unless an order for a stay of execution is granted.

10. The respondent urged this court to order the applicants to deposit the entire decretal sum in court should an order for a stay of execution be granted in the present circumstances; in the alternative, that part of the decretal amount (Kshs.3,000,000/) to be paid by the applicant's insurance company, be released to the respondent and the balance be deposited in court or in a joint interest earning account.

11. I have considered the grounds laid out on the body of the Motion, the facts deponed in the supporting affidavit and the contending submissions and authorities cited.

12. In brief, the respondent instituted a suit before the trial court against the applicants under the Fatal Accidents Act and the Law Reform Act. Upon hearing the parties, the trial court vide the judgment delivered on 6th September, 2019 awarded the respondent a sum of Kshs.5,000,000/ on general damages and Kshs.3,766,525.50 on special damages. The applicants are now appealing against the said judgment.

13. In answering the respondent's argument that the Motion is an abuse of the court process for the reason that the applicants had previously filed a similar application before the trial court, I note that the original application was subsequently withdrawn before it was prosecuted. Moreover, the law does not preclude a party from filing an application for a stay of execution even after a similar application has been heard and determined by a lower court.

14. On the merits of the Motion, I wish to begin by stating that the issue on whether a party has an arguable appeal is not for consideration when it comes to applications seeking an order for a stay of execution before the High Court.

15. The guiding provision in considering an application seeking an order for stay of execution is **Order 42, Rule 6(2) of the Civil Procedure Rules** which sets out the following conditions in determining an application for stay.

16. The first condition is that the application must have been made without unreasonable delay. In her affidavit, Wanjiku Caroline stated that the Motion has been filed without unreasonable delay, while the respondent is of the view that not only has there been an unreasonable delay, but that the applicants have abused the court process by previously filing a similar application before the trial court before subsequently withdrawing it.

17. I note that the Motion was filed on 9th March, 2020 within an estimate timeline of six (6) months from the date of delivery of the impugned judgment. The record shows that the applicants had indeed filed a similar application dated 1st October, 2019 before the trial court before deciding to withdraw it vide the notice of withdrawal dated 11th March, 2020. The applicants explained in their written submissions that the initial application was erroneously filed with the trial court and hence the withdrawal.

18. Upon considering the time that lapsed in between, I find the delay of six (6) months not to be inordinate or unreasonable.

19. Under the second condition, the applicants must show to this court's satisfaction the substantial loss they would suffer if the order for stay is denied.

20. On their part, the applicants have stated that unless the order for stay is granted, they are anxious that the respondent will move to execute the decree, thereby rendering the appeal nugatory and that the respondent's source of income is unknown and hence it may be difficult for the applicants to obtain a refund of the decretal amount once the same is paid to the respondent and the appeal succeeds.

21. The courts have held that substantial loss which constitutes the cornerstone of an application for stay ought to be demonstrated. The courts have also determined that imminent execution is not in itself a ground on which a party can rely to argue substantial loss. The reason for this is that execution is a lawful process and no successful litigant should be denied the fruits of his or her judgment save where sufficient reason(s) have been given.

22. The above was echoed by the Court of Appeal in the case of **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR** relied upon by the parties, wherein the court rendered that in order for an application for a stay of execution to succeed, a party must demonstrate inter alia, that he or she will suffer substantial loss.

23. Furthermore, as earlier noted the respondent referred this court to the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** in which the court held that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

24. I looked at the various documents on record relied upon by the respondent and I note therefrom that the respondent had annexed some title documents to her replying affidavit sworn before the trial court to indicate her financial capabilities. However, she did not produce any valuation report to show the value of the properties referenced and she did not produce any documentation to show that she received a monthly rental income of Kshs.200,000/ as stated in the aforementioned affidavit before the trial court. This court is therefore unable to ascertain whether the respondent is in a financial position to refund the decretal sum should the circumstances require it.

25. I also acknowledge that the decretal sum is quite colossal in nature which to my mind would also constitute a factor to consider.

26. Upon taking into account all the foregoing factors, I am satisfied that the applicants have reasonably shown that they will suffer substantial loss.

27. In respect to the final condition which is the provision of security for the due performance of such decree or order, the applicants indicated their readiness and willingness to deposit part of the decretal sum (Kshs.3,000,000/) as security. The respondent on her part is of the view that the applicants ought to provide security for the entire decretal amount, which view I concur with.

28. In the end, the Motion dated 9th March, 2020 is found to be with merits. Consequently, an order for stay of execution pending appeal is granted on the condition that the applicants deposit the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates within 30 days of this day, failing which the motion shall be treated as having been dismissed. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24th day of September, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the 1st and 2nd Appellants/Applicants**

..... **for the Respondent**