



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 123 OF 2019**

**SEAMAN BUILDING &**

**CIVIL ENGINEERING LTD.....APPELLANT**

**VERSUS**

**JUSTUS MAKOKHA NASONGO.....RESPONDENT**

**RULING**

1. The Application for determination is one dated 10/06/2020. It seeks for an order that the Court directs that the entire decretal sum be deposited in a joint interest-earning account in the names of the advocates of both parties, pending the hearing and determination of the appeal filed herein. The Application is supported by the affidavit of Francis Macharia Mbugua, a director of the Appellant Company.

2. The Application is opposed. The Respondent has filed a Replying Affidavit in opposition.

3. The Court directed the parties to file Written Submissions urging their respective positions.

4. The facts as gleaned from the various documents filed by the parties are as follows. The Respondent sued the Appellant for general and special damages, costs and interests for injuries he claimed he sustained a road traffic accident caused by a Motor Vehicle owned by the Appellant. The Appellant resisted the suit. It proceeded to full hearing. A judgment was entered on 02/07/2019 against the Appellant for Kshs. 700,000/- as general damages; future medical expenses of Kshs. 100,000/-, special damage of Kshs. 21,168/-. The costs were later assessed to Kshs. 249,205/-.

5. The Appellant is dissatisfied with the judgment. It has timeously preferred an appeal to this Court. It also sought a stay of execution in the Lower Court. That application was resisted by the Respondent. However, in a ruling dated 29/05/2020, the Learned Trial Magistrate allowed, in part, the Appellant's Application for stay on condition that "50% of the decretal sum be released to the Plaintiff/Respondent and 50% be deposited in an interest earning account in the joint names of both advocates for the parties within 30 days from the date of the ruling."

6. Further dissatisfied with the conditional stay granted, the Appellant has approached this Court for orders that the full decretal sum, not just half, be deposited in a joint interest-earning account in the names of the advocates of both parties, pending the hearing and determination of the appeal filed herein.

7. One of the issues raised by the Respondent's Counsel is whether the instant Application is incompetent, bad in law or otherwise an abuse of the process of the Court. This is because, the Respondent says, the Appellant has already benefited from positive orders in the Court below but rather than satisfy those, he elected to come to this Court.

8. The main argument by the Appellant seems to be that it will suffer substantial loss and that the appeal will be rendered nugatory if the orders are not given. In the affidavit of Francis Macharia Mbugua the apprehension of substantial loss is explained in two sparse paragraphs thus:

*5. THAT the Appellant is aggrieved by the said ruling hence instituted this application seeking for the stay orders so as to prevent the appeal being rendered nugatory.*

*6. THAT the application was made without unreasonable delay and stands to suffer substantial loss as it is being condemned to pay for another's wrong as the entire appeal is on the issue of ownership of the accident vehicle.*

9. In their written submissions, Counsel for the Appellant urged the Court to give a new stay of execution arguing that the Appellant has satisfied all the conditions for the grant of stay:

- a. The Application was brought without any delay and immediately the 1<sup>st</sup> Appellant appointed new counsel to represent them;
- b. On substantial loss, Counsel for the Appellant argued, for the first time, that the Respondent has not amply demonstrated that he has the means to refund half the decretal amount if the same is paid to him as per the Lower Court's conditions; and
- c. Finally, Counsel submitted that the Appellant is willing to deposit the whole decretal amount in a joint interest-earning account in the names of the advocates of both parties.

10. As aforesaid, the Respondent is vehemently opposed to the Application. In addition to the argument that the Application is an abuse of the Court process, the Respondent argues that the Application has not met the conditions for grant of stay or variation of the stay orders granted by the Lower Court. In particular, the Respondent argues that the Appellant has failed to demonstrate that it would suffer substantial loss if the conditions for the grant of stay remain as earlier given by the Lower Court. The Respondent argue that the Appellant has not anywhere in the affidavit filed in support of its Application alleged or demonstrated that the Respondent is a man of straw who would be incapable of refunding half the decretal sum if the same is paid to him.

11. I begin by pointing out that the Appellant has a right to approach this Court for a stay of execution pending an appeal, even where the Lower Court has granted stay on conditions it deems inappropriate. The only requirement in such a case is for the Applicant to disclose to the High Court that there was a similar application in the Lower Court and disclose its outcome. The Applicant has done so here.

12. Both parties have correctly pointed out the requirements for the grant of an order for stay of execution by this Court. These are derived from the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsulated in that Rule in the following terms:

*6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under sub-rule (1) unless—*

*(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

13. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in **Rhoda Mukuma v John Abuoga**:

*It was laid down in M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979, (following Wilson v Church (No 2) (1879) 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.*

*Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.*

14. Hence, under our established jurisprudence, to be successful in an application for stay, an Applicant has to satisfy a four-part test. He must demonstrate that:

- a. The appeal it has filed is arguable;
- b. It is likely to suffer substantial loss unless the order is made. Differently put, it must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
- c. The application was made without unreasonable delay; and
- d. It has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on it.

15. Although the Respondent obliquely argues that the preferred appeal is non-meritorious, there is no disputing that the Memorandum of Appeal as filed raises arguable points of law or fact. I have perused the Memorandum of Appeal and I am unable to say that the grounds of appeal enumerated are in-arguable. In particular, the question of ownership of the motor vehicle that caused the accident is in contention. It is important to recall that to be eligible for a stay of execution, one is **not** required to persuade the Appellate court that the filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict. There is also no question that the Application was brought timeously; and that the Appellant has offered security for the due performance of the decree which may ultimately be binding on it.

16. This case turns on the question of substantial loss. In the Application as filed and in the Supporting Affidavit, the Appellant cite the likelihood that it would suffer substantial loss which may render the appeal nugatory but does not say exactly why that is so. There is no allegation either on the face of the Application or deponed in the affidavit that the Respondent is so impecunious that he would be unable to refund half of the decretal sum as ordered by the Lower Court. The first time we encounter any such allegation it is in the Written Submissions by the Appellant's Counsel. This is so even though the Respondent directly invited the allegation in his Replying Affidavit by deponing, in essence, that he is a man of means – a large scale farmer and a businessman dealing in commercial supply of cereals – but without offering much evidence of it.

17. Yet, our jurisprudence is that when it comes to money decrees in such situations, the first onus is on the judgment-debtor seeking a stay of execution to make a case for his apprehension that the judgment-creditor will be unable to refund any decretal sums disbursed to them. Only upon such claim being made by a judgment-debtor is the onus of the judgment-debtor to credibly demonstrate his means and capacity to refund the decretal sum is triggered. It then falls on the Court to ultimately determine if the judgment-debtor's apprehension is reasonable in the circumstances of the case.

18. In the present case, the Appellant did not trigger the Respondent's onus because it did not make any claim that the Respondent is sufficiently impecunious to provoke reasonable apprehension that he would be unable to reimburse any decretal sums paid to him by the Appellant.

19. In the circumstances, the Appellant did not satisfy a crucial condition for the independent grant of stay of execution by this Court: it did not demonstrate that the appeal will be rendered nugatory if stay on the terms it suggests is not granted. However, the Appellant had already succeeded in persuading the Lower Court to grant a conditional stay of execution. I do not have all the materials that were presented before the Court before it issued its considered ruling on the question. I have, therefore, not reviewed or sat on appeal against that decision. I have simply rejected an invitation by the Appellant to grant stay on the terms that it suggests. The upshot is that the conditional stay that was granted by the Lower Court will remain in effect.

20. The disposition, then, is the following:

**a. The Application dated 10/06/2020 is hereby dismissed with costs.**

**b. There shall be a stay of execution to the judgment and decree entered in *Nakuru CMCC No. 1566 of 2007* delivered on 02/07/2019 on the terms granted in a ruling by the Learned Hon. F. Munyi on 29/05/2020.**

21. Orders accordingly.

**Dated and delivered at Nakuru this 17<sup>th</sup> day of September, 2020.**

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**JOEL NGUGI**

**JUDGE**