



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL CASE NO. 11 OF 2020

FRANCIS MATHEI WAMBUA.....APPELLANT/APPLICANT

VERSUS

ALIPHONCE MUSAU NZIOKA.....1ST RESPONDENT

NDUNGE WAWERU.....2ND RESPONDENT

RULING

1. The application for determination is dated 06/03/2020. It was filed under certificate of urgency and is brought under Sections 1A and 1B of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. It seeks the following orders;

a) **THAT** there be a stay of execution of the decree in Tawa Civil Suit No. 54 of 2019; Aliphonce Musau Nzioka & Ndunge Waweru (Suing as the legal representatives of the estate of Urbanus Kioko Musau) –vs- Francis Mathei Wambua, pending the hearing and determination of the appeal herein.

b) **THAT** this Honorable court be pleased to grant any further and or other order which is just and fair in the circumstances hereof.

c) **THAT** costs be in the cause.

2. The application is supported by the grounds on its face and the affidavit of UAP Insurance Legal Officer, Joy Muthoka, sworn on the same day. She deposes that the Appellant has an arguable appeal on issues of quantum and liability and has exhibited the pleadings and submissions in the trial court as **JM-1**. She deposes that the 2nd Respondent's occupation or earnings are unknown and there is real apprehension of not recovering the decretal sum if the appeal is successful. It is also her deposition that the underwriter and Appellant are ready, able and willing to abide by any conditions that this Court may impose to secure the decree.

3. The application is opposed through the replying affidavit of the 1st Respondent sworn on 12/03/2020. He deposes that the Appellant has not demonstrated that the appeal has overwhelming chances of success and that he is likely to suffer substantial loss if stay is not granted. He deposes that he is an employee of the Teachers Service Commission hence capable of refunding the decretal sum if the appeal succeeds. A payslip copy is exhibited as **AMN-1**.

4. He deposes that the 2nd Respondent is also employed and has exhibited a letter from her employer as **AMN-2**. He deposes that the appeal is on quantum and he should be paid half of the decretal sum if the court is inclined to grant stay.

5. The application was canvassed through written submissions.

6. The Applicant through M/s C.W Githae submits that the appeal is arguable as it raises points of law and will therefore be rendered nugatory if stay is not granted. Mr. Ngechu relies on **Nairobi Civil Application No. 161 of 1988: Stanley Munga Githunguri –vs- Jimba Credit Corporation** where the Court of Appeal stated;

“The guiding principle which emerges and is discernible from case law on this subject are first, the appeal should not be frivolous or as is otherwise put, the Appellant must show that it has an arguable appeal and second, this Court should ensure that the appeal, if successful should not be nugatory.... as to whether the appeal, if successful will be rendered nugatory, that will undoubtedly be the consequence because once the money is paid over to the decree holder, it will be beyond the reach and control of the Applicant...we would like to point out that once these conditions are satisfied, this Court will normally grant an order for stay of the execution

without making any distinction between money and other decrees.”

7. The Applicant submits that if the decretal sum is paid to the dependants of the deceased’s estate, it will be out of reach and the appeal will be rendered nugatory if successful. The Applicant contends that the employment of the Respondents is not crucial in determining whether or not to issue stay of execution.
8. The Respondents through Mr. A.K Mutua submit that the Applicant has not satisfied the conditions necessary for grant of stay *to wit*, that the appeal has overwhelming chances of success and that it will be rendered nugatory if stay is not granted.
9. He submits that the Applicant did not swear an affidavit to indicate the kind of loss it will suffer. He contends that it is a principle of law to furnish the Court with material particulars of loss so that it can make an informed decision.
10. With regard to payment of half of the decretal amount, he submits that the court should balance between the Appellant’s right to appeal and their right to enjoy the fruits of their judgment. It is his submission that the principle of half payment is supported by the Court of Appeal in **Nairobi Misc. Civil Application No. 252 of 2000: Mohan Meakin Ltd –vs- Mutunga Kiundi**.
11. Having considered the application, the supporting affidavit, the replying affidavit and the rival submissions, the only issue for determination is whether the application is merited;

Analysis and determination

12. The conditions which should guide the court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.
13. Judgment in the case appealed from was delivered on 13/02/2020 and this application was filed on 09/03/2020 which is within the 30 days period provided for filing appeals from the subordinate court to the High court. Evidently there was no delay.
14. As for substantial loss, the Appellant is apprehensive that if the decretal amount is released to the beneficiaries, it might not recover the same if the appeal succeeds. Contrary to the Respondents’ submissions, the memorandum of appeal shows that the appeal is against both liability and quantum. I have also noted that the decretal award is in excess of Kshs.5 million hence substantial. Further, the 1st Respondent’s pay slip shows that her net monthly salary is Kshs.21,620/65. The 2nd Respondent’s gross salary is kshs 25,000/=. Cumulatively, their combined earnings are less than 50,000/= per month.
15. I have also noted that the 1st Respondent is 55 years old and in light of the Kenyan retirement age of 60 years, he has 5 years left. If we take a conservative figure of kshs 40,000/= as their combined earnings per month, the amount raised in five years will be kshs 2,400,000/=. In arriving at this figure, I have not considered the period it will take to determine the appeal hence the possibility that the recovery period may be shorter. I have also not considered that only a percentage of a person’s earnings can be attached and not the whole amount. Accordingly, the combined earnings may even be less. Looking at all these factors *vis-à-vis* the decretal award, I am convinced that substantial loss may occur.
16. As for security, I agree with the Respondents that the court should balance the two competing interests. The Appellant’s proposal before the trial court was as follows; liability-50:50, and a of quantum Kshs.1,002,890/=.
17. After weighing all the circumstances, I find that the Appellant/Applicant has satisfied the conditions for grant of stay of execution pending appeal. I grant the stay sought on the following conditions:

- i. Kshs.1,000,000/= to be released to the Respondents within 14 days of this ruling.
- ii. The balance to be deposited in an interest earning account opened in the joint names of the parties’ advocates, within 30 days.
- iii. Costs in cause.

Signed & dated this 30th day of October 2020, at Makeni High Court.

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H. I. Ong’udi

Judge

Same to be sent electronically to both counsel appearing for the parties on 2nd November 2020.