



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 32 OF 2020

ABDI HILOWLE.....1ST APPELLANT/APPLICANT

ABDI ALI GELE.....2ND APPELLANT/APPLICANT

-VERSUS-

JULIUS MAONGE MWANGI.....RESPONDENT

RULING

1. Before me for resolution is the Notice of Motion dated 16th June, 2020 brought by the 1st and 2nd appellants/applicants and supported by the grounds set out on its face and the facts stated in the affidavits of the 1st applicant and *Simon Kioko*. The applicants sought for the orders hereunder:

i. Spent.

ii. Spent.

iii. Spent.

iv. THAT this court be pleased to order a stay of execution of the judgment in Milimani CMCC NO. 6710 OF 2016 delivered on 18th December, 2019 pending the hearing and determination of the appellants' appeal against the same.

v. THAT such other additional, suitable and/or alternative orders be made as are just and expedient in all the circumstances of the case and the application considered.

vi. THAT the insurer of the appellants/applicants be allowed to deposit an insurance bond against the full judgment sum as security for the due performance of the judgment/decreed herein pending the hearing and determination of the appeal.

vii. THAT the costs of the application be in the cause.

2. In his affidavit, the 1st applicant asserted that in the judgment delivered on 18th December, 2019 the applicants herein were ordered to pay to the respondent a sum of Kshs. 1,800,000/ as general damages plus costs of the suit and interest thereon. That being dissatisfied with the aforementioned judgment, the applicants have filed the instant appeal against the same.

3. The 1st applicant asserted that unless an order for a stay of execution is granted at this stage, he is apprehensive that the respondent will execute the decree which will in turn render the appeal nugatory.

4. It was the averment of the 1st applicant that the applicants' insurer, Monarch Insurance Company Limited ("the insurer"), is ready and willing to deposit the entire decretal amount in a joint interest earning account within 90 days from the date of this court's ruling.

5. In the second affidavit, *Simon Kioko* who is the Deputy Manager-Legal Services of the insurer restated the averments made by the 1st applicant save to add that the insurer is willing to deposit security in the form of an insurance bond; and that it is likely that the respondent will not be able to refund the decretal amount upon payment of the same and success on the appeal, thereby causing substantial loss to the applicants.

6. The respondent swore a replying affidavit on 22nd July, 2020 to oppose the Motion and stated that the application is solely intended to hinder him from enjoying the fruits of his judgment and is therefore an abuse of the court process.

7. The respondent further stated that he suffered financial strain following the material accident and had to rely on well-wishers, and hence should this court be inclined to grant an order for a stay of execution, then the applicants should be ordered to pay half the decretal sum to him and to deposit the remaining half in a joint interest earning account.

8. The Motion was canvassed through the filing of written submissions. The applicants did not file any submissions and chose to rely on the contents of their Motion and supporting affidavits.

9. On his part, the respondent through his submissions dated 14th September, 2020 argued *inter alia* that the delay of over six (6) months between delivery of the impugned judgment and the bringing of the Motion has not been explained, and therefore constitutes inordinate delay. The respondent chose to rely on the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** where the court rendered that:

“For the success of an application for stay of execution pending appeal, the applicant must meet all the tenets – requirements of- Order 42 Rule 4 of the Civil Procedure Rules. Failure to satisfy any one of the tenets stipulated in that rule is fatal to the application. Accordingly, whereas the applicant/appellant might have an arguable appeal, and whereas the application was brought without undue delay, those are not all that the rule calls for.”

10.10. Under the principle on substantial loss, the respondent quoted the following reasoning by the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**:

“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...”

11. It was the submission of the respondent that the applicants have not placed before this court any evidentiary material to show the substantial loss they stand to suffer if an order for a stay of execution is denied. It was also the submission of the respondent that the applicants have equally not shown that they will suffer financially if they are ordered to pay the decretal sum.

12. The respondent further argued that whereas the applicants have indicated their willingness to furnish security for the due performance of the decree, he is also entitled to equal treatment under the law and hence the applicants do not require 90 days to comply with the conditions for depositing the security. Reference was made to the case of **Edward Kamau & another; v Hannah Mukui Gichuki & another [2015] eKLR** in which the court determined that:

“In the end, I employ a balancing act between two rights- that of appeal by the applicants and of enjoyment of a lawful judgment and not being discriminated for being of unknown financial means, for the Constitution commands that justice shall be done to all irrespective of status...”

13. I have considered the grounds as presented in the Motion, the facts deponed in the affidavits supporting and opposing the Motion, and the written submissions on record together with authorities cited.

14. In respect to the subject on whether the applicants have an arguable appeal, the legal position has been that this subject is not for consideration when determining applications for a stay of execution pending appeals to the High Court.

15. The applicable provision on the granting of an order for a stay of execution is **Order 42, Rule 6 (2)** of the **Civil Procedure Rules** which both parties have cited before me. The provision specifies the principles for consideration in such applications and which I shall address hereunder.

16. In respect to the first principle on whether the Motion has been brought without unreasonable delay, I observed from the record that the judgment to be appealed against was delivered on 18th December, 2019 whereas the instant Motion was filed over six (6) months later on 29th June, 2020. In my view, while it is true that the applicants have offered no explanation for the delay, I do not find the delay to be unreasonable.

17. The second principle concerns itself with whether the applicants have shown that they will suffer substantial loss. The courts have maintained that this condition which forms the cornerstone of an application of such nature, must be satisfied by the applying party. Such was the case in **Antoine Ndiaye v African Virtual University [2015] eKLR** cited by the respondent and where the court with reference to various other authorities, articulated that:

“So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed.”

18. The above was reaffirmed by the court in the known case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** similarly cited by the respondent, when it held thus:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

19. I have taken into account the sentiments offered by the applicants on this principle as well as the responses on the part of the respondent. In both the grounds to the Motion and the supporting affidavit of Simon Kioko, I note the averment that the respondent’s financial means are unknown and hence there arises the likelihood that upon payment of the decretal sum, he may not be in a position to refund the same should the appeal succeed. I also note that the respondent did not bring any evidence or material to show his financial capabilities.

20. I respectfully concur with the argument presented by the respondent that the legal burden does not shift to him to prove that he is in a position to refund the decretal sum. Various authorities have illustrated that the moment an apprehension is raised regarding a respondent’s ability to refund the decretal sum, the evidential burden shifts to the respondent to prove otherwise. For reference purposes, I will cite the following rendition by the Court of Appeal in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**:

“...Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

21. The above position was reaffirmed in the fairly recent case of **CFC Stanbic Bank Limited v John Kung’u Kiarie & Dyer & Another [2016] eKLR** where the Court of Appeal reasoned that though the respondent in that instance stated in his affidavit that he is a man of means with substantial assets to repay the decretal sum, he did not place any evidence before the court to show such abilities.

22. In the absence of any evidence to indicate the financial ability of the respondent and upon considering the colossal nature of the decretal amount, I am satisfied that the applicants have shown that they stand to suffer substantial loss if the order for stay of execution is declined.

23. On the third and final condition relating to the provision of security, I considered the applicants’ willingness to comply with the conditions to be set by this court.

24. In the end, the Motion is allowed in terms of prayer (iv) and an order for a stay of execution is hereby granted on the condition that the applicants do deposit the whole of the decretal sum in an interest earning account to be held in the joint names of the parties’ advocates/firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 29th day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

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

.....for the Respondent