



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CIVIL APPEAL NO. 88 OF 2019**

**JULIUS MUIA KISILU....APPELLANT/APPLICANT**

**-VERSUS-**

**JANET MBULA MUSYOKA .....1<sup>ST</sup> RESPONDENT**

**COSMAS MUKOSI KISILU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for determination is dated 27/11/2019. It was filed under Certificate of Urgency and is brought under Article 50 of the Constitution and Order 42 Rule 6 of the Civil Procedure Rules, 2010. It seeks the following orders among others:-

a. That pending the hearing and determination of the appeal, there be an order of stay of execution of the decree and or judgment dated 30/10/2019.

b. That costs of this application be provided for.

2. The application is supported by the grounds on its face and the Applicant's supporting affidavit sworn on the same day. The Applicant deposes that his very first application for adjournment was declined by the trial Court after which the Plaintiffs'/Respondents' witnesses testified hurriedly. His case was then marked as closed and he deposes that by so doing, the Trial Court denied him his constitutional right of a fair hearing.

3. The pleadings and submissions are exhibited as **JMK-1, 2 and 3** respectively. He deposes that the appeal is well grounded and is likely to be decided in his favour. The Memorandum of Appeal is exhibited as **JKM-4**. It is also his deposition that the Respondents are persons with no known income or assets and if the decretal sum is paid to them, it will be impossible to recover if the appeal is successful.

4. The application is opposed through a replying affidavit sworn by the 1<sup>st</sup> Respondent (Janet Mbula Musyoka) on 17/01/2019. She deposes that most of the grounds in support of the application should have been addressed in an appeal against the order that declined the adjournment. She adds that instead of filing the appeal, the Applicant proceeded to file submissions. She deposes that the application has no basis because the Applicant has not filed a memorandum of appeal.

5. It is also her deposition that there is no impending threat of execution hence the Applicant's apprehension is baseless. Further, she deposes that security is a necessity in proceedings of this nature and the Applicant has not made any proposal for the same.

6. The application was canvassed by way of written submissions.

7. The Applicant submits that although the amount of Kshs. 400,000/= may not appear substantial, the Respondents are not persons of means and it may be impossible to recover it if the appeal succeeds.

He relies on **VOI HCCA No. 20 of 2016: Mt. View Maternity and Nursing Home –Vs- Miriam Maalim Bishor & Anor (2018) eKLR** where the Court stated that;

“It was the considered view of this Court that substantial loss does not have to be a lot of money. It was sufficient if an Applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

8. The Applicant submits that there was no unreasonable delay as the application was filed in less than a month after delivery of judgment. Further, he submits that the memorandum of appeal was filed barely two weeks after the decision.

9. It is also his submission that he is ready and willing to provide security on such terms as the Court shall order.

10. The Respondents submit that the statement about unknown income or assets is not proof of substantial loss by the Applicant. They submit that the 2<sup>nd</sup> respondent is one of the directors of PENI INVESTMENT, a transport company that deals with matatus operating different routes within Makueni. Further, they submit that the 1<sup>st</sup> Respondent is a known business woman with various businesses in Machakos town and Nairobi.

11. Accordingly, they submit that they are in a position to pay back the decretal sum if the appeal succeeds. They rely on **Nairobi HCCA 372 of 2012: Joseph Gachie T/A Joska Metal Works –vs- Simon Ndeti Muema (2012) eKLR** where the Court stated that;

“It is not sufficient merely to state that the decretal amount is a lot of money and the Applicant would suffer if the money is paid. In an application of this nature, the Applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgment and that would be denying a successful litigant of the fruits of judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it exercise its discretion in granting the order of stay.”

They submit that although the application was filed without undue delay, that alone cannot warrant the stay order as all the three conditions must be met.

12. It is their further submission that the Applicant has not indicated whether he is willing to furnish any security and as such, he should not be granted stay of execution. They however add that if the Court is inclined to grant the stay order, it should direct that half of the decretal amount be paid to them and the balance be deposited in an interest earning account in the joint names of parties’ advocates.

### **Analysis and determination**

13. It is trite that 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.

14. The Respondents do not dispute that the application was filed without undue delay. Indeed, the impugned judgment was delivered on 30/10/2019 and the instant application was filed on 28/11/2019 which is within the period allowed for filing of appeals. A Memorandum of Appeal had been filed on 12<sup>th</sup> November 2019.

15. As for substantial loss, the Applicant is apprehensive that the Respondents will not be in a position to refund the Kshs. 400,000/= if the appeal succeeds. On the other hand, the Respondents have submitted that they are people of means hence capable of refunding the money. It is important for the Respondents to understand that submissions are not evidence hence the information about their means should have been in their replying affidavit.

16. In fact, their replying affidavit is totally quiet on their means and does not refute the Applicant’s clear deposition that they are persons with no known income or assets. I agree with the sentiments of Lady Justice Mutende in **Swapan Sadhan Bose –Vs- Ketan Surenda Samaia & Others (2006) eKLR** where she stated as follows;

“This Court has said before and would bear repeating that while the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by the respondent or the lack of them. 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.”

17. Accordingly, the Respondents have not demonstrated their financial capability and I am convinced that substantial loss will occur if the decretal sum is paid to them.

18. As for security, it is indeed true that the Court should balance the two competing interests i.e. that a successful litigant should enjoy the fruits of the judgment and at the same time allow an aggrieved party to exercise his right of appeal. However, this being a defamation case, the payment of the award will depend on whether or not the trial Court’s judgment is upheld by this Court. It could go either way.

19. That being the case, it is my considered view that it would not be prudent to order payment of half of the decretal award to the Respondents. It should be preserved.

Further and contrary to the Respondents’ submissions, the Applicant has expressed willingness to deposit the decretal award in an account held by the parties’ respective advocates.

20. In order to balance the interests of all parties, I am inclined to agree with the Applicant that the decretal sum should be deposited in an

interest earning account to be opened in the joint names of the parties' advocates.

21. The upshot is that the Applicant has satisfied the conditions for grant of stay pending appeal. I therefore grant stay of execution of the Judgment dated 30<sup>th</sup> October 2019, pending the hearing and determination of the appeal on the following conditions: -

- **The Appellant/Applicant to deposit the entire decretal sum in an interest earning account in the joint names of the parties' advocates.**
- **The said condition should be complied with within 45 days from today's date.**

**Delivered, Signed and dated this 16<sup>th</sup> day of December 2020 in open court at Makueni.**

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**HON. H. I. ONG'UDI**

**JUDGE**