



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 115 OF 2018

PATRICK MULEI KIETI.....APPELLANT

-VERSUS-

PETER WAMBUA MUTUA.....RESPONDENT

RULING

1. The Applicant seeks orders of stay of execution of Makueni SPMCC 170B/17 made on 17/08/2018 pending hearing and determination of the Appeal.
2. The same is based on Order 42 Rule 6, and Order 51 Rule 1, CPR Cap 21 on the grounds set out on the motion. The same is supported by affidavit of Caroline Kimeto sworn on 28/08/2018.
3. The same is premised on grounds that:-
 - i. **THAT** the intended appeal is arguable and has overwhelming chances of success.
 - ii. **THAT** the Applicant is the Defendant in the recently concluded matter before the Subordinate Court Makueni CMCC 170B of 2017 and judgment has been obtained against him for the payment of a sum of Kshs.1,832,047/= and further, costs of the suit.
 - iii. **THAT** the intended appeal shall be rendered nugatory should the Respondent execute the said decree and seek satisfaction of the Judgment.
 - iv. **THAT** the Applicant stands to suffer substantial loss in the event that the orders sought herein are not granted.
 - v. **THAT** further to the above a refund of the judgment sum or any part thereof is paid out to the respondent will be exceedingly difficult to obtain should the appeal be successful as the respondent testified to have no form of employment and his income if any would not be substantial enough to guarantee the availability of the sum of Kshs.1,832,047/= which is the decretal sum.
4. The same grounds are reiterated in Supporting Affidavit of Caroline Kimeto in which it is averred in summary that, *the damages awarded are inordinately high given the nature of the injuries sustained by the respondent.*
5. **Thus**, BRITAM General Insurance being the insurance company responsible for satisfaction of the said judgment are aggrieved by the ruling of Hon. Otieno delivered on 16th August, 2018 in Makueni CMCC 170B of 2017 and has already begun appeal proceedings in the High Court at Makueni.
6. The insurance is ready to deposit the full decretal sum in a joint interest earning account pending the hearing of the Appeal and so as to not prejudice the respondent.
7. The insurance company is apprehensive that should the intended appeal be found to be meritorious, and the judgment amount having been satisfied the respondent Mr. Peter Wambua Mutua will be unable to refund the full or indeed any portion of the sums already paid up for the reason that he was a baker and is now not in any formal employment and therefore would be unable to raise such sums as is the one in question without difficulty.
8. There is also Supplementary Affidavit sworn by same deponent on 30/11/2018 explaining delay in service of the application.
9. The same is opposed by way of Affidavit of Peter Wambua Mutua sworn on 16/10/2018 which is summary avers that, on the 29/08/2018 the Applicant's Advocates after receipt of the letter from respondent's advocates advising them of the particulars of the judgment filed a

memorandum of appeal but in bad faith did not bother to serve them for 2 months and only served them on the 05/10/2018.

10. The Applicant is not deserving of the orders sought as she is guilty of inordinate delay as this application has been brought two months after filing of the Memorandum of Appeal.

11. The Applicant is guilty of indolence and was woken up from her slumber after respondent's advocates demanded that the claim be settled via a letter dated 01/10/2018 two months after delivery of judgment.

12. The incompetent appeal filed is frivolous without any prima facie merits and has no chance of success its intention is only to waste judicial time and deny respondent fruits of his judgment as the court cannot interfere with the quantum awarded taking into consideration the seriousness of the injuries he sustained.

13. The medical evidence adduced in court by respondent doctor were not rebutted by applicant calling their doctor to adduce contrarily evidence or the concise evidence on liability that attached 70% negligence on the part of the plaintiff.

14. Without prejudice to the foregoing, respondent averred that if court grants a stay of execution, one of the conditions should be that half of the decretal amount Kshs.916,024/= be released to her as the Appeal filed cannot succeed and it would be only fair if she is partly compensated to take of herself and her family.

15. The applicant has not shown by way of proof her inability to repay the decretal sum if the appeal so succeeds, which she is advised by her advocates has no chances of success. However she avers that, she is a baker and also a farmer with cattle and other livestock that fetch a substantial financial security for her family and also live in her own home erected in an acre of land all which can be used as security.

DETERMINATION

16. Having set out the different perspectives of the parties in this case, I find the main issue that falls for determination is ;

- Whether the grounds for grant of stay of execution pending appeal have been met by the Applicant?

17. Stay of execution pending appeal is governed by **Order 42 Rule 6 of the Civil Procedure Rules**. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose.

18. To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent.

19. In this application the appellants contention is that, if the stay is not granted then the appellant will have to pay the decretal sum to the respondent as ordered in the judgment by the lower court. The respondent having not demonstrated that he is a man of means and capable of repaying the judgment sum should the appeal succeeds will result to the appellant suffering substantial loss.

20. The respondent on the other hand went on to contend that the appellant had not established that there would be any substantial loss on their end if the stay was not granted. The respondent depones that she is a farmer and a baker.

21. I will apply the said conditions of stay of execution in this case. On whether the appellant will suffer substantial loss, this is what substantial loss would entail, a question that was aptly discussed in the case of **SILVERSTEIN VS. CHESONI (2002)1 KLR 867** "**issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory**"

22. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **CANELAND LTD. & 2 OTHERS V. DELPHIS BANK LTD. Civil Application No. Nai. 344 of 1999**. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means.

23. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there.

24. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **KENYA POSTS & TELECOMMUNICATIONS CORPORATION VS. PAUL GACHANGA NDARUA CIVIL APPLICATION NO. NAI. 367 OF 2001; ABN AMRO BANK, N.K. VS. LE MONDE FOODS LIMITED CIVIL APPLICATION NO. 15 OF 2002.**

25. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case.

26. Other than averring that she is a farmer and a baker, the respondent has not shown how she would be able to raise the decretal amount in event same is paid and appeal succeeds.

27. However the respondent proposes to be paid half of the decretal amount pending hearing and determination of the appeal to be able to take care of herself and her family.

28. The court finds it fair for the respondent to be paid part of the decretal amount as a condition of stay and thus makes the following orders;

I. -The stay of execution pending appeal is granted on condition that, Ksh.500, 000/= is paid to the respondent within 30 days.

II. -In defaults execution to issue.

III. -Costs Ksh.10, 000/= is awarded to the respondent to be paid along with the amount above within 30 days.

DATED, DELIVERED, SIGNED THIS 30TH DAY OF JANUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE