



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCA NO. 159 OF 2018**

**FRANCIS KAKEU MUUNDA.....APPLICANT**

**-VERSUS-**

**JOSEPHINE MULINGE KILUU.....1<sup>ST</sup> RESPONDENT**

**BRIAN NYAMAI MUTUNGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. By way of a Notice of Motion dated 10/12/2018, the Applicant seeks the orders for Stay of Execution of Tawa SRMCC 1/2018 pending hearing of the instant appeal.
2. The same is anchored on the Provisions of 42 Rule 6 *inter alia* Civil Procedure Rule. It is based on the grounds on the face of the application.
3. The Application is supported by the Affidavit of Paul Rop Kibet sworn on 10/12/2018.
4. The Applicant case is that the Lower Court awarded Respondent Kshs.589,990/= in a running down claim in which the Applicant is in the process of recovery via execution process.
5. The Applicant was dissatisfied with aforesaid award and thus lodged an appeal against Trial Court's verdict and an application for stay of execution pending appeal as he is apprehensive that if same money is paid it may never be recovered thus he will suffer substantial loss.
6. Consequently, the appeal will be regarded nugatory.
7. The Application is opposed via an Affidavit of Josephine Mulinge Kilulu sworn on 18/01/2019. The Respondent's side deponed that the liability was apportioned at 60:40% in her favour and the appeal is only on the quantum.
8. Thus she seeks part payment of the decretal amount as she is suffering from injuries sustained in that accident and she requires money for her medication.
9. She avers that the Applicant has not demonstrated that he has met the conditions for grant of stay pending of appeal under provisions of Order 42 (6) (a) CPR.
10. She says the Decretal Amount is Kshs. 589,990/=

Costs Kshs. 133,880/=

**Total Kshs. 723,870/=**

11. She seeks the court to order she be paid Kshs.361,935/= and the balance Kshs.361,935/= to be deposited in Court.
12. The parties agreed to file submissions and they have done so and exchanged the same.

## APPELLANT'S/APPLICANT'S SUBMISSIONS

13. The Applicant submits that the key issue for determination by this Honourable court is whether the Appellant has satisfied the conditions for grant of the orders sought.
14. The Appellant argues that he has satisfied the conditions for grant of the orders sought in line with the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules.
15. The Applicant has filed the appeal herein against the Judgment in TAWA SRMCC No. 1 of 2018 in which an award of Kshs.589,990.00/= was made.
16. The complaint is that, same is inordinately high thus seeks stay of execution pending appeal.
17. The Applicant submits that he will suffer substantial loss if stay is not granted as the principal sum of Kshs.589,990.00/= is substantial and will cause difficulties in his life.
18. Further, the Applicant submits that the 1<sup>st</sup> Respondent will not be able to pay back the principal sum if the same is paid and the appeal herein succeeds.
19. The reason given for this position is that the 1<sup>st</sup> Respondent's testimony in the Trial Court was that she is an elderly lady aged sixty eight (68) years old without a reliable source of income hence if execution is allowed and the judgment sum paid, the Appellant/Applicant will not be able to refund the decretal amount if the appeal eventually succeeds.
20. In **Masisi Mwita -Vs- Damaris Wanjiku Njeri (2016) eKLR**, it was held that to show that the Appellant stands to suffer substantial loss, it must be demonstrated that the Respondent will not pay the money back if the Appellant succeeds in his appeal. He relies on the case of **Stanley Karanja Wainaina & Anor -Vs- Ridon Anyangu Mutubwa (2016) eKLR**.
21. In the case of **National Civil Appl. No. 238 of 2005, National Industrial Credit Bank Limited -Vs- Acquinas Francis Wasike & Anor (UR)** the court stated: -

*“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove 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 a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to matter which is peculiarly, within his knowledge.”*

22. On whether the Application was filed without undue delay, the impugned judgment was delivered on 11<sup>th</sup> November, 2018 while the application herein was lodged on 10<sup>th</sup> December, 2018.
23. They submit that the application was filed timeously in that the time taken to file the same was reasonable time for the Applicant to give instructions to file the appeal herein and sign the Supporting Affidavit for the application herein.
24. The Applicant argue that he has made a reasonable offer of security for the stay pending appeal in the form of depositing in court or a joint interest earning account in the names of the parties advocates on record part of the decretal amount being Kshs.250,000.00/= secure the balance by way of a bank guarantee or insurance bond.

## RESPONDENT'S SUBMISSIONS

25. It is submitted that, in an application for stay of execution, the Appellant must surmount the first hurdle of demonstrating that he will suffer substantial loss if stay is not granted before the court can consider the other conditions.
26. The Appellant herein in the Supporting Affidavit sworn by Paul Rop Bett a legal manager at **Kenya Orient Insurance Limited** has stated in paragraph 13 that he is apprehensive that if the decretal sum is paid to the Respondent, he would not refund the same.
27. The affidavit in support of the application is defective as it is sworn by a person who is not a party to this suit. Though the said Legal Officer alleges he has been authorized by the Appellant to swear the affidavit **no such authority has been attached to the supporting affidavit to prove such assertion.**
28. Further sufferance of substantial loss is a matter of fact and the person who can suffer the loss is the Appellant and not the legal officer of **Kenya Orient Insurance Limited.**
29. The Appellant ought to have sworn the supporting affidavit himself and demonstrate what loss he will suffer if stay is not granted and execution proceeds.
30. The deponent of the supporting affidavit who is the legal manager of **Kenya Orient Insurance Limited** has also not disclosed the source of her information to buttress his assertion that the Respondent is not a woman of means and is unable to refund the decretal sum. He has not stated in his affidavit that he has personal knowledge of the Respondent.

31. The Respondents urges this court to find that the Applicant has not satisfied the conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules and dismiss the Application.

32. The Respondents rely on the following authorities:-

1) **Mutua Kilonzo –Vs- Kioko David Machakos HCC No. 62 Of 2008**, where the court dismissed an application for stay pending appeal for a monetary decree as the Appellant failed to prove how he will suffer substantial loss.

2) **Equatorial Commercial Bank Ltd & Others -Vs- Retreat Villas Limited (2006) eKLR**, where the court dismissed an application for stay for a sum of Kenya shillings 135 Million as the Applicant failed to show the damages it would suffer if the order for stay is not granted. The circumstance obtaining in this case is similar.

33. However, would the court in exercise of its discretion be incline to allow the application, the Respondents urge the court to order that a sum of Kenya Shillings 361,935/= be paid to the Plaintiff/Respondent through his advocate and the balance be deposited in court within a reasonable time pending the hearing and determination of the appeal.

#### **ISSUES, ANALYSIS AND DETERMINATION**

34. After going through Application, Affidavits and Submissions on record, I find the issues are;

- ***Whether the application has merit and what is the order as to costs?***

35. Order 42, Rule 6. (2) States;

***“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;***

***(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.”***

36. It is thus incumbent upon the Applicant to demonstrate meeting the threshold of the above three conditions. On expeditious lodging the application for stay, the court notes that there was no delay and in any event the Respondent does not contest the same element.

37. On likelihood of Applicant being inflicted a substantial loss in event the appeal succeeds after payment of the decretal amount, the Applicant has demonstrated that the 1st Respondent’s testimony in the Trial Court was that she is an elderly lady aged sixty eight (68) years old without a reliable source of income hence if execution is allowed and the judgment sum paid, the Appellant/Applicant will not be able to refund the decretal amount if the appeal eventually succeeds.

38. In **Masisi Mwita -Vs- Damaris Wanjiku Njeri (2016) eKLR**, it was held that to show that the Appellant stands to suffer substantial loss, it must be demonstrated that the Respondent will not pay the money back if the Appellant succeeds in his appeal.

39. The Respondent has not demonstrated that she would be able to refund the decretal amount in event appeal succeeds after she is paid. However the court notes that the liability apportioned by the trial court is not challenged in appeal thus implying that even if the appeal succeeds, the Respondent will still get 60% of the amount arrived at by this court.

40. The Applicant proposes that, Kshs.250,000.00/= be deposited in court or in a joint interest account of parties advocates and then secure the balance by way of a bank guarantee or insurance bond.

41. However the Respondents proposes that Kshs. 361,935/= be paid to the Respondent through his advocate and the balance be deposited in court within a reasonable time pending the hearing and determination of the appeal.

42. Doing the best I can, I make the following orders;

1) ***Stay of execution of the lower court decree is allowed on condition that Kshs. 361,935/= is paid to the Respondent within 30 days from dates herein.***

2) ***Costs in the main appeal.***

**SIGNED, DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2019 IN OPEN COURT.**

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**HON. C. KARIUKI**

**JUDGE**