



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 421 OF 2003

ROSEMARY KIMINGI.....PLAINTIFF/RESPONDENT

-VERSUS-

WACHIRA WARURU.....1ST DEFENDANT/APPLICANT

THE STANDARD GROUP LTD.....2ND DEFENDANT/APPLICANT

RULING

1. The defendants/applicants herein have brought a Notice of Motion dated 13th November, 2018 and the same stands supported by the grounds set out on the body thereof and the facts deponed to in the sworn affidavit of *Millicent Ng'etich*.
2. The applicants are seeking for an order for stay of execution of the judgment delivered by this court on 19th October, 2018 pending the hearing and determination of their intended appeal.
3. The abovementioned deponent stated that on the said 19th October, 2018, this court entered judgment in favour of the respondent as follows:
 - a. General damages in the sum of Kshs.10,000,000/=.
 - b. Aggravated and exemplary damages in the sum of Kshs.1,500,000/=.
 - c. Costs and interest thereon from the date of judgment until payment in full.
 - d. A published apology from the applicants within 30 days from the date of judgment.
4. It is also the deponent's assertion that the applicants are aggrieved by the entire judgment and are desirous of appealing against the same, adding that a notice of appeal has been filed and served upon the respondent, and a draft memorandum of appeal annexed to the Motion.
5. The deponent further stated that the applicants stand to suffer prejudice and substantial loss if execution proceeds since the decretal sum is colossal and the respondent's means and assets are undisclosed, which goes to show that the respondent is unlikely to repay the decretal amount should the appeal succeed.
6. The respondent filed Grounds of Opposition arguing that there has been inordinate delay in filing the application and that since the respondent is a senior judicial officer, there is nothing to show that she will not be in a position to refund the decretal sum as claimed by the applicants.
7. The respondent also generally argued that the applicants have not shown sufficient cause to deserve a stay of execution and that it would be unfair to further deny her the fruits of her judgment.
8. The Motion was disposed of by way of oral arguments, which I have taken into consideration together with the grounds set out on the face of the Motion and the facts deponed in the affidavit in support plus the Grounds of Opposition and authorities cited by the parties.
9. The brief background of this matter the respondent filed a suit against the applicants, seeking for *interalia* damages for defamatory publications made against her.
10. This court heard the suit and awarded the respondent a sum of kshs.11,500,000/= for general and exemplary damages. The defendants

are now seeking to impugn the aforesaid decision before the Court of Appeal.

11. In the principles to be considered in application for stay of execution are set out under *Order 42, Rule 6 (2)* of the *Civil Procedure Rules* as follows:

- a) *The application must be brought without unreasonable delay;*
- b) *The applicant must demonstrate that substantial loss may result if the order for stay is denied*
- c) *Provision should be made for security.*

12. As concerns the first principle, it is the applicants’ argument that the Motion has been timeously filed while the respondent has taken the view that there has been inordinate delay in bringing the same. This court delivered its judgment on 19th October, 2018 as earlier indicated. The Motion was filed on 15th November, 2018, barely one (1) month later. In the premises, I am convinced that the application was filed without unreasonable delay.

13. The second principal relates to substantial loss. The applicants contended that once paid, the respondent may not refund the decretal amount to the applicants if the appeal succeeds and no affidavit of means has been filed to show the respondent’s liquidity. It is also argued that the amount in question is colossal hence it would be proper for a stay to be granted.

14. The respondent stated that the appellants’ arguments being speculative and argued that being a judicial officer, the respondent has reasonable means of income; adding that in any event, the argument that the amount involved is colossal cannot hold water.

15. I have considered at the authorities cited by the respective parties herein. The Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR* stated inter alia that:

“Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

16. It therefore follows that substantial loss forms the crux of an application for stay of execution.

17. In addressing the applicants’ apprehension that the respondent has given no indication of her ability to refund the decretal sum once the same is paid and the appeal succeeds, the court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR* stated that the burden rests upon the applicant to first show that the respondent has no means of refunding the decretal sum and only then does the burden shift to the respondent.

18. In the present instance, it is not disputed that the plaintiff/ respondent is a senior judicial officer. It is also not in dispute that she has not provided an affidavit of means to show that if the judgment sum is paid to her she will be in a position to make a refund. The defendants/applicants had specifically alleged that she is incapable of repaying the decretal sum in case the appeal succeeds. Having failed to provide an affidavit of means, I find that the defendants/applicants’ assertion that the plaintiff/respondent lacks the capacity to make a refund plausible. I am therefore convinced that the defendants have shown that they would suffer substantial loss if they are denied the order for stay of execution.

19. The final principle to be considered is the provision of security which the applicants have not opposed the applicants have stated that they are willing to deposit the decretal sum. The plaintiff/respondent on the other hand has beseeched this court to make an order directing the defendants to pay her half.

20. The purpose of providing security for the due performance of the decree is to ensure that the subject matter of the appeal is secure pending appeal to enable the parties easily access it upon the appeal being determined. This court has been asked by the plaintiff to issue an order to have her paid half the decretal sum plus interest and for the remaining balance to be deposited either in court or in an interest earning account in the joint names of advocates. The order seeking for payment of half the decretal sum is an emerging practice which is not grounded by law but courts have in recent past exercised their inherent discretionary power to make the order in some unique circumstances where the parties have given compelling reasons. In some instances parties have been able to show that arising out of necessity, the respondent requires urgent medical attention which can only be financed by part of the decretal sum. In the current motion, the plaintiff/respondent has failed to show that she falls within the category of such parties. Consequently, I decline to grant the prayer for payment of half of the decretal sum.

21. In the end, the motion dated 13.11.2018 is allowed. Therefore an order for stay of execution is given pending appeal on condition that the decretal sum of kshs.11,500,000/= is deposited in an interest earning account in the joint names of the advocates and or firms of advocates within 30 days from the date hereof. In default the motion will be treated as having been dismissed.

Costs of the motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 27th day of March, 2019.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

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