



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 558 OF 2018

BERNARD KIRUI KIPTOO1ST APPELLANT

ATHIANY HOLDINGS LIMITED2ND APPELLANT

VERSUS

ESTHER NYAMBURA MWANGI.....1ST RESPONDENT

TAZAMA MOTORS LIMITED.....2ND RESPONDENT

RULING

1. The two appellants in this appeal namely, *Bernard Kirui Kiptoo* and *Anthiany Holdings Limited* (the 1st and 2nd applicants respectively) moved the court through a Notice of Motion dated 26th November 2018 seeking orders of stay of execution of the judgment delivered by the lower court on 1st November 2018 in CMCC No. 3584 of 2014 and any consequential decree pending the hearing and determination of the appeal.
2. The application is premised on grounds stated on its face which are replicated in the depositions made in the supporting affidavit sworn on 26th November 2018 by *Mr. Thomas Kilonzo*, the 2nd applicant's Chief Operations Manager. The deponent avers that he had sworn the affidavit on behalf of both applicants since the 1st applicant is the 2nd applicant's driver.
3. In the main, the application is anchored on grounds that the applicants were aggrieved by the decision made by the trial court (*Hon. PN Gesora CM*) on both liability and quantum hence this appeal. They aver that if stay is not granted, the respondents will execute for the decretal amount and this will expose them to substantial loss since the respondent's financial means are unknown and they may not be able to recover the decretal amount in the event that their appeal is successful; that therefore, their appeal will be rendered nugatory. The applicants in addition expressed their willingness to deposit the entire decretal amount in an interest earning account in the names of both advocates on record as security for the due performance of the decree. They also invited the court to note that the application was filed timeously.
4. The application is opposed. The 1st respondent *Esther Nyambura Mwangi* swore a replying affidavit on 19th December 2018. She opposed the motion contending that it was an afterthought aimed at keeping her away from the fruits of her validly obtained judgment. In her view, the application lacked merit and ought to be dismissed with costs.
5. On the date the application was scheduled for hearing which date was fixed by consent of the parties, only the applicants' counsel attended the court. The respondents and their counsel chose not to attend the court. In her brief oral submissions, *Mrs. Ngala*, the applicants' learned counsel reiterated the grounds supporting the motion and added that the applicant was willing to deposit KShs.800,000 as security in an interest earning account held jointly by the advocates on record pending determination of the appeal.
6. Having considered the application, the affidavits on record and the oral submissions made by *Mrs. Ngala*, I find that the only issue that arises for my determination is whether the applicants have met the threshold for grant of stay of execution pending disposal of their appeal.
7. The parameters for grant of orders of stay pending appeal are set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules* (the *Rules*) which provides as follows:

“(2) No order for stay of execution shall be made under subrule (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; and

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.”

8. The decision regarding whether or not to grant stay pending appeal is discretionary but needless to state, the court’s discretion must be exercised judiciously in accordance with the law. It should not be exercised capriciously or arbitrarily.
9. An applicant will be deserving of orders of stay of execution pending appeal if he demonstrates that sufficient cause exists to warrant the exercise of the court’s discretion in his favour. Sufficient cause is established if the conditions specified in *Order 42 Rule 6 (2)* of the *Rules* as reproduced above are met.
10. Starting with the condition requiring that the application ought to be filed timeously, the court record shows that the judgment challenged on appeal was delivered on 1st November 2018. The application was filed on 26th November 2018 less than a month later. There is therefore no doubt that the application was filed without unreasonable delay.
11. On substantial loss, the applicants have contended that the respondents are persons of unknown means and if the decretal amount is paid to them by way of execution, they are unlikely to recover the same if their appeal is successful.
12. The law is that once an applicant expresses apprehension that the respondent may not be possessed of means to refund the decretal amount when called upon to do so, the burden of proof shifts to the respondent to demonstrate that he has ability to refund the money if need be. See: ***National Industrial Credit Bank Limited V Aquinas Jarius Wasike & Another, Nrb Civil Appln No. 283 of 2005 [2006] eKLR.***
13. The 1st respondent in her replying affidavit did not make any reference to her financial standing. The 2nd respondent did not also avail any evidence regarding her financial capability since she did not oppose the motion as she did not file any response to the same. It is thus my finding that the respondents did not discharge their burden of demonstrating that they have the financial capacity to refund the decretal sums if the applicants are successful in their appeal. In the circumstances, I am persuaded to find that the applicants have proved that they are likely to suffer substantial loss if stay is not granted as prayed.
14. I have considered the 1st respondent’s assertion that if the application is allowed, she will suffer prejudice as her right to enjoy the fruits of her judgment will be delayed. That may well be so but justice is a two way street. In as much as the respondent is entitled to immediate enjoyment of the fruits of her judgment, the appellants who are dissatisfied with the trial court’s judgment have a right to challenge it on appeal and to have that right safeguarded so that their appeal is not rendered nugatory. In determining applications of this nature, the court is called upon to undertake a delicate balance between the competing interests of the parties and arrive at a decision that is fair and just to each one of them.
15. Having weighted the interests of the parties in this appeal, I find merit in the instant application and it is hereby allowed on condition that the applicants will deposit the entire decretal amount exclusive of costs in an interest earning account held jointly by counsel on record for the parties within the next 45 days failing which the stay orders will automatically lapse.
16. Costs of the application will abide outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 29th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mrs. Ngala for the appellants

Ms Adani holding brief for Ms Masika for the respondents

Mr. Salach: Court Assistant