



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 32 OF 2018

LAWRENCE MUSYOKA NDAMBUKI.....1ST APPELLANT

DORRIS MUTHEU KISILU.....2ND APPELLANT

-VERSUS-

DANIEL KATO NDAMBUKI.....RESPONDENT

RULING

1. By Notice of Motion dated 24/05/2018, the Applicant seeks the following orders:-

- a. **THAT** there be a stay of execution of the judgment and/or decree in Makueni PMCC No. 43 of 2017 herein, and of any other consequential orders arising there from pending further orders of this Honourable Court and pending the hearing and determination of this application.
- b. **THAT** there be a stay of execution of the judgement and/or decree in Makueni PMCC No. 43 of 2017 and any consequential orders arising there from pending the hearing and determination of the Appeal filed herein.
- c. **THAT** the costs of this application be in the cause.

2. The same is based in the following grounds:-

- i. **THAT** the Appellants/Applicants being dissatisfied with the Lower Court's judgment delivered on 17th April, 2018 have already appealed against the said judgment and have filed a Memorandum of Appeal before the High Court.
- ii. **THAT** the Respondent is likely to move through his auctioneers to proclaim the Appellants/Applicants property since there is no stay of execution.
- iii. **THAT** if this application is not allowed, the Appellants/Applicants stand to suffer irreparable loss and grave prejudice while no prejudice or such loss stands to be suffered by the Respondent if the same is allowed.
- iv. **THAT** the Appellants/Applicants are willing to abide by any terms as to security as shall be ordered by this Honourable Court and by the outcome of the Appeal.
- v. **THAT** the Appellants/Applicants have a merited Appeal with a high probability of success.

3. The Application is supported by Affidavit of Jamuel Mwakandana Kiwinga sworn on 24/05/2018 which reiterates the grounds of the appeal.

4. I did not see a Replying Affidavit or grounds of opposition from the Respondent side.

5. However the parties agreed to canvass the application via submissions which they filed and exchanged.

6. APPLICANT'S SUBMISSIONS

7. It is submitted that under Order 42 Rule 6 of the Civil Procedure Rules, 2010 this Honourable Court has the discretion to consider and grant an application for stay of execution pending hearing and determination of an appeal.

8. It is urged that the Applicants have satisfied all the conditions that must be met in order to be granted the stay orders sought herein as follows;

a. An arguable appeal with high chances of success.

9. The Applicant filed the Appeal herein and in particular, the Memorandum of Appeal setting out the grounds upon which the appeal is based on. These grounds have expressly shown that the Applicants appeal is based on facts that are true and high chance of success is therefore imminent on matters of both law and fact.

10. The applicant has in its Memorandum of Appeal demonstrated that it has an arguable appeal. In the case of **David omwenga –Vs- John Teleyo, Kisii HCCC No. 149 of 2010 eKLR**, the court while quoting the authority of **Butt –Vs- Rent Restriction Tribunal (1982) KLR Z**, stated that;

i. “If there is no overwhelming hinderance, a stay ought to be granted so that an appeal is not rendered nugatory should the appeal succeed.”

11. It is therefore in the interest of justice that this application be granted to allow the applicant pursue the appeal and ensure that the appeal herein is not rendered nugatory.

12. The court of appeal has time and again held that an arguable appeal is not one that will necessarily succeed but one which raises triable issues. The appeal only ought to raise a legitimate point or points deserving judicial determination.

a. Applicant shall suffer irreparable loss if the stay order is not granted.

13. In a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back.

14. The decretal amount is substantial and the Respondent has no known source of income. Further, the Respondent has not demonstrated that he would be able to refund the said amount in the event the Applicants appeal is allowed. There is no sworn affidavit of means that has been served upon and or on record.

15. The law as it is requires that where there is an allegation that the Respondent is not possessed of means, the burden of proof shifts to the Respondent to demonstrate, by way of affidavit of means evidence that they are possessed of such sufficient means that should the decretal sum be paid to them and the appeal is successful they shall be in a position to reimburse/refund the decretal sum.

16. The decretal award of this honourable court is Kshs. 1,991,512 in being costs, special and general damages which if paid out to a person who is not in any gainful employment as is the case herein, the Respondent will not be in a position to reimburse the same should the appeal succeed.

17. The Applicants are therefore fearful that if the application is not allowed, they will suffer substantial loss considering the colossal amount that was awarded by the trial court.

18. On the other hand, in the event that the filed appeal is not successful, then the Applicants’ insurer will be in a position to pay the decretal sum.

19. The Applicants will therefore suffer substantial and irreparable loss if the orders sought herein are not granted as they appealed against the excessive judgment of the learned trial Magistrate.

20. The court of appeal while dealing with a similar situation in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Ltd –Vs- Aquinas Francis Wasike & Anor (UR)** as was stated in the case of **Stanley Karanja Wainaina & Anor –Vs- Ridon Anyangu Mutubwa [2016] eKLR** held the following:-

i. “This court has said before and it would bear repeating that while the legal duty is on an 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 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 the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the respondent was unable to discharge his burden.”

21. The applicants rely on the case of Johnson **Mwiruti Mburu –Vs- Samuel Macharia Ngure [2004] eKLR** whereby Justice J.G. Nyamu in allowing an application for stay of execution pending appeal stated;

i. “I have considered the case of Kenya Shell –Vs- Kabiru & Anor [1986] KLR 410 – see holdings 2 to 4 for the principles to consider and the unreported case of Cotecna Inspection SA –Vs- Hems Group Trading Co. Ltd CA 303/2000 unreported where the Court of Appeal in an application involving a money decree had to consider the possible inability of the respondent company failing to refund the moneys. The court went on to grant a stay although a substantial money decree was the subject matter. In the circumstances of this case I find that substantial loss could result to the applicant in view of the possible inability of the respondent to pay.”

b. Compliance with orders or conditions for granting stay.

22. The Civil Procedure Rules at Order 42 Rule 6(2)(b) provides for one of the conditions for granting stay pending the determination of an appeal as the issuance of orders as to security directed at the person making an application for stay.

23. The Applicant has already indicated that they are ready and willing to deposit security and/or comply with such terms as to security as may be ordered by this Honourable Court. The Applicant are also willing to deposit the judgment award or such sum as directed by this honourable court in a joint interest earning account in the names of both advocates representing both parties as averred in paragraph 10 of the Supporting Affidavit.

a. There was no undue delay in lodging the appeal.

24. The Applicant moved with speed to pursue the appeal herein which goes to show that they are keen on prosecuting the same. The judgment was delivered on 17th April, 2018 and the Memorandum of Appeal filed on 23rd April, 2018. There was therefore no undue delay on the part of the Applicants.

25. In addition, the Application herein was similarly filed without unreasonable delay. The Applicant has therefore acted within reasonable time as required.

26. In sum it is submitted that the application herein is meritorious and the Applicants have duly and satisfactorily complied with all the necessary conditions that must be met before the orders are granted.

27. RESPONDENT SUBMISSIONS

a. Law Applicable

28. The Respondent cites provisions of **Order 42 Rule 6 of Civil Procedure Rules** and relies on the case of **Housing Finance Company of Kenya –Vs- Sharok Kher Mohamed Ali Hirji & Anor [2015] eKLR** while quoting **Carter & Sons Ltd –Vs- Deposit Protection Fund Board & Two Others – Civil Appeal No. 291 of 1997**, at page 4 as follows:-

“.....the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay.....the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

29. The Respondent submits that it is incumbent upon one who seeks a stay of execution pending appeal to demonstrate that they will suffer substantial loss if their application for stay is not allowed.

30. Further it is the Respondent’s submission that, the only way of showing or establishing loss is by showing that if the decretal sum is paid to the Respondent, the Respondent would not be able to pay and/or refund the sum.

31. The respondent invite the court to consider the fact that the Applicants have not demonstrated that the Respondent is a man of straw and neither have they demonstrated what loss they would suffer if the application was denied.

32. The Applicant must demonstrate they would suffer if the application was denied. It is thus submitted that if it has not been shown that the Respondent is a man of straw and that he may not repay the said sum in the event the appeal succeeds.

33. The court is invited court to consider the well established principle to the effect that, the fact that the process of execution has been put in motion or is likely to be put in motion does not amount to substantial loss, that even when execution has been launched and completed, even where property has been attached and sold, it does not amount to substantial loss.

34. Substantial loss would be shown if the Appellant successfully demonstrated that the Respondent would not be able to refund the decretal sum in the event an appeal succeeds. It is hereby submit ted that is not the case in the present matter.

35. It is argued that the Appellants have not offered to give security in the matter, and that they only said they are willing and ready to comply with any order to security as may be ordered by court.

36. It is submitted that it is trite law that the offer for security must come from the applicant as a price for stay and we proceed to submit that there is no offer for security that has been made by the Appellant. They have not on their own written to give security.

37. Respondent notes that the judgment in this matter was delivered on 17th April 2018 and the appeal herein promptly filed. However, the present application was not filed until 31st May 2018. In fact, court had to wake them from their sleep by fixing the present appeal for mention.

38. It is contended that the Respondent is entitled to the fruits of justice and every delay this matter delays the Respondent’s right to enjoy the fruits of his judgment, that if however, the court is of a different opinion it is urged that, court should order half of the decretal sum be released to the Respondent and the balance be held in an interest earning account with a reputable bank.

39. The parties herein recorded a consent on liability at the ratio of 85:15 in favour of the Respondent (Plaintiff) against the Appellant (Defendant). The issue that was left to court to determine was on quantum, as it can be seen from the parties submissions attached to the Respondents Submissions, both parties were in agreement that the Respondent suffered subdural hematoma fracture of the olecranon process and soft tissue injuries.

40. The only issue parties did not agree on is in respect to future medical expenses and if the Respondent was likely to suffer a neurological deficit.

41. The court is invited to consider the fact that the Appellant had submitted that the amount of **Kshs. 300,000/=** would suffice as adequate remedy. The court is invited to consider the cases quoted by the Appellant and to note neither of them guided court on damages payable for the head injury, specifically on the injury of the subdural hematoma.

42. To the contrary the Respondent quoted the cases one in which the Plaintiff suffered a subdural hematoma and was awarded Kshs. 600,000/= and another in which the Respondent suffered head injury leading to post traumatic epilepsy. As per one of the doctors the Respondent was expected to have suffered (traumatic epilepsy) in which the Respondent was awarded Kshs. 1,200,000/=.

43. Moreover, it is noted in the case the Respondent quoted there was none in which a party suffered a fracture of the olecranon process with deformity which injury the Respondent suffered in addition to the head injury suffered by the Respondent in this matter.

44. It is noted the Respondent in this matter suffered very serious injuries and that the honourable court did not error in awarding general damages of Kshs. 1,500,000/=, future medical expenses of Kshs. 600,000/= and special damages of Kshs. 950/= together with interest.

45. In sum the respondent submit that the whole amount be released to the Respondent. In the alternative it is prayed that half of the decretal sum herein an amount totaling to Kshs. 995,756.25/= be released to the Respondent and that the balance be held by the advocates for parties herein in an interest earning account with a reputable bank.

46. ISSUES, ANALYSIS AND DETERMINATION

On issue, the court finds the issues are; whether application has merit? and what is the order as to costs?

47. **Order 42 Rule 6 of Civil Procedure Rules** provides that:-

1) No appeal or second appeal shall operate as to stay of execution or proceedings under a decree or order appealed from except in as far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2) 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; 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.

48. On the first limb, the Applicant has to demonstrate that he shall suffer irreparable loss if the stay order is not granted. In a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back.

49. The decretal amount is substantial and the Respondent has no known source of income. Further, the Respondent has not demonstrated that he would be able to refund the said amount in the event the Applicants appeal is allowed. There is no sworn affidavit of means that has been served upon and or on record.

50. The law as it is requires that where there is an allegation that the Respondent is not possessed of means, the burden of proof shifts to the Respondent to demonstrate, by way of affidavit of means evidence that they are possessed of such sufficient means that should the decretal sum be paid to them and the appeal is successful they shall be in a position to reimburse/refund the decretal sum.

51. The decretal award of the court was Kshs. 1,991,512 being costs, special and general damages which if paid out to a person who is not in any gainful employment as is the case herein, the Respondent will not be in a position to reimburse the same should the appeal succeed. Thus the threshold of the first limb is met.

52. On the second limb, the Applicants has already indicated that they are ready and willing to deposit security and/or comply with such terms as to security as may be ordered by this Honourable Court. The Applicant are also willing to deposit the judgment award or such sum as directed by this court in a joint interest earning account in the names of both advocates representing both parties as averred in paragraph 10 of the Supporting Affidavit.

53. However the court is mindful of the Respondent interest in terms of the respondent submission of payment of part of the decretal amount as a security.

54. Thus court makes the following orders;

- i. -Stay is granted on condition that ksh 600,000 is paid to the respondent within 30 days from dates herein.**
- ii. -In default execution to issue for entire amount.**
- iii. -Costs in the main appeal**

SIGNED, DELIVERED THIS 31ST DAY MAY, OF 2019, IN OPEN COURT.

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C. KARIUKI

JUDGE