



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 40 OF 2017

JECINTA RUGURU.....APPELLANT/APPLICANT

VERSUS

BEATRICE MUTHONI MUTHEKE (Suing as the Legal

Representative & Administrator of the Estate of the Late

ISAAC MUTHIKE NYAGA).....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on the application dated 14/08/2017 seeking for orders for stay of execution pending the hearing and determination of the appeal.
2. The background facts are that the respondent filed suit against the applicant and two others for general and special damages following a fatal road accident and was awarded cumulative damages of Kshs. 1,895,050/= for pain and suffering, loss of expectation of life, loss of dependency and special damages in the judgment delivered on the 18th July 2017.
3. The application was disposed of by way of written submissions.

B. Applicant's Submission

4. The applicant submits that the status quo has to be maintained so that the appeal is not rendered nugatory as the filing of the appeal is evidence that they would suffer substantial loss if stay is not granted. She relies on the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** where it was held that substantial loss is what has to be prevented by preserving the status quo as such loss would render the appeal nugatory.
5. She further submitted that the respondent was a man of straw and if the decretal sum was released to her she would use it and be unable to refund in the event that the appeal is successful.
6. The applicant further submitted that she moved to court promptly and without any delay as the application for stay was filed on the 14th August 2017, 30 days after judgement was delivered and further that she has demonstrated the willingness to deposit the decretal sum in an interesting earning account as security.

C. Respondent's Submissions

7. The respondent has submitted that the applicant has failed to prove what loss she will incur if stay of execution pending appeal is declined. She relies on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** where it was held that the applicant should place before court material to prove that they would suffer substantial loss.
8. On security, she submits that the estate of the deceased continues to suffer pain and loss and thus it is only fair that the applicant should release the entire decretal amount to the estate of the deceased.

D. Analysis & Determination

9. This court has discretionary powers to grant stay which must be exercised judiciously. The application is brought under **Order 42 Rule**

6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“No order for stay of execution shall be made under subrule (1) unless–

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 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.”

10. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

11. The above cited case captures the applicable principles in deciding whether or not to grant orders for stay of execution pending appeal.

12. In the Court of Appeal decision in the case **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held that:

“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.”

13. In the case at hand, the respondent has not disclosed any source of income that she would use to refund the applicant the decretal amount should the appeal succeed. Indeed, the respondent’s submission that the deceased’s estate is in dire need of money can only confirm that he will not be able to refund the decretal sum should it be paid to her. The applicant has thus established that it will suffer substantial loss if the intended execution is not stayed.

14. It also follows that if the respondent executes the judgement and the applicant’s appeal succeeds, then not only will the applicant suffer substantial loss but the appeal will also be rendered nugatory.

15. The other issue to determine is whether the application was filed without unreasonable delay. The application was filed 30 days after the delivery of the judgement. There is thus no inordinate delay on the part of the applicant.

16. The applicant has indicated its readiness to furnish security for the due performance of the decree. The respondent asserts the estate of the deceased continues to suffer pain and loss as they await the outcome of the appeal. I am alive to the fact that the respondent is entitled to equal treatment before the law. The answer to the respondent’s concern is that his interests will be taken care of by the applicant depositing the decretal amount or part of it as the court may decide in an interest earning account.

17. A perusal of the memorandum of appeal demonstrates that the appeal is arguable and that the applicant has a right to be heard on the merits.

18. In the circumstances, it is my considered opinion that the applicant has satisfied the conditions for granting stay under **Rule 42(6) of the Civil Procedure Rules.**

19. I hereby find the application merited and allow it accordingly on the following terms: -

a) That the orders for stay of execution are hereby granted on condition that the whole decretal amount is deposited in an interest earning account in the names of the advocates on record for the parties within thirty (30) days.

b) That in default of deposit within the time given, the stay orders will stand vacated.

c) That the costs will be in the cause.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Mugendi for Respondent