



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 7 OF 2019

JACKLINE TABITHA KINYUA.....APPELLANT/APPLICANT

VERSUS

JACOB MUGO NYAGA.....1ST RESPONDENT

MUCINA MWANGI PETER.....2ND RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the application dated 18/02/2018 seeking for orders for stay of execution of the judgment of Embu Senior Principal Magistrate in CMCC No. 246 of 2017.
2. The applicant was dissatisfied with the said judgement where the trial magistrate found her 100% liable for the accident and awarded damages to the respondent based on full liability.
3. The parties disposed of the application by way of written submissions.

B. Applicant's Submission

4. It is the applicant's case that she is ready to provide security as the court may deem fit. She relies on the Court of Appeal case of **Gitahi & Another v Warugongo [1988] KLR** where the court was of the view that the requirement of security should not disadvantage any of the parties in a case.
5. She further submitted that the respondent was a man of straw and as such the inability to refund the decretal sum if the appeal succeeds would result in the applicant suffering substantial loss.

C. 1st Respondent's Submissions

6. The respondent submits that the applicant has not demonstrated what substantial loss she will suffer if the orders sought are not granted and that in the unlikely event the appeal is successful, she will be able to refund the decretal amount. He relied on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** where it was held that an applicant is bound to place before court such material and information to demonstrate the risk of suffering substantial loss.
7. He further submits that in the unfortunate event that the applicant's application succeeds, the applicant should furnish the entire decretal amount with half of it being released to the respondent and the other half deposited in court. These sentiments were expressed in the case of **Francis Kirwa Magut & Another v Grace Agiso [2015] eKLR & Malindi HCCA No. 18 of 2017 Amal Hauliers Limited v Abdulnasir Abukar Hassan** delivered on the 3rd November 2017.
8. The respondent in conclusion submitted that the applicant had failed to satisfy the requirements of Order 42 rule 6 (2) of the civil procedure 2010 and as such her application ought to be dismissed.

D. Analysis & Determination

9. In the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** and **Kenya Shell Limited vs Kibiru [1986] KLR 410**, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

10. **Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

- a) *Substantial loss may result to the applicant unless the order was made;*
- b) *The application was made without unreasonable delay; and*
- c) *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.*

11. Evidently, the three (3) prerequisite conditions set out in the said **Order 42 Rule 6 of the Civil Procedure Rules, 2010** cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

12. It is submitted for the applicant that if stay of execution is not granted the applicant will suffer substantial loss as the respondent is a person of straw who has not shown in any way that he is capable of refunding the said sum if the same was paid to him and the appeal succeeds. That the 1st respondent on his behalf states that he owns a large tract of land in Embu and will be able to settle the decretal sum if the appeal is successful.

13. The 1st respondent has not provided any evidence of ownership of such land. Even if the land surely belongs to the applicant, he is at liberty to sell or transfer it to any person at any time in exercise of his proprietary rights. In my view this would not be a reliable security to bank on in an application for stay of execution and is likely to cause injustice to the respondent.

14. In the Court of Appeal decision in the case of **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.”

15. Considering the uncertainty and ambiguous description of the security offered, I find that the applicant has established that it will suffer substantial loss if the intended execution is not stayed. 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.

16. As to whether the instant application was filed without unreasonable delay, the record shows that judgement in the suit was delivered on the 22nd January 2019. The applicant filed the present application on the 20th February 2019, a period of less than a month. It is my view that the application was filed without unreasonable delay.

17. The applicant has indicated her readiness to furnish security for the due performance of the decree save that the security offered would not be acceptable to the respondent. The 1st respondent asserts that he is entitled to equal treatment with the applicant before the law implying that his interests in this appeal ought to be protected in the event that this application for stay is granted.

18. Regarding the proposal by the respondent that the applicant deposits the whole of the decretal amount with half of it being released to the respondent, it is my considered view that the interests of justice will not be served if such an order is granted. I have already said that refund cannot be guaranteed in the event of a successful appeal.

19. I find that the applicant has satisfied the requirements of Order 42 Rule 6. The application is hereby allowed on the following terms:

- a) *That stay of execution of the judgment delivered on 22/01/2019 in Embu CMCC No. 246 of 2017 is hereby granted.*
- b) *That the applicant is hereby ordered to deposit as security half of the decretal amount in the names of the advocates for the parties within thirty (30) days and in default, the stay orders to be automatically vacated.*
- c) *That costs be in the cause.*

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JUNE, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

