



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.1 OF 2019**

**DANIEL PAUL OKANGI.....1<sup>ST</sup> APPELLANT/APPLICANT**

**BERNARD OBAT OWINO.....2<sup>ND</sup> APPELLANT/APPLICANT**

**CHERUIYOT BII.....3<sup>RD</sup> APPELLANT/APPLICANT**

**VERSUS**

**VERONICA MUHONJA MUGAILWA.....RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. Nandi, SRM, delivered on 13<sup>th</sup> December 2018 in Oyugis SRMCCNo.229 of 2017)**

**RULING**

[1] The Notice of Motion dated 26<sup>th</sup> April 2019, by the appellant/ applicant contained a number of prayers but for the purposes of this ruling, prayer (3) and (6) are non-rival.

The applicants thus pray for a stay of execution order respecting the judgment made on 13<sup>th</sup> December 2018, in **Oyugis CMCC No.229 of 2017**, pending the hearing and determination of this appeal and also an order to set aside/quash/vary the conditions granted on 13<sup>th</sup> March 2018 by the lower court.

The grounds in support of the application are in the body of the Notice of Motion and are fortified by the averments of the second applicant contained in the supporting affidavit dated 29<sup>th</sup> April 2019, which is opposed by the respondent on the basis of her averments contained in the replying affidavit dated 17<sup>th</sup> June, 2019.

[2] The application proceeded by way of written submissions. Accordingly, the applicants filed their written submissions, dated 12<sup>th</sup> July 2019, through the firm of **Mose, Mose Millimo & Co. Advocates** while the respondent filed her submissions dated 12<sup>th</sup> July 2019, through the firm of **Omwenga & Co. Advocates**.

These rival submissions were given due consideration by this court in the light of the grounds in support of the application of which grounds (c) (d) and (e) are most relevant at this stage as they tally with the enabling provision of the Civil Procedure Rules i.e. **Order 42 Rule 6 (1) (2)**, which provides for stay pending appeal in the following terms:-

[3] 6 (1) – “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appeal 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 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”.

6 (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 an order as may ultimately be binding on him has been given by the applicant”.**

[4] The issue for determination herein is whether the applicants have demonstrated by means of satisfactory and sufficient evidence that they stand to suffer substantial loss in the event that stay is not granted.

From the supporting affidavit, it is clear that the applicants are apprehensive that the respondent may not be in a position to refund even half of the decretal amount in the sum of Kshs.2, 738, 469/82. They contend that the decretal sums is a colossal amount of Kshs.5, 476, 939/82 and indicate in their submissions that a sum of Kshs.2, 738,469/82 has already been remitted to the respondent through her advocate, but even then, she has not demonstrated that she is a person of means and capable of refunding the entire decretal amount or half thereof if the appeal succeeds.

[5] The respondent argued in her submissions that the application is res-judicata but this argument is untenable considering the clear provision of **Rule 6 (1) of Order 42**.

In any event, the dispute between the respondent and the appellants is yet to be finally decided as this appeal against the decision of the trial court is pending hearing and determination.

[6] Clearly, the gravamen of this application is based on the provisions of **Rule 6 (2) (a) of Order 42** of the **Civil Procedure Rules**. This brings to the fore the issue of “**substantial loss**” which is most important at this stage than the issue pertaining to the appeal being rendered nugatory if stay of execution is not granted.

Indeed, as was held in **Kenya Shell Limited –vs- Benjamin Karuga Kabiru & Another [1986] e KLR**, substantial loss in its various forms is the cornerstone of the jurisdiction for grant of stay.

[7] Herein, the applicants are merely apprehensive that they would suffer substantial loss by the payment of the decretal amount to the respondent. They believe that the respondent is a person of straw and may be unable to refund the amount should the appeal succeed. This belief is based on the fact that in her response to this application, the respondent failed to demonstrate that she is not a person of straw. Such belief is absolutely unfounded as the obligation to prove or establish that the respondent is a person of straw may not on the respondent but squarely on the applicants and they have failed to discharge the obligation. Their allegation in that regard remained unproven.

[8] The impugned decree is a money decree. As such, the mere payment of the decretal amount to a succeeding litigant would not amount to substantial loss however large the amount. The court may however, note that a sum of Kshs.5 million or Kshs.2 million is not a small amount by any standard in a poor county like ours. There is always an uneasiness pervading a refusal to grant stay where a large amount is involved, but the applicants herein have not established or shown the damage, they are likely to suffer by this court refusing to stay execution other than expressing a fear that the respondent may be unable to refund the decretal amount in the event that the appeal succeeds.

Such damage ought to be readily substantial and/or crippling to be treated as substantial loss and none was shown herein.

[9] The requirements of **Rule 6 (2) (a) of Order 42 Civil Procedure Rules** have therefore not been established by the applicants for this court to exercise discretion in their favour.

Prayer (3) of the application must fail together with prayer (4) for which a case for its grant was never made by the applicants.

In sum, the application is dismissed in its entirety with costs to the respondent.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**23.07.2019**

**[Read this 23<sup>rd</sup> day of July, 2019]**

**[In the presence of M/s Kerubo for Applicant and M/s Migai holding**

**brief for Mr. Omwenga for Respondent.]**