



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NO. 67 OF 2019**

**HASSAN MOHAMMED BORU.....1<sup>ST</sup> APPELLANT/APPLICANT**

**OMAN EDIN IBRO.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**RACHAEL MUTETE MUSYIMI.....RESPONDENT**

**RULING**

1. The Applicants approached the court with the instant application vide certificate of urgency where they primarily seek an order for a stay of execution of the judgment and decree rendered between the parties in the lower court on 4<sup>th</sup> April, 2019. The appeal is from a judgment delivered in Kithimani PMCC 379 of 2016 by Hon E.M. Wambugu. The application is supported by a supporting affidavit by Emmanuel Nzioka, who is the Legal Officer of APA Insurance, the insurers of the vehicle that is the subject matter of the instant suit. He averred that APA Insurance issued instructions on behalf of the insured to appeal against the judgement and if execution of the decree is carried out, then the appeal will be rendered nugatory. However she has not annexed a copy of the memorandum of appeal but nonetheless the same is on record. The deponent averred that the appeal has high chances of success and further that the insurance company is willing to offer security for performance of the decree but however it is apprehensive that the respondent is not likely to refund the decretal sum if the appeal is successful.

2. The application is opposed. In opposition, the Respondent deponed on 8<sup>th</sup> May, 2019 a replying affidavit wherein she averred that the application is frivolous, vexatious and an abuse of court process. She averred that the appeal has no chances of success and further that the affidavit in support has been deponed by an incompetent party. She urged the court to dismiss the application.

3. The application was canvassed by way of written submissions. Learned counsel for the applicants filed submissions on 21<sup>st</sup> May, 2019 while the respondents filed theirs on 18<sup>th</sup> June, 2019.

4. Learned counsel for the applicant submitted that the applicants have met the test for grant of the orders sought and that the replying affidavit raised no opposition to the application. It was submitted that the respondent has not demonstrated that she will suffer any prejudice if the orders sought are granted. In placing reliance on the case of **Devki Steel Mills v Robert Aputo Amariati (2014) eKLR** learned counsel submitted that the applicants are willing to abide by an order for security for costs.

5. According to the Respondent, there is one issue for determination; whether the applicant is entitled to the stay order. In that regard counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the respondent is entitled to the fruits of her judgment but however if the court is inclined to grant the application, then it should order that half the decretal amount be deposited in a joint interest earning account in the names of both advocates.

6. The issue for determination is whether the Appellant is entitled to an order for stay of execution.

7. The first argument taken up by the Respondent is that the application is frivolous and an abuse of court process. This application is brought under Order 42 Rule 6, Order 22 Rule 22 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. Upon reading the said provisions I find that the appellant has not breached any law and procedure in bringing this application. Section 3A preserves the applicants' right to approach this court to realize their cherished right of appeal and Order 42 Rule 6 provides for stay of execution pending appeal and on record there is a memorandum of appeal that was filed on 30<sup>th</sup> April, 2019. Order 22 Rule 22 provides for stay of execution by the court to which the decree has been sent for execution and I find that the said rule is inapplicable to the instant application. Looking at all the factors in totality, I am unable to agree with the Respondent that this application is an abuse of the court's process or frivolous or vexatious.

8. Having been satisfied that the application is not incompetently before the court, I will now consider the application on its substance.

9. The application for stay of execution of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

**6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so 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—**

**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. Applicants have to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Beckett, Civil Application Number 204 of 2004**. They must demonstrate that:

*a. The appeal they have filed is arguable;*

*b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;*

*c. The application was made without unreasonable delay; and*

*d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.*

11. I have perused the filed Memorandum of Appeal in this case as annexed to the application. I am unable to say that the grounds of appeal enumerated are in-arguable hence I find that the applicant has easily met that standard.

12. But what is the substantial loss that the applicants are likely to suffer if the order is not granted? The affidavit is silent on the same.

13. I am not convinced that there may be loss occasioned to the applicant if the orders sought are not granted. The applicants have indicated their willingness to deposit security while the respondent has not done so and in this regard it cannot be found that the applicant has shown this court what substantial loss they would suffer if stay of execution is not granted. None of the parties have managed to satisfy this mandatory requirement for the grant of stay.

14. The application was brought without inordinate delay and therefore my conclusion is that the applicants have partially met the conditions placed by Order 42 Rule 6.

15. In light of the foregoing, I am inclined to allow the instant application, and add that under Order 42 Rule 6(1), a court is to “**make such order thereon as may to it seem just**”. Having considered the materials placed before me, I shall grant prayer 3 of the application and give the appellants time to deposit the requisite security for performance of the decree.

16. The upshot is that the application dated 29<sup>th</sup> April, 2019 succeeds and is allowed in the following terms:

**a. An order of stay of execution of the decree in Kithimani PMCC No. 379 of 2016 is granted upon the applicants depositing the decretal sums into a joint interest earning account in the names of the advocates for the parties within the next twenty one (21) days from the date of this ruling failing which the stay shall lapse.**

**b. The costs of the application shall abide in the appeal.**

It is so ordered.

**Dated and delivered at Machakos this 23<sup>rd</sup> day of October, 2019.**

**D. K. Kemei**

**Judge**