



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NO. 53 OF 2019**

**KIMUYU WAMBUA TITUS.....APPELLANT**

**VERSUS**

**ILUKU SHADRACK IKONZE.....RESPONDENT**

***(Being an appeal from the judgement and decree of Hon B. J. Bartoo (S.R.M)***

***in Machakos CMCC 508 of 2017 delivered on 28<sup>th</sup> March, 2019)***

***BETWEEN***

**ILUKU SHADRACK IKONZE.....PLAINTIFF**

**VERSUS**

**KIMUYU WAMBUA TITUS.....DEFENDANT**

**RULING**

1. The Applicant approached the court with the instant application vide certificate of urgency where he seeks an order for a stay of execution of the judgment and decree rendered between the parties in the lower court on 28<sup>th</sup> March, 2019. The appeal is from a judgment delivered in Machakos CMCC 508 of 2014 by Hon B.J. Bartoo. The application is supported by a supporting affidavit by Regina Ileri, who is the legal officer of Heritage Insurance Company Limited, the insurers of the vehicle that is the subject matter of the instant suit. She averred that the appellant has filed an appeal against the judgement of the trial court 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 no prejudice will be occasioned if the application is allowed and is willing to comply with orders for 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 3<sup>rd</sup> May, 2019 a replying affidavit wherein he averred that the application is not in good faith. He averred that the application is intended to deny him the fruits of judgement and urged the court to direct that half of the decretal amount be paid to him and the other half to be paid into a joint interest earning account in the names of both advocates.
3. The application was canvassed by way of written submissions. Learned counsel for the applicants filed submissions on 13<sup>th</sup> June 2019 while the respondent filed theirs on 15<sup>th</sup> May, 2019.
4. Learned counsel for the applicant submitted that the applicant has met the test for grant of the orders sought. Counsel cited case of **Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa (2016) eKLR** and urged the court to allow the application.
5. According to the Respondent, there are conditions for grant of stay. In that regard counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicant has not satisfied the grounds for grant of the stay order and therefore the same should be dismissed. However, in the alternative 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 and the rest be paid to the respondent.
6. The issue for determination is whether the Appellant is entitled to an order for stay of execution.

7. This application is brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. 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. 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.**

8. The applicant has 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**. He must demonstrate that:

*a. The appeal he has filed is arguable;*

*b. He is likely to suffer substantial loss unless the order is made. Differently put, he 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. He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.*

9. 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 not arguable hence I find that the applicant has easily met that standard.

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

11. I am not convinced that there may be loss occasioned to the applicant if the orders sought are not granted. None of the parties have indicated the willingness to deposit security, and in this regard it cannot be found that the applicant has shown this court what substantial loss he 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.

12. The application was brought without inordinate delay as it was brought within 30 days from the date of delivery of the judgement. My view is that the applicant has partially met the conditions imposed by Order 42 Rule 6.

13. 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. The deposit of the security will assuage the concerns of the respondent as the appeal is canvassed. It is noted that the appeal is mainly against the quantum of damages and hence an order for payment of half of the decretal sums to the respondent will be in tandem with his quest to enjoy the fruits of the judgement.

14. The upshot is that the Application dated 11<sup>th</sup> April, 2019 succeeds and is allowed in the following terms:

*a) An order of stay of execution of the decree in Machakos Cmcc No.508 of 2017 is granted upon the Appellant paying half the decretal sums with the respondent while the other half be deposited into a joint interest earning account in the names of both Advocates within thirty (30) days from the date of this ruling and in default 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**