



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 24'A' OF 2019

CHRISTINE DANIEL.....APPELLANT/APPLICANT

VERSUS

KEVIN MOVA MUNYWOKI.....RESPONDENT

RULING

1. By way of Notice of Motion dated **30th May, 2019**, the Applicant seeks stay of execution of the Judgment and Decree of the Principal Magistrate's Court delivered on the **20th March, 2019**, pending hearing and determination of the Appeal.
2. The Application is premised on grounds that; the award given of **Kshs. 1,219,676/=** was manifestly high; the Appeal has overwhelming chances of success, is arguable and has merit; execution is imminent and unless execution is stayed, the Appellant stand to suffer substantial loss which cannot be compensated if execution proceeds; there has been no unreasonable delay in bringing the application, and she is willing to abide by any conditional terms of stay that may be given by the Court.
3. **Erastus Mbaka**, a Legal Officer of CIC General Insurance, insurers of the Appellant's motor-vehicle **Registration Number KBZ 961Q** which was involved in the accident with the rider of motorcycle **Registration Number KMDS 435T** deposed an affidavit where he averred *inter alia* that they were dissatisfied with the Judgment on the issue of apportionment of liability and general damages for pain and suffering. That the Respondent having stated that he has meager income will not be able to refund the decretal sum if the Appeal succeeds; that they are willing to provide security by depositing **Kshs. 600,000/=** in a joint interest earning account in the names of both Advocates and the balance to be secured by way of guarantee or insurance bond pending the outcome of the Appeal and it is in the interest of justice and fairness for the application to be allowed.
4. In response thereto, the Respondent filed a Replying Affidavit where he deposed that; the application was not made in good faith as it was aimed at delaying payments in the matter to derail him from enjoying fruits of the Judgment; after the accident he relies on handouts from friends and relatives to pay hospital bills and feed his family, amounts he has not refunded and he is pressurized to pay upon finalization of the matter. That as a result of the accident he cannot do manual work as he used to and it will be difficult for him to survive as he waits for the determination of the Appeal. He called upon the Court to order the Applicant to pay him half the decretal amount of **Kshs. 587,745/=** and deposit the balance of **Kshs. 587, 745/=** in a joint account.
5. In a further affidavit it was urged that as a sign of good faith an offer of security had been made; that in case the Appeal is allowed entirely, the Applicant will have no means of recovering the monies paid out.
6. The application was canvassed by way of written submissions that I have taken into consideration.
7. Principles of granting a stay of execution are provided for under **Order 42 Rule (6)** of the **Criminal Procedure Rules** that state as follows:

“(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 subrule (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 or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. The Applicant is therefore required to prove that:

(i) Substantial loss may result to the Applicant unless the order is made.

(ii) The application has been made without unreasonable delay; and

(iii) Such security as the Court orders for the due performance of the Decree or Order as may ultimately be binding on the Applicant has been given by the Applicant.

9. In the case of **Mukuma vs. Abouga (1988) KLR 645**, the Court of Appeal stated that:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

In **Sewankambo Dickson vs. Ziwa Abby HCT-00-CC MA 0178 of 2005** it was held that:

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...”

10. The nature of loss alluded to herein is that the Respondent will not be able to repay the money in event that the Appeal succeeds.

11. The response put in by the Respondent is an admission of being handicapped financially such that he will not be able to refund the money in case the Appeal succeeds.

12. However, in the Memorandum of Appeal filed it is urged that the Respondent contributed to the accident such that the award made was excessive. It was for that reason that they are ready and willing to deposit **Kshs. 600,000/=** in an account held jointly by advocates representing both parties.

13. The application herein was filed two (2) months after delivery of Judgment. Having filed the Appeal against the decision of the Lower Court, it is an indication of the intention to have the matter considered at the Appellate stage. I therefore find that there was no inordinate delay on the part of the Applicant.

14. The Applicant has demonstrated the intention to furnish security for due performance of the Decree considering the argument raised by the Applicant, of contributory negligence, therefore, I make orders thus:

(i) There be stay of execution of Judgment of the Lower Court and consequential orders thereof on condition that the Applicant pays the Respondent **Kshs. 400,000/=**. The balance of the decretal sum shall be deposited in Court within **21 days** from today. In default, the application shall stand dismissed.

(ii) The costs of the application shall abide the Appeal.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of November, 2019.

L. N. MUTENDE

JUDGE