



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 24'B' OF 2019

CHRISTINE DANIEL.....APPELLANT/APPLICANT

VERSUS

SAMMY KAMENE.....RESPONDENT

R U L I N G

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** in **Kitui CMCC No. 156 of 2017**, pending the hearing and determination of the Appeal filed herein.
2. The Application is premised on grounds that the award of damages in the sum of **Kshs. 894,880/=** was manifestly high such that the Appeal has overwhelming chances of succeeding, is arguable and has merit.
3. That the Respondent has started the process of execution against the Appellant/Applicant and unless orders sought are granted the Applicant stands to suffer substantial loss which cannot be compensated. She is willing to abide by any conditional terms and the orders sought will not be prejudicial to the Respondent.
4. In a response thereto, the Respondent deposed that as a result of the accident he was involved in, he cannot do manual work that he used to do, survival is difficult, he has borrowed money from friends and relatives to pay the hospital bill therefore, in the event that the application is allowed the Court would be considerate to order the Applicant to pay half the decretal sum being **Kshs. 447,440/=** and deposit the balance in a joint account.
5. I have considered the affidavit evidence, rival submissions by both counsels alongside authorities cited.
6. Principles of granting a stay of execution are provided for in **Order 42 Rule 6** of the **Criminal Procedure Rules** that provides thus:

“(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.”

Therefore, the Applicant must satisfy the following conditions:

(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.

7. The remedy of stay of execution is discretionary but the stated discretion must be exercised judiciously. **(Also see Antoine Ndiaye vs. African University (2015) eKLR).**

8. The impugned Judgment was delivered on the **20th March, 2019**, the Appeal was lodged on **23rd April, 2019** and the application was filed on the **30th May, 2019**. Indeed, the application was filed without undue delay.

9. It is urged by the Applicant that he will suffer substantial loss if the order sought is not granted because the Respondent had commenced the process of execution and is in the process of filing a Declaratory Suit. That the Respondent will not be able to pay back the principal sum if the Appeal succeeds.

10. In the Replying Affidavit it is deposed that the Respondent is a man of meagre means therefore in event the Appeal succeeds he will not be in a position to refund the money. Looking at the Memorandum of Appeal, it is averred that the trial Magistrate erred in law and fact by reaching a finding that the Appellant was **100%** liable and disregarding evidence which demonstrated that the Respondent largely contributed to the accident.

11. On his part the Respondent has conceded to the stay being granted subject to some of the decretal sum being released to him considering his dire need of some income for purposes of sustenance.

12. The Applicant has expressed willingness to furnish security for due performance of the Decree. He has proposed to deposit **Kshs. 400,000/=** in a joint interest earning account in the name of the parties and the balance to be served by way of a bank guarantee.

13. From the foregoing, I find the Applicant having met the conditions for grant of stay. Therefore, I grant the Applicant stay of execution of the Judgment of the trial Court and consequential orders thereto on condition that he pays the Respondent a sum of **Kshs. 300,000/=** and the balance of the decretal sum shall be deposited in Court within **21 days**. In default orders of stay granted shall lapse.

14. It is so ordered.

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

L. N. MUTENDE

JUDGE