



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO 4 OF 2018**

**HARJEET SINGH PANDAL..... APPELLANT**

**VERSUS**

**HELLEN AKETCH OKUODHO..... RESPONDENT**

**RULING**

1. By a notice of motion dated 24.1.18 brought under Section 1A, 1B, 75 and 78 of the Civil Procedure Act and Order 42 Rule 6 and all enabling provisions of the law, the applicant/appellant prays for orders that

**a. This application be certified urgent**

**b. A temporary stay of execution of the decree arising from a judgment delivered on 6th December, 2017 in Kisumu CMCC No. 341 of 2014 be granted pending the hearing and determination of this application *interpartes***

**c. The court be pleased to grant a stay of execution of the decree arising from a judgment delivered on 6th December, 2017 in Kisumu CMCC No. 341 of 2014 pending the hearing and determination of this appeal**

**d. Costs of this application be provided for**

2. The application is based on the grounds among others that the appellant is aggrieved by the judgment in which the respondent was awarded Kshs. 860,100/- and has preferred an appeal which has set out serious points of law, plausible and arguable grounds of appeal with overwhelming chances of success.

3. The application is supported by an affidavit sworn on 24th January, 2018 by Richard B.O. Onsongo, advocate for the appellant who reiterates the grounds on the face of the application and further that the appellant is ready and willing to deposit half the decretal sum pending the hearing and determination of the appeal. Attached to the affidavit is a copy of Memorandum of Appeal filed in this appeal.

4. The application is opposed on the grounds set out in the respondent's replying affidavit sworn on 30th January, 2018 in which it she avers that this application is intended to deny her the decretal sum which is legitimately due and therefore prays that half of the decretal sum be paid to her and the balance in an interest earning account in the names of both advocates.

5. I have considered the application in the light of the affidavitson record.

6. Order 42 (6) of the Civil Procedure Rules provides:

(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
- b. That the application has been made without unreasonable delay; and
- c. 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.

**i. Unreasonable delay**

7. The notice of motion herein was filed on 8th December, 2017 which was 1 month and 12 days after the judgment sought to be stayed was delivered. It is my considered view that the application was filed without delay.

**ii. Substantial loss**

9. There are a myriad of cases on what constitutes substantial loss. In **Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred MumeaKomu** the Court stated-

**“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money.”**

9. Similarly in **Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd** the Court stated-

**“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”**

10. From the affidavit evidence, the applicant has not established what substantial loss it would suffer if the order of stay of execution is not granted.

**iii. Security**

11. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. It has been averred that the appellant is ready and willing to deposit half the decretal sum pending the hearing and determination of the appeal. The respondent on the other hand urges the court to order that the other half be paid to her but fails to demonstrate that she would be in a position to refund the same in the event that the appeal succeeds.

**Decision**

12. Although I have found the applicant has not established substantial loss, he has offered security for the due performance of the decree herein.

13. The overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

14. Section 3A of the Civil Procedure Act Cap 21 Law of Kenya provides that:

**“Nothing in this Act shall limit nor otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the process of the court”.**

15. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

16. The upshot of the foregoing is that the notice of motion dated 6.12.17 is considered and allowed on the following conditions:

**a. The applicant pays 50% of the total decretal sum in an interest earning account in the names of both advocates within 30 days from today's date**

**b Costs shall be in costs in the appeal**

**DATED AND DELIVERED THIS 15th DAY OF February, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix&Carolyne**

**Appellant/Applicant - N/A**

**Respondent - Mr Ariho/Mr Menezes**