



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 30 OF 2018

BERNARD KYALO MAITHYA.....APPELLANT

VERSUS

PHILOMENA KYUMWA MBITHI.....1ST RESPONDENT

JOSEPH MUTUNGA.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 11/04/2018, the Applicant seeks the reliefs of Stay of Execution of the Decree in Makueni CC 72/2016 pending hearing and determination of the Appeal.
2. The Application is premised on Order 42 R(6) and Order 1 R 11 CPR Section 3A CPA 2010. It is supported by the grounds on the face of the motion and the Supporting Affidavit of Joseph Mwai sworn on 12/04/2018.
3. The Application is opposed by the Respondent and a Replying Affidavit has been filed and sworn by Faith Mutio Mutuku on 31/04/2018.
4. Before I go to the merit of the Application, I have to decide a Preliminary issue raised by Applicant to wit that the court to consolidate this file HC Misc 30/2018 with HCCA 23/2018.
5. There was an oversight in that instead of filing Application in the HCCA 23/2018 file, it was filed as a Misc No. 30/2018.
6. The Respondent oppose the consolidation of the same 2 files and instead pray for the court to strike out the Application as there is procedural impropriety.
7. The Notice of Motion was filed on 13/04/2018 while the Appeal was filed on 28/03/2018. The Applicant in ideal situation ought to have filed the Application in the file hosting the Appeal.
8. However the Respondent has not demonstrated the aforesaid mistake to be incurable nor show any prejudice to be suffered by her invent the Application is determined on merit.
9. The court therefore overrules Objection by the Respondent and proceeds to determine the Application on merit. I invoke the provisions of Article 159 (2) (b) of the Constitution and S 3A, 3B CPA on merit. The Appellant is enjoined to establish the existence of conditions set out in Order 42 (6) CPR namely:-

The Application was filed timeously that there will be hardship on Applicant side if orders sought are not granted and finally that he is ready, able, and willing to provide security for payment of the decretal amount should Appeal fail.

10. However when both parties counsels were submitting, they narrowed down their issue to security and abandoned the other 2 limbs of the conditions.
11. The Applicant urged court to order decretal amount to be deposited in joint interest earning account in the names of both parties' counsels as security, until Appeal is disposed off.
12. The Respondent side sought to have part of decretal amount to be paid to the Respondent and the balance to be in interest earning account in joint names as above proposed by Applicant. The Respondent proposes Kshs. 1 Million be paid to her pending Appeal.

13. The Applicant alternative submissions submitted that since during trial his side quantified at Kshs. 233,800/= same can be paid and the balance to be deposited in interest earning account in both parties' advocates names.

14. This Appeal turns on issue of apportionment of liability and the Quantum. I have seen the Memorandum of Appeal and the Judgment by the trial Magistrate. I find there are serious issues for trial.

15. The Respondent has not demonstrated ability to refund the Decretal amount in event same is paid to her and Appeal succeeds.

16. On the other hand, the Applicant does not say that at the end of the matter there will be nothing to be paid to the Respondent. The amount may be substantially reduced.

17. In light of the above, I find it fair to order half of Respondent proposal (Kshs. 500,000/=) to be paid to the Respondent and the balance to be deposited in interest earning account till pending hearing and disposal of the Appeal. The deposit to be done within 30 days and in default execution to proceed. Costs in main appeal.

18. Thus the court makes the following orders;

1. **Stay of Execution as prayed in prayer No. 3 is granted.**
2. **Kshs. 500,000/= shall be paid to the Respondent and balance be deposited in interest earning account in joint names of parties Advocate within 30 days.**
3. **In default Execution to issue for entire decretal amount.**
4. **The file HC Misc 30/2018 and HCA 23/2018 are consolidated.**
5. **Cost in the main cause.**

SIGNED, DATED AND DELIVERED THIS 17TH DAY OF MAY, 2018 IN OPEN COURT.

C. KARIUKI

JUDGE

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