



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 24 OF 2018

JOHN MBURU GACHAU.....APPELLANT

-VERSUS-

LAWRENCE KIMANTHI KAWELU.....RESPONDENT

RULING

INTRODUCTION

1. By a notice of motion dated 11/05/2018 and supported by an affidavit sworn on 07/05/2018 by Rina Welemba the applicant seeks the orders *inter alia*.

1. That there be stay of execution of the decree herein pending the hearing and determination of this appeal against the judgment and order of the Honourable Magistrate against the Applicant/Appellant.

2. That cost of this application be provided for.

2. The same is supported by the grounds on the face of the motion in addition to the supporting affidavit.

3. The application is opposed and Respondent has filed an affidavit sworn by Faith Mutio Mutuku on 30/05/2018.

4. The parties agreed to canvass the motion via written submission which they filed and exchanged.

APPLICANT'S SUBMISSION

5. The Applicant submits that substantial loss shall be occasioned to Applicant if no stay orders are granted as his properties shall have to be carted away and sold to satisfy the decree if his insurer will not have settled and/ or satisfied the decree.

6. The decretal sum is also colossal and the Respondent means of refunding the decretal sum if paid to them is unverifiable. The affidavit of means of the Respondent filed herein does not indicate the capability of the Respondent to pay back the decretal amount if the same is paid to him.

7. Thus the Applicant requests and prays for orders which shall secure the decretal amount for any successful party and specifically same to be put in a fixed joint interest earning account of both parties' counsels.

8. The said affidavit of means just indicate that a company owned by the Respondent is profitable but does not indicate whether the said profit/ income is available to be utilized to pay back the decretal amount.

9. The Applicant is willing to offer security for due performance of the decree and abide with any other conditions the court may set thus prays for stay orders as requirements for grant of the same have been established.

10. The Applicant relies on the following authorities to anchor his submissions;

1. MOMBASA HCCA. NO. 82 OF 2012 ABRAHAM MWANGI –VS- AHMED IBRAHIM.

2. MOMBASA HC. MISC. APPL. NO. 40 OF 2013 GYKA FUEL MART LTD –VS- BWANA MSHIRI SUNGURA.

11. The submits that ,the Applicant in reply, does not seriously oppose grant of orders sought and neither does he indicate any prejudice which he will suffer in case the application is allowed.

12. The instant application was filed timeously and if there is any delay in filing it, the same was not inordinate as the applicant as same has been explained. The applicant relies on the cases below;

1. **MOMBASA HCC MISCELLANEOUS CIVIL APPL. NO. 16 OF 2009 MOHAMMED ABBAS M. SOMJI –VS- JAMES JAPETH OTIENO (2009) Eklr.**

2. **NAIROBI HCC. NOL 559 OF 2014 DEVKI STEEL MILLS –VS- ROBERT APUTO AMARIATI (2014) Eklr.**

RESPONDENT'S SUBMISSION

13. It is submitted that the applicants have not demonstrated how they will suffer substantial loss.

14. The court is invited to consider the respondent supporting affidavit and the affidavit of means to the effect that the Respondent is a man of means.

15. Attached documents clearly demonstrate that the respondent is a director and/ or the manager in a company known as **Laphejo contractors Limited** and that he holds 98% of the shares in the company.

16. The court is invited to consider the CR 12 attached to the Respondents affidavit of means. The Respondent has gone ahead to show that this company is owned by him, his family and child. He has attached a marriage certificate and a birth certificate showing this.

17. It is submitted that the company is a going concern, is stable and is making profits. A look at the company's bank accounts and financial statement reveal that.

18. It is submitted that, the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent, the Respondent would not be in a position to pay and/or refund as he is a man of straw.

19. The Respondent is supposed to show that he has assets that he is in position to refund the decretal sum if the appeal is successful, which he has shown herein.

20. See **Njoro Canning Factory –vs- John Michael Mbugua & Anor (2015) eKLR** quoted **ABN AMRO bank N. V –vs- Monde foods Civil Appeal No. Nai 15 of 2002** which held,

“This evidential burden would easily be very easy for a Respondent to discharge. He can simply show what assets he has land cash in bank and so on.” It is not enough to state that if an appeal is unsuccessful a party would able to repay the decretal sum as the Respondent has done.”

21. It is submitted that, respondent made an offer to the appellant that they pay the Respondent Kshs.300, 000/= and that the balance be put in an interest earning account but they refused. Thus a clear indication that the Applicants are not willing to offer security for the due performance of the decree herein.

22. On allegation that the award was high, one has to note that, the parties were in agreement as to the nature of injuries sustained by the Respondent. Thus it is contended that, the argument that the medical evidence was not considered cannot therefore stand.

23. Moreover, the Applicant did not quote any case in which someone had a deformity of clavicular (shoulder) and soft tissue injuries.

24. The Respondent on their part quoted a 2006 case in which the injuries were very similar to the injuries sustained by the plaintiff in present matter. In which case the amount of kshs.350,000/= was awarded.

25. The court awarded general damages of Kshs.480, 000/=. The said award of kshs.480, 000/= is not too high as it has been shown that ten years ago court awarded Kshs.350, 000/= for similar injuries.

26. On special damages, the plaintiff pleaded special damages Kshs.25, 000/=.as manifested in the pleadings.

ISSUES,ANALYSIS AND DETERMINATION

27. The only is which arises is;

-Whether the application has merit?

28. The principles guiding the grant of stay of execution pending appeal are well settled;

Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:

-Substantial loss may result to him unless the order is made;

-That the Application has been made without unreasonable delay; and

- That the Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

29. In the case of **JASON NGUMBA KAGU & 2 OTHERS V INTRA AFRICA ASSURANCE CO. LIMITED** the court held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

30. In the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIAKA CHESETO** the court held that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

31. The court defined substantial loss as outlined above as factors which show that the execution of the judgement will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.

32. In **JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO MISC APPLICATION NO 42 OF 2011 [2012] eKLR (Gikonyo J as he then was)** stated that:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

33. In the case of **JASON NGUMBA KAGU & 2 OTHERS V INTRA AFRICA ASSURANCE CO. LIMITED** the court held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules....”

34. The contest seems to narrow down to the respondent ability to refund the decretal sum in event appeal succeeds. This is apparent from the fact that the contention that application was filed timeously and offer of security elements are not seriously contested by the respondent.

35. The respondent has demonstrated by evidence that he is a man of means and can easily refund the decretal amount should the appeal succeed. The general damages awarded was Kshs 480,000. The amount is moderate and recoverable in event appeal succeeds thus the court finds that the application lacks merit.

36. The court thus makes the following orders;

i. The application is dismissed.

ii. Costs in the main appeal.

SIGNED, DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE