



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 382 OF 2018

MORRIS GARI.....1ST APPELLANT

DAN ONYONGO ODEYO.....2ND APPELLANT

KANTECH STEEL FABRICATORS.....3RD APPELLANT

VERSUS

CYRUS MUGWE KURIA.....RESPONDENT

RULING

1. The Notice of Motion dated 15th August 2018 principally seeks orders of stay of execution of the ruling and order made on 9th August 2018 by *Hon. D.O. Mbeja* in Nairobi CMCC No. 3814 of 2014 pending the hearing and disposal of the appeal filed herein.
2. A reading of the memorandum of appeal and the application reveals that though three persons are named as the appellants in the appeal, the appeal and the application appears to have been filed by only one of them, namely *Morris Gari* who is described as the 1st appellant.
3. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn on 15th August 2018 by the 1st appellant.
4. It is the applicant's contention that if stay orders are not granted, the respondent is likely to levy execution by attaching $\frac{1}{3}$ of his salary which will render the appeal nugatory and expose him to irreparable loss and damage since it is unlikely that he will be able to recover the decretal amount from the respondent if his appeal succeeds; that the appeal has high chances of success; that the application had been filed timeously and if it is allowed, the respondent is not likely to suffer any prejudice.
5. The application is opposed through grounds of opposition dated 5th September 2018. The points taken in opposition to the motion are that the intended appeal is frivolous, groundless and amounts to an abuse of the court process and that if stay is allowed, it should be on condition that the applicant deposits the entire decretal amount in the sum of KShs.535,035 either in court or in an interest earning account.
6. When the application came up for hearing, both parties agreed to have it canvassed by way of written submissions which they duly filed.
7. I have considered the application, the supporting affidavit, the grounds of opposition filed by the respondent and the parties' rival written submissions together with the authorities cited.
8. I find that the only issue which arises for my determination in this application is whether the applicant has met the threshold for grant of orders of stay of execution pending determination of an appeal.
9. The parameters within which the orders of stay pending appeal may be granted are set out in *Order 42 rule 6 (2)* of the *Civil Procedure Rules, 2010* which provides as follows:

“(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 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.”

10. The decision whether or not to grant stay of execution pending appeal is discretionary but needless to say, the discretion must be exercised judiciously in accordance with the law and not arbitrarily or capriciously.

11. For an applicant to be deserving of orders of stay pending appeal, he must demonstrate that sufficient cause exists for the exercise of the court's discretion in his favour.

Sufficient cause is established if the conditions specified in *Order 42 rule 6 (2)* are met.

12. It is clear from the court record that the application was filed timeously since the ruling challenged on appeal was delivered on 9th August 2018 and the instant application is dated 15th August 2018 though it is not clear when it was actually filed in court. There appears to be an error on the court stamp on the face of the application which shows that the application was filed on 5th August 2018 which is obviously not possible as the motion could not have been filed before the impugned ruling was delivered.

13. Regarding the requirement for demonstration of substantial loss, the applicant has contended that he is likely to lose $\frac{1}{3}$ of his salary every month in satisfaction of the decretal amount if stay is not granted and this will cause him irreparable damage. He has deposed that if the decretal sum is paid to the respondent, he will not be in a position to refund the same if his appeal is successful.

14. The law is that once an applicant expresses some apprehension that he is unlikely to recover the decretal amount if he succeeds on appeal or that the respondent is not possessed of means to refund the decretal amount if need be, the burden of proof shifts to the respondent to demonstrate that he has the ability to refund the money if called upon to do so. See: **National Industrial Credit Bank Limited V Acquinas Jarius Wasike & Another, Nrb Civil Appln No. 238 of 2005.**

15. The respondent in this case chose to oppose the motion through grounds of opposition and he did not therefore adduce any evidence in the form of a replying affidavit to counter the applicant's claims. He has therefore not discharged his burden of proving that he is a person of means and will be able to refund the decretal amount if appeal is successful. I consequently find that the applicant has demonstrated that he is likely to suffer substantial loss if the application is dismissed.

16. I am alive to the fact that the applicant has a right to exercise his right of appeal and to have that right safeguarded by ensuring that his appeal is not rendered nugatory. The respondent on the other hand being the successful litigant is entitled to the fruits of his judgment.

17. To balance the competing interests of both parties and to ensure that none of them suffers any prejudice, I will allow the application on condition that the applicant deposits the entire decretal sum in a joint interest earning bank account held by counsel on record for both parties within 30 days from today's date in default of which the orders of stay shall automatically lapse.

18. The costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 29th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the appellants

Ms Kinge holding brief for Mr. Juma for the respondent

Mr. Fidel: Court Assistant