



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 251 OF 2016

EXZEL MWANGIAPPLICANT/APPELLANT

- V E R S U S -

STEPHEN MUNENE MWANGIRESPONDENT

RULING

1) Exzel Mwangi, the appellant/applicant herein was on 15.4.2016, found 100% liable and was ordered to pay Stephen Munene Mwangi, the respondent a sum of ksh.180,000/= and ksh.4,500 as general and special damages respectively. The appellant was unhappy by the aforesaid decision hence this appeal. The appellant has now taken out the motion dated 9th August 2016 in which he seeks for *inter alia* an order for stay of execution pending appeal. The respondent filed a replying affidavit to oppose the application. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

2) I have considered the grounds stated on the face of the motion dated 8th August 2016. I have further considered the facts deponed in the affidavits filed in support and against the application. I have also considered the rival submissions. It is the submission of the appellant/applicant that the temporary order of stay granted by the trial court has lapsed hence he is apprehensive that the respondent may proceed to execute the decree against. It is also argued that the judgment sum is substantial hence it may be extremely difficult to recover from the respondent if the same is paid. It is for this reason that the appellant thinks that his appeal will be rendered nugatory.

3) The respondent on the other hand is of the view that the application should not be granted because he is in a financial position to refund the decretal sum if paid at the conclusion of the appeal within 14 days from the date of demand.

4) The principles to be considered in applications such as this are well settled. The principles to be considered are stated in Order 42 rule 6(2) of the Civil Procedure Rules as follows:

First, the application must be filed without unreasonable delay.

Secondly, that an applicant must show that if the order for stay of execution is denied he would suffer substantial loss.

Thirdly, that the provision of security for the due performance of the decree should be considered.

5) On the first principle, there is no doubt that the application for stay was timeously filed.

6) Secondly, the question as to whether or not the appellant/ applicant will suffer substantial loss if denied the order for stay was ably argued by both sides. I am convinced by the argument put forward by the appellant/applicant that he may suffer substantial loss if the order for stay is denied because it may turn out to be extremely difficult to get the refund of the decretal if paid to the respondent. The respondent has merely stated in his replying affidavit that he will require about 14 days from the date of demand to make a refund of the decretal. The respondent has not put forward any documentary evidence as proof of his financial capability.

7) The third principle to be considered is the provision of security for the due performance of the decree. The appellant has stated that he is ready, willing and able to furnish such reasonable security as this court may deem fit. I think, in the circumstances of this case, the more secure and reliable form of security to give is to deposit the decretal sum.

8) In the end, I allow prayer 3 of the motion dated 9th August 2016 on condition that the appellant/applicant deposits the decretal sum in an interest earning account in the joint names of advocates/firms of the advocates appearing in this matter within 30 days from the date hereof. In default the motion shall be treated as having been dismissed.

9) Costs of the motion to abide the outcome of this appeal.

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent