



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 34 OF 2017

ALI SEIF MOHAMMED.....APPELLANT

**LUCY MALIA KILUNDA (Suing as the Administrator of the Estate of
PETER MUSYOKA KILUNDA (DECEASED)).....RESPONDENT**

RULING

1. The application before this Court for determination is dated 6/2/2017 for stay of execution of the judgment awarding the Respondent general damages of Kshs. 4,195,000/= and special damages of Kshs. 15,000/= less 50% contributory negligence. The application is supported by an Affidavit of Ali Seif Mohammed wherein he depones that he stands to suffer substantial loss and prejudice if the Application is not allowed since the amount involved is substantial and that the Respondent will not be in a position to refund the same in the event that the Appeal is successful as she does not have any means of restitution having testified in the lower court that her son, the deceased used to support her before his death.
2. In the written submissions, the Appellant submits that they have an arguable appeal with high chances of success and relies on the case of **David Omwenga Vs. John Teleyio, Kisii HCCC No. 149 of 2005** where the court quoted the authority of **Butt Vs. Rent Restriction Tribunal (1982) KLR 7** where it was stated that, “*if there is no overwhelming hindrance, a stay ought to be granted so that an appeal is not rendered nugatory should it succeed.*”. The Appellant commits to abide by or comply with such terms as to security as may be ordered by the court.
3. In response to the application, the Respondent filed a Replying Affidavit of Lucy Malia Kilunda where she deponed that the Appellant has not demonstrated that they are unable to repay the decretal amount in case the Appeal is successful and that the stay should not be automatically granted on the basis that there is an appeal filed. In the submission, the Respondent relies on **Timsales Limited Vs. Hiram Gichohi Mwangi, Civil Appeal Number 94 of 2008 (2013)** where the court stated that the mere fact that the process of execution has commenced or is likely to commence does not amount to substantial loss for the reason that execution is a legal process and that the Appellant must establish other factors.
4. The Respondent also referred to the factors to be considered in deciding whether to order a stay as were outlined by Ringera J (as he then was) in **Global Tours & Travels Limited winding up cause No. 43 of 2000**.
5. In deciding this application, I will consider whether the instant application meets the requirements for granting an order of stay of execution as provided under Order 42 Rule 6 of the Civil Procedure Rules which are;
 - a. That the application has been made without unreasonable delay;

b. That security for costs has been given; and

c. That substantial loss may result to the Applicant unless the order for stay is made.

6. The instant application was filed on 6th February, 2017 whilst judgment was issued on 13th December, 2016. The question as to whether there has been unreasonable delay in making an application for stay or otherwise is something for the court in its discretion to determine considering the circumstances of each case. Considering the timelines herein and the circumstances of this case, I find that even though the application was not timely, the delay was not unreasonable.

7. Moving on to the second requirement, the Appellant has offered to furnish security for the due performance of the decree and has offered to comply with such terms as to security as may be ordered by this honourable court.

8. Will the Appellant suffer substantial loss if a stay order is not granted? In determining this question, I will consider whether the Respondent has demonstrated the ability to refund the decretal amount in case the appeal succeeds. In the supporting affidavit, the appellant depones that the Respondent has no means of income and therefore she won't be able to refund the decretal sum in case the appeal is successful thus shifting the evidential burden to the respondent to demonstrate her means of income and financial capability to refund the decretal amount in case the Appeal successful. However, in her replying affidavit, the respondent states that it has not been demonstrated by the appellant that she will be unable to repay the decretal sum. The appellant is not privy to the means of income of the respondent and therefore the burden is upon the respondent to prove her financial capability which burden was not discharged. Nevertheless, I have mentioned that the mere fact the period of 30 days of execution has expired by itself does not amount to substantial loss as execution is a lawful process.

9. Having so stated, I am persuaded to grant a stay of execution of the decree issued on 13th December, 2016 on the condition that the Appellant deposits the whole decretal amount in a joint account in the joint names of both advocates within 30 days from the date of this ruling failing which the stay order shall lapse.

10. The cost of the application shall abide the outcome of the appeal.

Dated, signed and delivered at Nairobi this 29th day of June, 2017

.....

L. NJUGUNA

JUDGE

In the presence of;

.....**For the appellant**

.....**For the Respondent**