**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 11 of 2016**

**J M N ……. .....APPELLANT/APPLICANT**

**VERSUS**

**Z W G (THE GUARDIAN OF P K G)……..……RESPONDENT**

**RULING**

1. The Appellants herein came before this court with a Notice of Motion dated 15th January, 2016("Application") asking the court to stay execution of the judgment and decree entered in **Limuru PMCC No. 315 of 2006**.

2. The grounds upon which the Application is based are that:

a. The appellant was dissatisfied and aggrieved by the judgment of the Honourable Court in Limuru PMCC No. 315 of 2006 and has filed an appeal which is pending before this court;

b. The decree the subject matter of the appeal is a money decree and if it is settled there are no prospects of recovery of the funds from the Respondent in the event the Appellant is successful;

c. If the decree is executed the appeal will be rendered nugatory;

d. The Respondent has obtained orders in the Lower Court for the committal of the Appelant to civil jail in execution of the decree;

e. The Appellant is ready and willing to offer and provide security for the due settlement of the decretal amount upon the determination of the Appeal.

3. The Application is supported by the Appellant affidavit which is focused on demonstrating the arguability of the appeal and the alleged impecuniousness of the Respondent hence raising what the Appellant characterizes as well-founded fear that a money decree once satisfied will render the Appeal nugatory because the Respondent will be unable to refund the monies paid.

4. The Respondent has opposed the Application. The Advocate filed a Replying Affidavit outlining the two main factual grounds for the opposition. First, that the Respondent is scandalized by the allegations of her impecuniousness and the materials used to support them which the Respondent believes are inadmissible and should be struck out. Second, the Respondent believes that there has been undue and inordinate delay in bringing the application.

5. In the written submissions, the Respondent adds a third ground of opposition: that the Appellant has not really offered security for the stay as required by the law.

6. The Application was canvassed by written submissions, with the parties filing lists of authorities. I have considered the Application and the respective affidavits, as well as the submissions and authorities filed. The only issue for determination here is whether the stay pending appeal ought to be granted.

7. The Applicationhas been expressed as brought under Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, as well as Sections 1A, 1B, 3A and 65 of the Civil Procedure Act. The said Order provides as follows:

> 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (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.
>
> (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
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> (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
>
> (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
>
> (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

8. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

> It was laid down in ***M M Butt v The Rent Restriction Tribunal*****, Civil Application No Nai 6 of 1979**, (following ***Wilson v Church*** **(No 2) (1879) 12 Ch 454 at p 488**) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.
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> Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

9. Hence, under our established jurisprudence, to be successful in an application for stay, an Applicant has to satisfy a four-part test thus:

a. He must demonstrate that the appeal he has filed is arguable;

b. He must demonstrate that he is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. He must demonstrate that the application was made without unreasonable delay; and

d. He must demonstrate that she has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

10. In the matter before me, the appeal is from the magistrate's court on both liability and assessment of damages in a matter involving alleged professional negligence in medical practice. As in all matters of this nature, the appeal is eminently arguable: the Appellant wishes to re-test the conclusions reached by the Learned Trial Magistrate on both issues of fact and law. The Appellant argue that the filed appeal has "overwhelming chances of success" and indicate that the main point to be taken on appeal will be the problematic nexus the Learned Trial Magistrate found between a tetanus infection and onset of psychiatric episodes in the Respondent – against existing scientific evidence of the implausibility of the connection between the two. To earn a stay of execution, one is not required to persuade the Appellate court that the intended or filed appeal is cocksure of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. This being a first appeal where the grounds of appeal attack both the lower court's apprehension of the evidence as well as the law's application to the evidence, it is easy to conclude that there is an arguable appeal.As is this issue is not seriously contested, I find that the appeal is arguable an satisfies the first prong of the test for granting stay.

11. In order to earn a stay on merit, the Appellant is also required to demonstrate that he is likely to suffer substantial loss if the order is not granted. In other words, he must show that his appeal will be rendered nugatory if the decree is executed. In this regard, the Appellant has argued that this is a money decree and the Respondent's financial status raises the reasonable apprehension that she will not be in a position to re-pay and decretal amounts paid to her. The Appellant places his weight for this argument on two factual positions and a consequential legal argument. Factually, the Appellant argues that he personally knows the Respondent and deponed that she is impecunious and indigent having been the doctor who attends to the family: She is of humble means, has an unemployed husband a large family of eight children who all need her support. Secondly, the Appellant has annexed a report by a Dr. Frederick Owiti who assessed the Respondent and the minor child as part of the discovery process in the trial process. The Report, which was produced in court during the trial, catalogues the family history including its social economic status as presented to the doctor at the time (3rd April, 2006). The Report appears to corroborate the assertions by the Appellant based on personal knowledge about the financial difficulties of the Respondent. Third, the legal argument by the Appellant is that the factual assertions by the Appellant remain un contradicted and uncontested and that they must, therefore, be taken as established for purposes of this Application.

12. The Respondent bristles at the suggestion that she is impecunious and indigent and, in her Replying Affidavit, depones that the allegations made by the Appellant to this effect are scandalous and an affront to her person and her family's dignity. She would have the Court strike out those allegations as scandalous. In her written submissions, the Respondent appears to abandon this line of argument and does not argue the issue of financial ability at all. Instead, the arguments are focused on the third and fourth tests for grant of stay which are analyzed below.

13. As the parties readily recognize, the question whether the Applicant has shown that he will suffer substantial loss if stay is not granted is a crucial one. Substantial loss is the most important of the conditions precedent to the granting of stay orders appending appeal.The Appellant has referred me to ***LaljiBhimjiSanghani Builders & Contractors v Nairobi Golf Hotels Kenya Ltd*** **(Nairobi HCCC No. 1900 of 1998)** where the Court said in relevant part:

> What of the Defendant suffering substantial loss? I am of the opinion that for an applicant to satisfy this condition, he must persuade the court that the Decree Holder is a man of straw from whom it will be neigh impossible or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding.

14. The two other cases cited: ***Equity Bank Ltd v Taiga Adams Co Ltd*** **(Civil App. No. 772 of 2005**) and ***Kenya Shell v Benjamin Karuga Kibiru& Ruth Wairimu Kibiru*** are in accord with this exposition of the law.

15. Here, the Appellant has relied on stated personal knowledge and on a written report from a doctor who examined the minor and the Respondent as part of the trial process to establish his apprehension that the Respondent will have great difficulties in refunding the decretal amounts if they are released to her, only for the appeal to succeed. The Respondent has not disputed this claim even though she, naturally, finds the allegations embarrassing. I find that the allegations, while embarrassing in their social implications, to be legally necessary and admissible to establish a crucial point of law. Given the evidence proffered, it behooved the Respondent to demonstrate that despite the facts stated in the affidavit she was in a position to refund the decretal amount if paid to her. In the face of this factual evidence, the burden to show that she is in a position to repay the monies shifted to her. She has not discharged that burden here.

16. So far, so good for the Applicant. He has succeeded on the first two prongs of the test for grant of stay: He has an arguable appeal, and he is likely to suffer substantial loss if the stay is not granted. How about the third prong of the test? That prong requires the Applicant to demonstrate that he made the application without unreasonable delay.

17. Here, the judgment was given on 28thOctober, 2010. The Respondent was awarded Kshs. 251,000 plus interests and costs. The judgment was delivered in open court. The advocate for the Appellant, Mr. Wachira was present in Court. He applied for 30 days stay of execution. It was readily granted. On 19th November, 2010, Mr. Wachira filed a Memorandum of Appeal at the High Court – well within the thirty days allowed by statute and well within the thirty days stay period. It is not clear what other steps the Appellant or his advocate took to perfect the appeal, process it for hearing or extend the order for stay. What is clear is that the Appellant did nothing on the record for five years, eight months and fourteen days. It is only on 15th June, 2016 that the Appellant exploded into action suddenly filing the Record of Appeal and the present Application under Certificate of Urgency. It turns out that it was the efforts by the Respondent to execute the decree the previous day that prompted the Appellant to act.

18. How does the Appellant rationalize this delay? There is this gem in paragraph 9 of his Supporting Affidavit:

> THAT the presumed delay in concluding the Appeal hereof has been due to the fact that it has been difficult to obtain all the requisite documents to prepare the record of Appeal as all the exhibits produced in Court could be traced compelling my Advocates to go to great lengths to obtain copies of the same from other sources.

19. Hence, we learn that unspecified "difficulties" to obtain the "requisite documents" to prepare the appeal is, after all, the real culprit in the delay. The Appellant offers no evidence or indication on what those difficulties are. He offers no letters to show that they wrote to the Trial Court to get the documents needed. There is no affidavit deponing to the efforts taken in this regard – just a bald statement that the advocates went to "great lengths" to obtain copies of the documents.

20. This is a rather parsimonious way to explain a delay of 2084 days! What makes it even more incredulous is the fact that this might explain the delay in filing the Record of Appeal but it sure does not explain the delay in filing the application for stay after the one given by the Trial Court on 28th December, 2010 lapsed on 28th November, 2010 – 2054 days before the Appellant made this Application. In my view, there can be only one explanation for this delay: the Appellant went to sleep

soon after the first stay was granted and appeal filed. The Appellant, it would seem, only awoke from their slumber upon realizing that execution was afoot.

21. Our jurisprudence is clear: grant of stay is a discretionary remedy which is given upon demonstration that there was no inordinate delay. No supremely wise court has ever come up with a categorical test for inordinateness of delay -- and none is capable of doing so given the context-specificity of the inquiry – but if ever there was an outer limit for the test of inordinate delay, it has found its poster child in this Application: 2084 days! Five years, eight months, fourteen days! I find this delay truly and objectively inordinate and I find no reasonable explanation by the Appellant. The length of time the Respondent has waited to enjoy the fruits of her valid judgment can only be appreciated if one considers that the incident giving rise to this litigation occurred on 5th December, 2004 and suit was first filed on 30th August, 2006.

22. The Applicant has offered to furnish security by way of bank guarantee so I would have held that he would have satisfied the fourth condition about security for the due performance of the decree that may ultimately be binding on him. However, since I have held above that by any and all standards the Appellant was unduly late in making this Application, I am unable to exercise the Court's discretion to order stay. The Appellant has, in my view, disentitled himself from the discretionary remedy through the inordinateness of his delay in acting. The strength of his satisfaction of the other three prongs in the test for granting stay cannot overcome the extreme delay in filing the Application in this case.

23. Consequently, I will dismiss the Application dated 15th June, 2016 with costs.

**Dated and delivered at Kiambu this 22nd day of September, 2016.**

**JOEL NGUGI**

**JUDGE**