



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 52 OF 2016

JOSEPH MUCHIRI MWANGI.....APPELLANT

VERSUS

MARY MORAA MACHUKA &

DAVID MWANDIKO MUNYAO (Suing as the legal

Administrators of the Estate of PATRICK MUNYAO

DAUDI (Deceased).....RESPONDENT

RULING

The Application

The application before the court for ruling is a Notice of Motion dated 13th June 2016, filed by the Appellant under the provisions of Order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules, and sections 3A and 63(e) of the Civil Procedure Act. This Court gave directions that the said application be canvassed by way of affidavits and written submissions.

The Appellant is seeking orders that there be a stay of execution of the judgment delivered on 12th May 2016 in **Tawa SRMCC No. 192 of 2015** and all consequential orders arising therefrom, pending the hearing and determination of the appeal filed herein.

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on 13th June 2016 by the Appellant. The main ground is that the Appellant is aggrieved with the lower court's judgment, in which he was held liable to pay damages including for loss of dependency of Kshs 4,000,000/= , and that he has preferred the appeal herein against the said judgment. Further, that if the stay orders are not granted he will be exposed to execution, as the Respondent's Advocates in a letter dated 12th May 2016 have threatened to execute if the decretal sum is not paid. A copy of the said letter was attached together with the decree of the trial Court.

The Appellant averred that his appeal raises triable issues, and that the Plaintiff is not a person of means and may not be able to refund the decretal sum if the appeal succeeds. Lastly, the Appellant stated that he is ready to deposit half of the sum as security and abide with any other directions.

Lesinko Njoroge & Gathogo Advocates, the learned counsel for the Appellant filed written submissions on the Application dated 18th July 2016. It was urged therein that it is settled law that once an applicant expresses reasonable fear that a respondent is unable to pay back the decretal sum, the evidential burden

must then shift to the Respondent to show what resources he has, and the decisions in **Edward Kamau & Another vs Hanna Mukui Gichuki & Another, (2015) e KLR** and **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, CA Civil App No 238 of 2005** were cited in this respect.

Further, that the decretal sum is a colossal sum and the Appellant will suffer substantial loss if it is not refunded, and is willing to offer security. Lastly, it was submitted that the instant application was filed expeditiously after the lodging of the memorandum of appeal.

The Response

The Respondents opposed the Appellant's application in a Replying Affidavit sworn by their Advocate, Bernard M. Kitindio on 22nd June 2016, wherein it was urged that the Appellant's application does not satisfy the conditions laid down in Order 42 Rule 6 (2), and is intended to deny the Respondents opportunity of enjoying the fruits of their lawfully obtained judgment and access to justice. Further, that the parties entered a consent on liability at the ration of 85% : 15% in favour of the Respondents, and the general damages awarded were not excessive.

The Respondents averred that should the Court be inclined to grant the application, then it should order that the Appellant pays them half the decretal sum and costs totaling Kshs 2,000,000/=, and that the balance be deposited in a joint interest earning account in both names of the Advocates on record.

The Respondents' Advocate also filed submissions dated 21st September 2016 wherein he gave a background of the suit in the trial Court, and relied on Order 42 Rule 6(2) of the Civil Procedure Rules, and the decision in **Antoine Ndiaye vs African Virtual University (2015) e KLR** to urge that the Appellant had not demonstrated with specificity the substantial loss he would suffer, and had not placed real and cogent evidence before the Court to show that the Respondents are unable to refund the decretal sum. Therefore, as the Appellant had not discharged his legal burden, the burden of proof had not shifted to the Respondents to prove that they are possessed of means.

As regards the deposit of security, reliance was placed on the decision in **Anne Njeri vs Muzaffer Musafee Assajee & Another, (2014) e KLR** for the position that a successful litigant should not be denied the fruits of his judgment while the unsuccessful litigant exercises his right of appeal, and on the consent entered into between the parties as regards liability. It was submitted that in order to strike a balance between the competing interests, it is only fair that the half of the decretal sum be paid to the Respondent and that the other half be deposited.

The Issues and Determination

I have read and carefully considered the pleadings filed. The issue before the Court is whether the execution of the judgment of the trial Court should be stayed. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which 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 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties in terms of the right to enjoyment of a judgment by the successful litigant, and the right to appeal by the unsuccessful litigant.

As regards whether the stay of execution should issue in the instant application, I note that the decision in the lower Court was delivered on 12th May 2016 and the application herein was filed on 13th June 2016, after a period of one month. There was thus no inordinate delay in filing the application.

On the fulfillment of the second condition, the Appellant needs to show what specific loss or prejudice she will suffer if she pays the decretal sum. The Appellant has in this respect stated that the Respondent will not be able to refund him the decretal sum of over Kshs 4,000,000/= in the event that his appeal succeeds. This averment in my view is sufficient and specific enough as to the substantial loss that the Appellant will suffer if the application is not granted.

The Respondent submitted in this regard that the Appellant ought to have provided cogent evidence that the Respondents are not persons of means. I am of the view that this is not a burden that can be placed on the Appellant, as he is not seized of such evidence. I am in this regard guided by the position as stated by the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Nrb CA Civil Application No 238 of 2005** where it was held as follows:

“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”

Lastly, on the third condition, the Appellant did affirm that that he is willing to furnish security by depositing half of the decretal sum in Court. I also note in this regard that the Appellant did not contest the averment that he did enter into a consent admitting liability in the trial Court.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant’s Notice of Motion dated 13th June 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment delivered on 12th May 2016 in **Tawa SRMCC No. 192 of 2015** and all consequential orders arising therefrom, pending the hearing and determination of the Appellant’s appeal filed herein, only on condition that the Applicant shall pay to the Respondent Kshs 2 million (Kshs 2,000,000/=), and deposit the balance of the decretal sum in an interest earning account in the joint names of the Appellant’s and Respondents’ Advocates on

record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

2. The costs of the Appellant's Notice of Motion shall follow the appeal

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 29th day of November, 2016.

P. NYAMWEYA

JUDGE