



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 250 OF 2014

RAKESH ANAND.....APPELLANT

VERSUS

ROBERT NZUMA JOHN

NAHASHON MWASI.....RESPONDENTS

RULING

1. The appellant sued the respondents in Milimani CMCC No. 7925 of 2010 for damages arising out of road traffic accident. The appellant claims that during discovery, the 1st respondent failed to supply him with some witness statements and correspondences included in his list of documents on a without prejudice basis. He then filed an application dated 24th September, 2012 seeking that the correspondences be expunged from the record and that he be supplied with the missing witness statements. The 1st respondent filed a preliminary objection to the said application. The preliminary objection was dismissed and the 1st respondent was ordered to file a replying affidavit to the application. The 1st respondent went ahead and obtained a hearing date for the application but which date his advocate inadvertently failed to diarise. During the pendency of that application, the 1st respondent proceeded with the hearing of the case on 22nd April, 2013 and obtained judgment. Subsequent to the delivery of judgment, the appellant filed an application to set aside the said judgment but the said application was dismissed. The appellant felt aggrieved and has filed a notice of motion dated 24th June, 2014 seeking stay of execution of the decree of 3rd October, 2013 in CMCC No. 7925 of 2010 pending hearing and determination of this appeal. The application is premised on the grounds that; the his application to set aside judgment and have the matter heard afresh was dismissed on 18th June, 2014; that the 1st respondent has already extracted a decree for KShs. 1,788,510/- and had previously proclaimed the appellant's goods; that if stay of execution pending appeal is not granted substantial loss will result to the appellant; that the appeal has a reasonable chance of success and if stay of execution is not granted the appeal will be rendered nugatory and that it is just and fair to grant the prayers sought. The application is supported by the appellant's supporting affidavit sworn on 22nd June, 2014. His gravamen is that the matter proceeded to trial and judgment entered yet the application dated 24th September, 2012 was pending and pre-trial had not been done. He laments that auctioneers, without proclamation, attached his wife's car and a friend's car that had been parked at his home and that his application seeking to set aside the judgment was dismissed. He stated that he would not be able to recover the decretal sum from the 1st respondent who is a subsistence farmer in the event the appeal succeeds. The appellant expressed his willingness to deposit fifty per cent (50%) of the decretal amount as security.
2. The application was opposed vide the replying affidavit sworn by the 1st respondent on 17th July,

2014. He contended that the 2nd respondent neither entered appearance nor filed defence occasioning entry of an interlocutory judgment against the appellant and the 2nd respondent on 11th March, 2011. It is the 1st respondent's contention that the appellant had no defence on liability since judgment on the same had been entered against the 2nd respondent who was his driver at the material time. He contended that the decision to dismiss the application to set aside judgment was exercised discretionally yet the appellant has not challenged it on the basis of having been exercised un-judiciously. He contended that the appellant has not satisfied the requirements for stay of execution. He stated that the orders of stay would delay the matter further occasioning him loss. He urged that in the event this court is inclined to grant the orders sought, the appellant be ordered to release half the decretal sum to him.
3. Parties canvassed this application by way of written submissions. The appellant in his submissions attempted to demonstrate that he had satisfied the criteria for stay of execution. He submitted that the balance of convenience lies in safeguarding the decretal sum which he states is substantial, for both parties pending the determination of this appeal. He submitted that this application was brought without unreasonable delay considering that the ruling dismissing his application to set aside judgment was delivered on 18th June, 2014 and on 24th June, 2014 he filed the instant application. He stated that he is willing to furnish security. In conclusion he stated that he had good grounds for the appeal.
 4. The 1st respondent on the other hand submitted that the application for stay of execution lacks merit for the reason that the appellant seeks to appeal against a discretionary order, that the appellant has not demonstrated that he stands to suffer substantial loss and that the issue of security is integral as was held in **Charles Kinanga Maena v. Joshua Nyamache Omasire., C.O.A. Kisumu Civil Appeal No. 93 of 2012** and that this court should find so.
 5. I have considered the depositions and the submissions therein. Order 42 Rule 6 (2) of the Civil Procedure Rules lay down the conditions which must be satisfied by an applicant for the grant of the orders for stay of execution pending appeal. The applicant must establish that; he/she stands to suffer substantial loss if the orders are not granted; the application must be filed timeously and the applicant must offer security for the due performance of the decree or order. See: **Halai & Anor v. Thornton Turpin (1963) Ltd (1990) KLR 365**.
 6. From my reading of the depositions, the 1st respondent has not disputed that the application was filed timeously. What is in contention is whether the appellant has demonstrated that he stands to suffer substantial loss and whether the security of 50% offered by the appellant is appropriate.
 7. The appellant averred that it stands to suffer substantial loss since its tools of trade have been proclaimed. What amounts to substantial loss was well explained by Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** as follows:

“...substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

The appellant lamented that the matter was not ripe for hearing yet the matter proceeded and judgment was delivered against him. I gather from the 1st respondent's depositions and it is in fact his position that the appellant had no defence on liability based on the fact that interlocutory judgment was entered against the driver. This led to the entry of interlocutory judgment against the appellant. The 1st respondent has however, admitted that the appellant filed a defence to his claim. It is my considered view that failure to be heard on merit under circumstances such as in the instant case meets the meaning of substantial loss described in **Daniel Chebutul Rotich** (supra) and is an arguable ground in an appeal. In the circumstances, I find that the appellant has established that he stands to suffer substantial loss.

On the issue of security, it was stated in **Halai's case** (supra) as follows:

“The court ought not to place a successful litigant in such disadvantageous position that should the appeal not be proceeded with or withdrawn or fail, the respondent would find it difficult to realise the fruits of his litigation due to the inadequacy of the security

ordered.”

The court in **Kenya Tanzania Uganda Leasing Co. Ltd v. Mukenya Ndunda (2013) eKLR** stated as follows on the issue of security:

“As I stated in the case of KENYA COMMERCIAL BANK LIMITED vs. SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced...”

Such balance is arrived at by making an order for suitable security for due performance of the decree awaiting the outcome of the appeal. The appellant herein has offered 50% of the decretal sum and has stated that the amount is a substantive one. The 1st respondent wants the said sum to be given to him. It is noteworthy that he has not contended the appellant’s claim that he is unable to recover the said sum in the event the appeal succeeds. The appellants offer is a show of good faith and I shall in those circumstances order that the appellant does deposit 50% of the decretal sum considering also that it is a huge sum of money.

The upshot is that the application is allowed and I make orders as follows:

- a. There be stay of execution of the decree of 3rd October, 2013 in CMCC No. 7925 of 2010 pending hearing and determination of this appeal.
- b. The appellant to deposit 50% of the decretal sum in a joint interest earning account in the names of the firms of the appellant’s and 1st respondent’s advocates within 14 days from today.
- c. Costs shall abide the outcome of this appeal.
- d. Orders accordingly.

Dated, Signed and Delivered in open court this 23rd day of January, 2015.

J. K. SERGON

JUDGE

In the presence of:

Kasyani for the Appellant

N/A for Odawa Ochich for the 1st Respondent