



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 249 OF 2013

(Being an appeal from the Judgment of the Hon. Mr. P. N. Gesora SPM, delivered on 26th November, 2013 in the Chief Magistrate's Court Machakos CMCC No. 920 of 2012)

BEATRICE MUNENE.....APPELLANT

VERSUS

MOLLY WANGUI GITAHU.....RESPONDENT

RULING

1. The application dated 26th February, 2014 principally seeks orders that the orders of the trial court made on 18th February 2014 directing the Appellant to release half of the decretal sum to the Respondent be set aside and that fresh orders of stay be issued pending the hearing and determination of the appeal.
2. It is stated in the affidavit in support of the application that the ruling of the lower court directed the Applicant to deposit half of the decretal sum in court within 14 days and release the balance to the Respondent. According to the Applicant, the terms of the said ruling will render her appeal nugatory in that the memorandum of appeal contests the award of the trial magistrate as highly excessive, incommensurate with the injuries sustained by the Respondent and unsupported by the evidence tendered during the hearing of the suit. That the appeal has high chances of success and the Respondent who is not a person of means may not be able to refund half of the decretal sum which comes to more than Ksh 1,000,000/= (*one million*). The Applicant is willing to deposit the entire decretal sum in court as security. It is further deponed that the application was made timeously.
3. The application is opposed. The Respondent filed a replying affidavit in opposition to the application. It is deponed that the application is an abuse of the court process, has been brought after inordinate delay and has been overtaken by events. It is stated that the Applicants goods have already been proclaimed by the auctioneers and therefore there is nothing to stay. It is further stated that the Applicant has not even deposited half of the decretal sum in court as ordered by the lower court. That the application is improperly before the court as the lower court has already granted the orders for stay of execution. The Respondent has further stated that she is a person of means who can afford to refund the decretal sum as she is a Judicial Officer.
4. The application was canvassed by way of written submissions which I have considered.
5. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** –

“(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.”*

6. The ruling of the lower court in the application for stay was delivered on 18th February 2014. The present application was filed on 27th February 2014. The application was filed timeously.

7. The Appellant was dissatisfied with the conditional stay of execution granted by the lower court. The Appellant is allowed under **Order 42 rule 6(1)** to apply to this court for stay, the refusal by the lower court to grant stay notwithstanding. The proclamation of the goods cannot be said to be a completed execution process. The application is therefore not overtaken by events.

8. It is observed that whereas the applicants complaint is the payment of half the decretal sum to the Respondent and is even willing to deposit the entire decretal sum in court, no evidence has been exhibited to demonstrate the deposit of the other half of the decretal sum in court as per the orders of the lower court.

9. While deciding an application of this nature, the court has to balance the interest of both parties. As stated by the Court of Appeal in **Kenya Shell Ltd. Vs Kibiri & Another (1986) KLR:-**

“In applications for stay the court should balance the parallel propositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.”

10. The Applicant is apprehensive that in the event that stay is not allowed, she will suffer substantial loss as the Respondent may not be able to refund the half of the decretal sum paid to her. The Respondent’s uncontroverted evidence is that she is employed and capable of refunding the amount.

11. I have considered the grounds of appeal in the memorandum of appeal. The contest is on quantum of damages, not liability. It is contended that the award of General Damages of Ksh 1,800/= and Ksh 20,000/= costs of future medical expenses is highly excessive. This is not a small sum of money by any standards. However, there being no contest on liability, the Respondent is entitled to enjoy some fruits of the judgment entered in her favour. I think the ½ of the decretal sum ordered by the trial magistrate is not unreasonable. In any event, it is evident that the Respondent is not a person of no means.

12. With the foregoing, I find no merits in the application and dismiss the same with costs. The Applicant to comply with the lower court orders within 14 days from the date hereof. In default the Respondent at liberty to execute.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 28th day of May, 2015

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B. THURANIRA JADEN

JUDGE