



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. 30 OF 2019

COLEY NJERU BILDADAPPLICANT

VERSUS

RENTWORKS EAST AFRICA LIMITED.....RESPONDENT

R U L I N G

1. Before this court is the Notice of Motion application dated 13th July 2021 and filed on 14th July 2021. The application is expressed to have been brought under the provisions of **Sections 1A, 1B & 3A** of the **Civil Procedure Act (Cap 21 of the Laws of Kenya)**, and **Order 22 Rule 22, Order 42 Rule 6 & Order 51, Rule 1 of the Civil Procedure Rules (2010)**.
2. The application seeks for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. **THAT** there be a stay of execution of the decree emanating from the judgment delivered on the 11th day of March 2021 in Chuka High Court Civil Appeal No. 30 of 2019 pending hearing and determination of the appeal at the Court of Appeal.
 - d. **THAT** costs of this application be in cause.
3. The application is based on the grounds on the face of it and is supported by the affidavit of the Applicant sworn on 13th July 2021.
4. The Application was opposed by the Replying Affidavit sworn on 2nd November 2021 by Sammy Kamau Wanjiku, the Claims Manager of Fidelity Shield Insurance Company Limited, on behalf of the Respondent company, its insured. The deponent that there is no risk of the Applicant's appeal in the Court of Appeal being rendered nugatory as the insurance company is financially solid and so is the Respondent company.
5. The application was canvassed by way of written submissions. The Applicant filed his submissions on 2nd December 2021 while the Respondent filed its written submissions on 8th December 2021.
6. It was the Applicant's submission that the Applicant will or may suffer loss if the Respondent executes any time once a ruling on the bill of costs is delivered. The Applicant further submits that he is ready and willing to deposit security as the court may order.
7. The Applicant relied on the cases of **RWW v. EKW(2019)**; **Arun C Sharma v. Ashana Raikundalia t a & Co Advocates** (citation not provided); and **Butt v. Rent Restriction Tribunal (1982) KLR 417**.
8. The only issue for determination is whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of decree pending appeal.
9. A brief background of this case is that the Applicant herein instituted a case in lower court (Chuka CMCC No. 235 of 2018) seeking damages against the Respondent following a road traffic accident that occurred on or about 14th November 2016. The lower court entered judgment in favour of the Applicant against the Respondent herein by awarding him Kshs. 2,000,000/= as general damages for pain, suffering, loss of amenities and future medical expenses subject to the agreed contributory negligence of 20%.
10. Being aggrieved by the said judgment, the Respondent appealed to this court and the award of damages was reduced to Kshs. 600,000/=

less the 20% contributory negligence.

11. The Applicant has now lodged an appeal at Nyeri being Civil Appeal No. E51 of 2021 against the judgment of this court that was delivered on 11th March 2021.

12. I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon.

13. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under **Order 42 Rule 6** of the *Civil Procedure Rules (2010)* which provides as follows:

“(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.”

14. In **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR**, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under **Order 41 Rule 6** of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

15. Thus, the only issue for determination by this court is whether the Applicant has discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

16. Firstly, the Applicant must satisfy that he will *suffer substantial loss*, unless the orders sought are issued. The first question is whether the Applicant has demonstrated the likelihood of suffering substantial loss if the prayer for stay of execution is denied. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

17. In the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** the court held as follows:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two 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.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

18. It is evident that the Applicant has obtained a money judgment in its favour. In my view, there is no evidence of substantial loss to the Applicant.

19. Counsel for the Applicant argued that the appeal will be rendered nugatory and substantial loss suffered if execution of the decree proceeds, as there is a likelihood that the Respondent will be unable to repay the decretal sum should the appeal succeeds.

20. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** the Court of Appeal stated that:

“This 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 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, Chapter 80 Laws of Kenya.”

21. The judgment awarded by this court is for a net value of Kshs. 480,000/=. The lower court had awarded the Applicant Kshs. 2,000,000/= and the Respondent was able to pay Kshs. 500,000/= to the Applicant and deposit Kshs. 1,500,000/=. In my view, this is sufficient proof of the Respondent's financial means.

22. In the circumstances of this case, I opine that the Applicant has not satisfied the conditions for grant of stay of execution. It is therefore my view that the present application lacks merits.

The application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 3RD DAY OF FEBRUARY 2022.

L.W. GITARI

JUDGE

3/2/2022