



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 9 OF 2021

ERICK NYAMBANE SAGANY.....1ST APPELLANT/APPLICANT

JOHN KEBASO MASIEK.....2ND APPELLANT/APPLICANT

VERSUS

ELZABETH CHEPKEMOI(suing as a legal administrator of the estate

of the late ROBERT KIPYEGON CHEPKWONY).....RESPONDENT

RULING

1. The applicant filed the present application dated 13th May 2021 seeking the following orders;

a. spent

b. Spent

c. THAT this Honourable Court be pleased to stay the execution of the judgment/decree herein pending the hearing and determination of the Appellants/Applicant's Appeal in Nakuru HCCA No.9 of 2021.

d. THAT the Appellants/Applicants be allowed to furnish a bank guarantee in court as security for due performance of the Judgement/decree herein pending the hearing and determination of the Appeal.

e. THAT this Honorable Court be pleased to issue any other orders as it may deem just, appropriate and expedient in the interest of justice.

f. THAT costs of this Application be provided.

2. The application was based on the grounds on the face of the application and supported by the affidavit sworn by Kevin Ngure, General Manager Claims, at Direct Assurance Company Limited who are the insurers of Motor Vehicle Registration No. KCG 953 N, the accident motor vehicle.

3. The applicant's case is that on 20th January,2021 the lower court delivered judgment against the Applicants in favour of the respondent in the sum of Kshs.398,730/=.

4. Dissatisfied, the applicant filed an application dated 22nd February 2021 before the trial court seeking stay of execution pending hearing of the Appeal. The same was dismissed with costs to the Respondent vide a Ruling dated 12th May, 2021.

5. The applicant is apprehensive that the Respondent herein, being the decree holder, might proceed to execute against the Applicants if stay sought is not granted hence rendering this appeal nugatory and thus occasioning them irreparable loss. Further that the respondent's physical address and means are unknown to the applicant and there is apprehension that if the Respondent is paid the substantial decretal amount she may not be in a position to refund the same in the event the appeal is successful thereby occasioning the applicants' substantial loss.

6. The applicant is ready and willing to provide a Bank Guarantee as security for the performance of the decree.

7. It is the Applicants' position that the application has been made without any unreasonable delay, it will not occasion any prejudice to the Respondent and that the Appeal lodged is meritorious.

8. In opposing the application, the Respondent Elizabeth Chepkemoi Birir swore an Affidavit on 16th June 2021 to the effect that the application is frivolous, ambiguous, vexation and abuse of the court process. That the accident occurred in the year 2017 and she had waited for over four (4) years to get justice and thus it would be unfair and unjust to wait for unknown period of time to enjoy the fruits of her judgment.

9. That the application is meant to deny her justice and urged the court to dismiss it. She further deposed that if the Honourable Court was inclined to allow the application then Applicants should be ordered to pay her half of the decretal amount and the balance to be deposited in a joint interest earning account in the names of the parties' advocates, and also to pay her advocate costs of the lower court to be assessed at Kshs.91,135/=.

10. The parties consented to canvass the application by way of written submissions.

APPLICANT'S SUBMISSIONS

11. The Applicants filed their submissions dated 13th July, 2021 on 16th of July 2021.

12. They argued that they have met the conditions required for stay to be granted.

13. On whether they will suffer substantial loss, the applicants submitted that they have a meritorious appeal which has high chances of success and if orders sought are not granted the respondent may levy execution against them thus rendering the appeal nugatory leading to substantial loss. They argued that the respondent had neither disclosed nor furnished the court with any documentary proof of her financial standing. For this position the Applicants relied on the case of **Amal Hauliers Limited Vs Abdulnasir Abukar Hassan [2017] eKLR.**

14. The applicants submitted that they filed the appeal without delay. That the trial court did not grant them stay of execution orders and they filed an application before the lower court seeking for stay within a reasonable time.

15. On the issue of security, the applicants submitted that they are willing to deposit in court the principal sum.

RESPONDENT'S SUBMISSIONS

16. The Respondent's submissions dated 27th September 2021 were filed in this court on 27th September, 2021.

17. The Respondent reiterated the averments contained in her Replying Affidavit. In support of her submissions she cited the cases of **Joseph Muchiri Mwangi vs Mary Moraa Machuka & David Mwandika Munyao (Suing as the legal administrators of the estate of Patrick Munyao Daudi (Deceased) Civil Appeal Number 52 of 2016** and **Kenya Wildlife Services vs Sabina Mwothiru Civil Appeal Number 52 of 2017.**

ISSUES FOR DETERMINATION

Whether the Applicants have the application has met the threshold for grant of stay of execution pending determination of an Appeal as envisaged under Order 42 Rule 6.

ANALYSIS

18. Order 42 rule 6(2) of the Civil Procedure Rules 2010 states;

“(2) No order for stay of execution shall be made under sub rule (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.”

SUBSTANTIAL LOSS

19. The burden of proof on whether the respondent will be able to reimburse the decretal sum falls on him upon any concerns raised by the Applicant that he is unable to do the same.

20. I am guided by the finding in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & another [2006] eKLR** where the court held;

“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.”

21. In Swapan Sadhan Bose vs Ketan Surenda Samaia & Others [2006] eKLR it was stated as follows;

“This Court has said before and would bear repeating that while the legal duty is on the 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 the 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.”

22. The respondent did not respond to the issue raised as to her financial capacity to refund the money should the appeal succeed. **Whether the application was made without unreasonable delay**

23. It is not uncontroverted that the lower court’s judgement was delivered on 20th January 2021. The applicants filed the Memorandum of Appeal on 16th February, 2021 and an application dated 22.2.2021 before the lower court seeking stay of execution pending hearing and determination of the Appeal. The ruling to that application was delivered on 12.5.2021. The instant application was filed on 18th May, 2021. In the circumstances therefore, the Appeal and the application were filed without unreasonable delay.

SECURITY

24. The applicants in their supporting affidavit deponed that they are willing to furnish the court with a bank guarantee as security. In their submissions, they submitted that they are willing to deposit the principal amount in court as security.

25. In Application of this nature the Court should balance the Parties ‘competing interests i.e. that a successful litigant should enjoy the fruits of the judgment and at the same time allow an aggrieved party to exercise his right of Appeal.

26. The application is not resisted if the applicant can pay some of the decretal sum to the respondent. It is in the Memorandum of Appeal that the applicant seeks re assessment of liability and the awards made to the respondent.

27. In the circumstances of this case the application is allowed in the following terms;

i. THAT there be stay the execution of the Judgment/Decree herein pending the hearing and determination of the Appellants/Applicant’s Appeal in Nakuru HCCA No.9 of 2021.

ii. The entire decretal sum be deposited in a joint interest earning account in the joint names of the parties’ advocates within (45) days from the date hereof. In default the order of stay to lapse automatically.

iii. The Appellants to file and serve their Record of Appeal within sixty (60) days from the date of hereof this Ruling failing which the Respondents will be at liberty to take such appropriate steps to safeguard their interests.

iv. The costs of this application to abide the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2022

MUMBUA T. MATHEKA

JUDGE

CA Edna

Kimondo Gachoka & Co Advocates for the Applicant

Omonywa Mamwacha & Co Advocates for respondent