

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO 30 OF 2019

WAINAINA MWAURA ANTHONY.....APPELLANT

-versus-

IBEERE HENRY MURURU.....1ST RESPONDENT

JOHN RONO.....2ND RESPONDENT

KIPKOECH TONUI JOHN.....3RD RESPONDENT

RULING

Stay of execution

[1] Before me is a Notice of Motion dated 17th March 2020 which essentially seeks stay of execution pending appeal under order 42 rule 6 of the Civil Procedure Rules. The Motion is premised upon grounds set out in the motion, the supporting affidavits by MAUREEN GICHIMU and submission filed. The main argument by the applicant is that their appeal will be rendered nugatory unless stay of execution is granted, thus, occasioning the applicant substantial and irreparable loss. They argued that the 1st respondent is incapable of refunding the decretal sum if the appeal succeeds. They proposed to deposit the decretal sum in a joint account in the names of both counsels as security. Mr. Ogando for the applicant reinforced this commitment.

[2] The respondents opposed the application and filed replying affidavit and submissions. The main point of opposition is that the application does not meet the threshold for stay of execution; i.e. it has not established that it will suffer substantial loss unless appeal is granted. According to the 1st respondent, poverty should not be a basis for keeping a party from enjoying the fruits of judgment. They submitted that the court should consider all aspects of the case in order to balance the right of appeal with that of enjoyment of fruits of judgment. They however submitted that, should stay be granted, the appellant should be required to pay 35% of the decretal sum to the 1st respondent.

NALYSIS AND DETERMINATION

Stay of execution

[10] Stay of execution pending appeal provided under Order 42 rule 6 of the Civil Procedure Rule is a discretionary remedy granted only where sufficient reason has been shown. The predominant objective of the said remedy being; to prevent substantial loss from befalling a successful appellant; being reduced to a holder of a barren result of appeal. Such is a loss of real value as opposed to loss without value or nominal loss; for it blows away the essential core of the right of appeal. In money decrees, the loss ordinarily consist in the inability of the Respondent to refund the decretal sum should the appeal succeed or subjecting the successful appellant to hardships in the recovery of the decretal sum from the respondent. There is however, another eminent reality; the respondent's right to immediate enjoyment of the fruits of judgment. I am aware that the 1st respondent has argued that poverty *per se* should not be a basis for keeping a party from the fruits of judgment. Be that as it may, the greater comfort is that none of the rights is the lesser. Such are simply competing rights; settlement of which requires a subtle judicial balancing act in order to serve justice in the case; an act that never elevates or subjects one right over or to the other, respectively. The court had occasion to deal with this subject in **ABSALOM DOVA vs. TARBO TRANSPORTERS [2013] eKLR and stated:**

‘The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant has right of appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder has right to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination’

[8] In this case, it seems parties are not averse to stay of execution being granted on terms. The applicant proposes to deposit the entire decretal sum in a joint account in the name of counsels for both parties. The 1st respondent proposes that 35% of the decretal sum be paid to him as condition of stay. I do note that, on 14th November, 2020, I directed the appeal to be fast-tracked and ordered the parties to file and serve submissions on the appeal within a given time. The appellant as well as 1st respondent has already filed submissions. In the circumstances of this case, depositing the portion of the decretal sum due from him in the joint names of counsels for both parties secures the rights of the parties in symmetrical fashion. The money will be available for satisfaction of the decree that may become bonding upon the appellant. It will also secure the appellant's right of appeal. Accordingly, I order the appellant to deposit the portion of the decretal sum due from him in an interest earning account in the joint names of counsels for both parties within 30 days of today. It is so ordered.

Dated, signed and delivered at NAROK through Microsoft Teams Online Application this 1st day of February 2021

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F. GIKONYO

JUDGE