



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 157A OF 2020

JOHN KINUTHIA NJOROGE.....APPELLANT/APPLICANT

VERSUS

MARJORIE MURIGI SAIDI.....RESPONDENT

OCCIDENTAL INSURANCE CO. LIMITED....INTERESTED PARTY

RULING

1. The subject matter of this ruling is the Notice of Motion dated 23rd October, 2020 taken out by the appellant/applicant in which he sought for an order for a stay of execution of the judgment delivered on 13th March, 2020 in Milimani CMCC NO. 7611 of 2004 and all consequential orders, including the order made by the trial court on 9th October, 2020 pending the hearing and determination of the instant appeal.
2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of the applicant. To oppose the said Motion, the respondent swore a replying affidavit on 23rd November, 2020.
3. The Motion was dispensed with through written submissions. There is no indication of participation by the interested party at the hearing of the Motion.
4. I have considered the grounds set out on the face of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; and the contending written submissions plus authorities cited.
5. Going by the record, a brief background of the matter is that the respondent herein instituted a suit against the applicant and sought an award of damages arising out of a road traffic accident. Upon hearing the parties, the trial court delivered its judgment in favour of the respondent against the applicant, and made an award of Kshs.3,500,000/ in general damages.
6. The aforementioned judgment prompted the instant appeal and according to the record, the applicant filed the application dated 21st July, 2020 before the trial court seeking an order for a stay of execution pending the hearing and determination of the appeal. That upon hearing the parties, the trial court in its ruling delivered on 9th October, 2020 granted the order for a stay of execution pending appeal on the condition that the applicant deposits the decretal sum of Kshs.1,8877,034/ in a joint interest earning account in the name of the parties' advocates within 30 days from the date of the ruling.
7. It is clear that the applicant is now before this court seeking a similar order for a stay of execution. It is also apparent from the record that the ruling/order of 9th October, 2020 has not been complied with and hence the order for stay granted therein has since lapsed.
8. The guiding provision in determining applications seeking an order for a stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out three (3) conditions to be met for such an application to succeed.
9. The **first** condition is that the application must have been made without unreasonable delay. In his affidavit, the applicant states that the instant Motion has been timeously filed. In contrast, the respondent is of the view that the Motion is a mere afterthought and that it has not been made in good faith.
10. From my perusal of the record, I note that while none of the parties has availed a copy of the judgment and decree to this court, it is not in dispute that the impugned judgment was delivered on 13th March, 2020. It is also not in dispute that the applicant had sought and been granted a conditional order for a stay of execution vide the ruling delivered on 9th October, 2020.
11. The Motion was filed within weeks of the aforementioned ruling. In my view, I do not think that there has been any unreasonable delay

in bringing the Motion.

12. Under the **second** condition, the applicant must show to this court's satisfaction the substantial loss he would likely suffer if the order for stay is denied. The applicant states that he was unable to comply with the conditions for stay issued by the trial court owing to the prevailing Covid-19 pandemic which has brought a strain to his business, and that unless a similar order for a stay is granted, he stands the risk of suffering irreparable loss and the appeal will likely be rendered nugatory.

13. In his submissions, the applicant goes on to argue that the respondent has not shown her financial ability to refund the decretal sum upon payment of the same to her and a successful outcome on appeal.

14. On the other hand, the respondent avers that the applicant has not brought any evidence to show his financial difficulties or to demonstrate the irreparable loss he will suffer in general. Reference to the case of **Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR** in which the court held thus:

“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.

If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business.”

15. It is also the submission of the respondent that since the material accident, she has been undergoing physiotherapy sessions which have been quite costly and that she continues to rely on well-wishers for financial and emotional support.

16. The legal position is that execution is a lawful process and hence a party cannot simply argue that a stay of execution is necessary in order to halt or prevent execution. It is on this basis that the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** cited by the respondent, rendered itself thus:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

17. Upon considering the rival arguments by the parties, I observed that though the applicant did not bring any documentary evidence to support his assertion on his financial difficulties, this court acknowledges and appreciates the adverse and far reaching global impact of the Covid-19 pandemic in the private and public sector alike.

18. Moreover, since this issue was raised, the question on who has the burden of proof on the issue of refund of the decretal sum was addressed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** when it held that:

“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...”

19. In the absence of any indication on whether the respondent is in a financial position to refund the decretal sum should the circumstances require, I am satisfied that the applicant has reasonably shown that he will suffer substantial loss should the order for a stay of execution be denied.

20. In respect to the **third** and final condition which is the provision of security for the due performance of such decree or order, the applicant indicates his readiness and willingness to abide by any conditions that will be set by this court. The respondent urges that should this court be inclined to grant an order for a stay of execution, then conditions similar to those issued by the trial court on 9th October, 2020 do apply.

21. In my view, while it is clear that the applicant did not comply with the conditions earlier laid down by the trial court, I find that it would only be fair to balance the interests of the parties herein, for all the foregoing reasons laid out hereinabove. In the end, the Motion succeeds in terms of prayer 3.

23. Consequently, there shall be a stay of execution of the judgment delivered on 13th March, 2020 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 60 days from today, failing which the order for stay shall automatically lapse.

Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 11th day of March, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent

..... for the Interested Party