



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 118 OF 2019

BORNFACE MUNGAI NGURE.....APPELLANT

VS.

ROSE WANGARI WANGUI (*suing as the legal*

representative of the estate of ANTHONY

GACHAMIU MUTHIGA)..... RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate' Court at Kiambu, W.O. Rading delivered on 11th July, 2019, Civil Case No. 466 of 2018)

RULING

1. In Civil Case No. 466 of 2018 Kiambu Chief Magistrate's court (the trial court) delivered judgment in favour of the respondent in this appeal for Kshs.4,164,000/=. The appellant being aggrieved by that award, has filed the present appeal. The appellant has filed several applications dated 14th November, 2019, 20th November, 2019 and 26th November, 2019. By those applications the appellant seeks to stay the judgment of the trial court.

ANALYSIS

2. I have considered the parties' affidavit, evidence and submissions.

3. It is important to start by considering the preliminary objection raised by the respondent to the effect that the appellant, having made a similar application before the trial court was barred from seeking similar orders before this Court for stay of execution pending appeal.

4. My simple response to that objection is that the appellant is permitted to make a similar application before this Court by **Order 42 Rule 6(1)** of the Civil Procedure Rules. That Rule provides:-

"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." (underlining mine)

5. A case in point on that Rule is **PATRICK KALAVA KULAMBA & ANOTHER VS. PHILIP KAMOSU AND RODA NDANU PHILIP** (*Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (deceased)*) (2016) eKLR, where it was held:-

"12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty...to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof..."

6. It is conceded by the respondent that the appellant has paid to the respondent Kshs.2,211,718, being part of the trial court's judgment

amount leaving a balance of Kshs.2,217,718/- (without application of interest). The respondent accepts that the appeal before this Court will consider the trial court's finding on quantum of damages. With that in mind I make a finding in balancing the interest of both parties that a stay of execution ought to be granted on terms.

DISPOSITION

7. I grant the following orders:-

(a) There shall be a stay of execution of the judgment and decree of Kiambu Chief Magistrate's Court Civil Case No. 466 of 2018 pending the hearing and determination of this appeal on condition that the appellant does file in this case and serve within 30 days from today the respondent with a bank guarantee to pay Kshs.2,200,000/= if such payment shall be required by this Court.

(b) The costs of the applications dated 14th and 20th and 26th November, 2019 and dated 26th January, 2021 and the preliminary objection dated 9th December, 2020 shall abide with the outcome of this appeal.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU THIS 6TH DAY OF MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Kevin

For the appellantMs. Mukami holding brief for Mr. Onyango

For the respondent.....N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE