



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**CIVIL APPEAL NO. 248 OF 2019**

**MAHMOUD MUFTAH MUKHTAR.....APPELLANT**

**VERSUS**

**RAI NGAO NYAE.....RESPONDENT**

**RULING**

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated **2<sup>nd</sup> March, 2020**. The same is expressed to be brought under **Sections 3A of the Civil Procedure Act, Order 42 Rule 2** all of the **Civil Procedure Rules, 2010**. By the Application, the Appellant/ Applicant seeks the following orders:-

**1) Spent;**

**2) Spent;**

**3) THAT pending the hearing and determination of this Appeal this Honourable Court be pleased to stay the orders and Ruling of court (Hon. Muchoki, SRM) granted on 4<sup>th</sup> November, 2019 in Mombasa and any other order that may be issued pursuant thereto, pending the hearing of the Appeal;**

**5) THAT the costs of this application be provided for.**

2. The **Motion** is supported by the grounds presented on its body and the **Affidavit** of **Mahamoud Muftah Mukhtar**, the Appellant/ Applicant. He averred that he was the Defendant in **Mombasa SRMCC No.2242 of 2018** wherein a **Ruling** was delivered on **4<sup>th</sup> November, 2019**.

3. **Mr. Mahamoud** depones that he is aggrieved by the decision that was rendered by the trial court and has preferred the instant Appeal which may be rendered nugatory if this court does not grant the orders of Stay of Execution pending the hearing of his Appeal.

4. **He also averred that unless stay is granted pending the hearing and determination of the appeal the Respondent will move to enforce the Ruling of 4<sup>th</sup> November, 2019 and render the appeal nugatory.**

5. According to the Appellant/Applicant, the Respondent is a man of straw and will not be able to refund the decretal sum to the Applicant should this appeal succeed. He added that the Respondent has expressed the intention to execute vide a letter dated **6<sup>th</sup> November, 2019**.

6. The Respondent opposed the Application vide a **Replying Affidavit** sworn on **13<sup>th</sup> March, 2020**. He averred that on **3<sup>rd</sup> July, 2019**, **Judgment** was entered in his favour for the sum of Kshs.400,000/= general damages, Kshs.13,250/= special damages plus costs and interests giving an all-inclusive sum of Kshs.473,125/=.

7. It was deponed by the Respondent that once the judgment was issued in his favour and the Appellant defaulted to pay, he instituted execution proceedings that were stayed by the Appellant before the trial court and a temporary stay was issued on **22<sup>nd</sup> August, 2019**.

8. On **4<sup>th</sup> November, 2019**, the trial court dismissed the Appellant's application for stay which prompted the filing of the **Memorandum of Appeal** on the **4<sup>th</sup> December, 2019**.

9. The Respondent avers that the filing of the **Memorandum of Appeal** is a delaying tactic as the Appellant has not filed a **Record of**

**Appeal** to date, showing that he is not desirous with the Appeal herein.

10. According the Respondent, the Appellant has not complied with the requirements of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The Application herein has been filed, the Ruling sought to be appealed against was delivered on **4<sup>th</sup> November, 2019**, the instant application has been brought four months later on the **2<sup>nd</sup> March, 2020**.

11. He further stated that the Applicant has not shown the substantial loss he will suffer that cannot be compensated by an award of damages and that the Applicant is unwilling to furnish security all as required under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** for an order of stay of execution pending Appeal to issue.

12. Further, the Respondent depones that if this court is inclined to grant the stay of execution pending appeal, the Appellant/Applicant be ordered to deposit the entire decretal amount either in Court or in a joint interest earning account bearing the names of both advocates.

13. The Respondent urges this court to dismiss the Appellant/Applicant's as it is misplaced, misconceived, incompetent, frivolous and that the Appellant/Applicant are undeserving of the orders as sought.

14. Following the directions given by the court, the matter was disposed of by way of written submissions. The Appellant's/Applicant's submissions are dated the **10<sup>th</sup> February, 2020** and filed on **11<sup>th</sup> February, 2021** whilst the Respondent's submissions are dated and filed on **12<sup>th</sup> March, 2021**.

15. Parties relied on their written submissions in their entirety.

### **Analysis and determination**

16. Having considered all the pleadings and written submissions by the parties, the issue that arises for determination is whether this court can issue stay of execution of the Ruling and Orders granted on **4<sup>th</sup> November, 2019** pending the hearing of the Appeal.

17. **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -

**a) Substantial loss may result to the applicant unless the order was made;**

**b) The application was made without unreasonable delay; and**

**c) Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.**

18. From the above provision, it is clear that the power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, being **where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose.**

19. I am also of the view that to grant or not to grant an application for stay of execution pending Appeal is discretionary in that when granting stay, the court has to balance the interests of the Applicant with those of the Respondent. I will apply the said conditions of stay of execution in this case.

20. The Applicant in this case has averred that if stay is not granted, the Respondent may proceed to execute. It was submitted that the Respondent is a man of straw and unable to refund the decretal amount incase the Appeal succeeds and this position was not rebutted. I must reiterate the fact that an allegation that the process of execution is likely to be put in motion does not by itself amount to substantial loss and for that reason, I do not agree with the Applicant's submission to that extend.

21. The other ground taken out by the Applicant to demonstrate that he is likely to suffer substantial loss is that the Respondent herein is of unknown income and he has not demonstrated the ability to repay the decretal sum if stay is not ordered and the end result is that the Appeal will be rendered a mere academic exercise. The Respondent on the other hand has not submitted on this issue but has asserted that the Appeal is a delay tactic mounted to defeat the right to a successful Judgment.

22. I will borrow from the sentiments of Court of Appeal while considering a scenario similar to the issue at hand in the case of **National Industrial Credit Bank Limited –vs- Aquinas Francis Wasike & Another 2006 eKLR**. The Court held thus:-

***“This court has said before and it would bear repeating that while the local 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 an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show resources he has since that is a matter which is peculiarly within his knowledge”.***

23. The Respondent has not disclosed that he has means to refund the Applicant the decretal sum should the Appeal succeed. The income of the Respondent has not been disclosed nor has he sworn an affidavit to show that the economic activity he engages in can generate income capable of refunding the decretal sum. The law as I understand it and further, guided by the Court of Appeal decision cited above, is that, the

Appellant having expressed the fear of the Respondent not being able to refund the decretal sum, it was for the Respondent to allay such fears by stating its ability to refund. Having not done so, I hold the view that the Appellant's fears are not idle and that it needs to be taken into account in considering the prayer for stay.

24. In the decision of **Kenya Shell Ltd – vs- Kabiru**[1956-KLR 410, the Court of Appeal further pointed out that if an Applicant alleges difficulties in recovery of the decretal sum it rests on the Respondent to show that he would be able to effect a refund. The same court has in the case of **Kenya Hotel Properties Limited –vs- Willesden Properties Limited, Civil Application Nai 322/2006** reiterated in the case of **Housing Finance company of Kenya –vs- Sharok Kher Mohamed Ali Hirji & Another** [2015]eKLR, where it was stated that even in an application involving a money decree a stay of execution pending appeal may be granted so as to alleviate any undue hardship the Applicant would suffer if stay is refused.

25. In this particular case, I am satisfied that the Applicant has demonstrated the likelihood to suffer substantial loss if stay is not ordered. The Appeal may be rendered a mere academic exercise if the Respondent is unable to refund the decretal sum in case of a successful Appeal.

26. On whether or not the application was brought without undue delay, this application was filed on **2<sup>nd</sup> March, 2020** while the **Ruling** was delivered on **4<sup>th</sup> November, 2019**. Clearly, there has been a four (4) months delay that has not been explained. The Appellant/ Applicant did not seem to realize the threat to execute until the Respondent wrote a letter dated the **5<sup>th</sup> November, 2019**.

27. Apart from proof of substantial loss, the Applicant is enjoined to provide security. This is the final issue for consideration in an application seeking orders for stay pending appeal. However, in this case, the Applicant has not expressed any willingness to furnish security in due performance of the decree issued by the lower court. What he alleges is that his motor vehicle was insured and the insurer is capable to pay the decretal sum hence there is no need for depositing any security.

28. My view is that the proposal to provide security should always come from the Applicant but not for the court to propose the same to him. It is a mark of good faith and if the Applicant so proposes, it implies that the application is not just meant to deny the Respondent the fruits of his/her/its Judgment. In this case, however, the impression created by the Applicant is the opposite. Indeed, how I understand his submissions is that execution should not be commenced against him for the reason that his insurer is able to pay the amount claimed. If I was to adopt his line of argument then that would not be an impartial determination simply because the right of the Respondent to enjoy the fruits of a successful Judgment would not have been weighed against the Appellants right to appeal, on a balance of justice. In any event, it would be also right to state that in view of the Applicant's submissions, if the execution process was initiated against him, then his insurer would reimburse him.

29. In the upshot, the Applicant has not established the grounds prerequisite to grant of orders of stay which should be considered collectively. I therefore find that this is not a case of the Applicant and I consequently disallow the Application **dated 2<sup>nd</sup> March 2020**. However, I direct that each party bears its own costs.

It is hereby so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 18<sup>TH</sup> day of MAY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**