



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 150 OF 2017

DICKSON CIURI WANJIRU.....APPELLANT

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU.....2ND RESPONDENT

RULING

1. This is a ruling on application dated 13th March 2020. It seeks the following orders: -

1) Spent

2) Spent

3) Stay of execution of this court's judgment/decree pending hearing and determination of the intended Appeal preferred against this court's judgment/decree dated 27th February 2020.

4) Costs of this application to be provided for.

2. Grounds on the face of the application are that the 2nd respondent being aggrieved with the judgment dated 27th February 2020 intends to appeal against it and has filed notice of appeal dated 27th February 2020 and if the decree/judgment is not stayed, the intended Appeal will be rendered nugatory and would occasion substantial loss to the 2nd respondent. Further that the award of kshs 403,000 plus costs is substantial.

3. That based on the proceedings recorded before the subordinate court, the appellant/respondent is not a person of means and might not be able to refund the decretal sum; that the applicant has moved this court timeously and is amenable to furnishing security pending hearing and determination of the intended appeal; that the appellant /respondent will suffer no real prejudice.

4. The application is supported by affidavit sworn by **Sophie Omolo** the Legal Officer M/s First Assurance Company Limited. She averred that the 2nd respondent is obligated by the statute to satisfy the judgment/decree of this honourable court delivered on 27th February 2020. She restated the grounds in support of the application as captured above. She averred that it is fair and just and in the wider interest of justice to stay execution of judgment of 27th February 2020 pending hearing and determination of the preferred appeal in the Court of Appeal.

5. In response, the appellant filed replying affidavit dated 10th June 2020 sworn by the appellant. He submitted that the respondent has failed to demonstrate that the appeal will be rendered nugatory. He submitted that he suffered serious injuries as shown by documents produced in court and the applicant instead of compensating him is employment delay tactics to frustrate the compensation.

6. The respondent averred that he is a businessman with good returns and is capable of refunding the applicant's funds if the appeal succeeds.

7. He averred that he has information that the defendants wish to settle the claim but the insurers are adamant; further that the application herein is premature as the decree has not been approved.

8. He averred that the applicant has resources to deposit in court or in a joint interest earning account but that will not help him as he has waited for justice for over 8 years.

2ND RESPONDENT'S/APPLICANT'S SUBMISSIONS

9. The 2nd respondent filed submissions dated 25th June 2020. The 2nd applicant submitted that being aggrieved by the decision of this court, it promptly filed notice of appeal on 27th February 2020 and lodged appeal on 5th March 2020.

10. The applicant submitted that the grounds to be satisfied for stay of execution pending appeal are well espoused under **order 42 Rule 6 (2)** of the **Civil Procedure Rules** which provide that the following conditions should be satisfied: -

- 1) **Substantial loss shall be occasioned to the applicant.**
- 2) **The application has been made without unreasonable delay.**
- 3) **The applicant has given adequate security for due performance of the decree as ordered by the court.**

11. The applicant cited the case of **Onesmus Kinyua Michudu v Mishi Kambi & Another [2019] eKLR** where the case of **Kiambu Transporters Vs Kenya Breweries** was cited where the court stated that the conditions listed above must be satisfied for stay of execution pending appeal to be allowed.

12. The applicant submitted that the application was filed timeously; that the notice of appeal was filed before the end of 14 days.

13. On issue of substantial loss being occasioned, the applicant submitted that if stay is not granted, the 2nd respondent will be made to pay kshs 403,000 plus costs and interest and is apprehensive that if appeal succeeds, it will not be able to recover the amount based on the fact that the applicant's worth and assets are unknown to the 2nd respondents and cited several authorities where substantial loss was defined and submitted that substantial loss is just but loss whose worth can be established and submitted that the decretal amount herein is substantive amount; that the record show that the plaintiff stated that he is a motor cycle rider and further that the respondent besides stating that he is a businessman whose returns are good and capable of refunding but failed to provide prove of his means of paying the decretal amount if appeal succeed.

14. On willingness to tender security, the applicant submitted that the second respondent is amenable to tendering security to court as part of condition of having this application allowed.

RESPONDENT'S SUBMISSIONS

15. The respondent submitted that the court cannot confirm whether the applicant has an appeal with chances of success as they have not attached the memorandum of appeal.

16. On whether the appeal will be rendered nugatory, the respondent submitted that they have not specified exact loss they will suffer and cited the case of **Mutua Kilonzo Vs Kioko David [2000] eKLR** where the court dismissed the applicant on ground that the applicant failed to prove how he will suffer substantial loss and the case of **Kenya Shell Limited Vs Benjamin Karuga & Another [1986] eKLR** where the court held that it is not normal in money decrees for the appeal to be rendered nugatory, if payment is made.

17. On deposit of security, the respondent submitted that the applicants have not specified the amount of security they are willing to deposit.

18. The respondent further submitted that the applicants were held 50% liable and since they have not attached memorandum of appeal, it is not clear they are appealing on liability or quantum and urged this court to dismiss the application and order the applicant to pay the respondent the entire decretal amount.

ANALYSIS AND DETERMINATION

19. I have considered arguments by the parties herein. Conditions for grant of stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

“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.”

20. The Court of Appeal in *Halai & Another v Thornton & Turpin [1990] eKLR 365*, held as follows: -

“Whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. “

21. In respect to filing of application for stay timeously, there is no doubt that the application was filed in time.

22. On whether appeal will be rendered nugatory, I note that besides the respondent indicating that he is a businessman and capable to refund the decretal amount, he has not attached any document to confirm his capability.

23. On deposit of security to perform the decree, the applicant has not proposed the amount its willing to deposit but in view, the court has discretion to order the deposit and reasonable amount to be deposited as security.

24. FINAL ORDERS

1) Stay of execution pending appeal is allowed on condition that the decretal amount is deposited in court within 30 days from the date of this ruling.

2) Costs of the application in the cause.

Ruling dated, signed and delivered via zoom at Nakuru This **3rd** day of **June**, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola- Court Assistant

Mr. Muchela Advocate for Applicant

Ms. Kiberenge Advocate for Respondent