



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.E010 OF 2021**

**1. AWADI ALI AWADH**

**2. SHEIKH ALI**

**INVESTMENT LIMITED.....APPELLANTS/APPLICANTS**

**VERSUS**

**ESTHER MARTHA AMURA.....RESPONDENT**

*(Being an Appeal from the Ruling and orders made by Hon. C. N.*

*Ndegwa (SPM) on 28<sup>th</sup> January, 2021 in Mombasa CMCC No. 772 of 2018)*

**RULING**

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated **29<sup>th</sup> January, 2021**. The same is expressed to be brought under **Article 1, 2, 19, 20, 21, 22, 23, 24, 25, 27, 28, 40, 48, 50 & 159 of the Constitution of Kenya, Sections 1, 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act and Order 22 Rule 22, Order 40 Rules 1, 2 and 4, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law**. By the Application, the Appellant/ Applicants seek the following orders: -

**1. Spent;**

**2. THAT pending inter parties Hearing of this Application, interim orders do issue Ex parte at the First Instance in the following terms:-**

**i) There be Unconditional stay of execution of the Judgment delivered herein in 12/07/2019 and Ruling delivered on 28/01/2021 on MSA RMCC No. 772/2018: Awadi Ali Awadh, Sheikh Ali Investment Limited Vs Esther Martha Amura as well as any/all Consequential Orders/Decrees and/or process;**

**ii) AN order do issue restraining the Respondent, whether by Herself, Her Agents/Servants/ Employees/Assigns from Transferring, Disposing, Registering, Alienating and/or otherwise howsoever Dealing and/or Interfering with the Appellant's open, peaceful, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use of All Appellants' Assets as appearing in:**

**i) Proclamation of Attachment of Movable Property dated 9/10/2019;**

**ii) Warrants of Attachment of Movable Property dated 3/08/2020;**

**iii) An order do issue restraining the Respondent, whether by Herself, Her Agents/Servants/ Employees/Assigns from Engaging in any and all Acts and/or Omissions amounting to and/or capable of Construction to amount to Harassment and/or Imitation against the Appellant whether by Themselves, Their Agents/Servants/ Employees/Assigns;**

**3. THAT the Orders subject of Prayer 2 above be served upon:**

**i) The Court Bailiff, Mombasa Law Courts;**

*ii) The OCS, Central Police Station, Mombasa.*

**4. THAT Orders subject of Prayers/Items No.2 and 3 above do persist until the Hearing and Determination of this Application and ultimately, the Appeal subject hereof.**

**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 Mohamed Hassan**, the Director of the 2<sup>nd</sup> Appellant/Applicant. He averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were Defendant in **Mombasa SRMCC No.772 of 2018** wherein a **Ruling** was delivered on **28<sup>th</sup> January, 2020**.

3. It was deponed that the Respondent lodged a **Plaint** on **20<sup>th</sup> April 2018** as against the Appellants jointly and severally seeking damages for injuries allegedly sustained on **29<sup>th</sup> November 2017** occasioned by the driver of **KBG 321F Nissan Matatu** that collided into the 2<sup>nd</sup> Appellant's Motor Vehicle Registration **No.KBD 407F Mercedes Benz Axor**.

**4. Mr. Mohamed** stated that a firm unknown to the Appellants **M/s Ojode & Udoto Advocates**, Mombasa entered appearance on their behalf on **31<sup>st</sup> July 2018**, but did not file a Statement of Defence on behalf of the Appellants.

5. It was stated that the suit was set down for formal proof hearing on the **12<sup>th</sup> May, 2019** wherein the Respondent was heard and the case was closed and **Judgment** was delivered on the **12<sup>th</sup> July, 2019** and the Appellants were condemned to pay the Respondent general damages of Kshs.900,000/=; Special damages Kshs.7,050 plus costs of the suit.

6. The 1<sup>st</sup> Appellant stated that consequently a **Notice of Motion** dated **14<sup>th</sup> October 2019** was filed with the aim to set aside the Judgment as delivered **12<sup>th</sup> July, 2019**.

7. It was the 1<sup>st</sup> Appellant's averment that on the **3<sup>rd</sup> March, 2020** the trial court delivered a **Ruling** and directed that the Appellants *pay throw away costs of Kshs.60,000/=within 15days thereof; pay the auctioneer charges to be agreed between the parties; the Defendant file and serve their Defence within 15 days from the date of the Ruling; a condition that if the Appellants do not comply with the set conditions their application will stand dismissed and the Judgment delivered on 12<sup>th</sup> July, 2019 will automatically be reinstated.*

8. It was deponed that the conditions of the **Ruling** delivered on **3<sup>rd</sup> March, 2020** were communicated to the 1<sup>st</sup> Appellant who was ready and willing to comply but was however unable to do so due to the closure of Law Courts and the Appellants office due to the **Covid -19 pandemic**.

9. The 1<sup>st</sup> Appellant stated that he has complied with condition 1 of the **Ruling** delivered on **3<sup>rd</sup> March, 2020** and has issued a Cheque dated **28<sup>th</sup> July 2020** and that has been very desirous to comply with all the conditions issued by the said **Ruling**.

10. That the omission to file a response to the suit should not be visited on the Appellants as it is the mistake of Counsel as a perusal of the attached Statement of Defence indicates that the Appellants have a viable Defence as against the Respondent's claim.

11. It was stated that the 1<sup>st</sup> Appellant is a person of modest means and thus unable to raise any portion of the Judgment and ought not to be condemned to satisfy any portion of the subject Judgment without being heard on their incontrovertible Defence.

12. According to the Appellants, their Appeal is arguable with an overwhelming chance of success, that the execution of the said Decree will result in Substantial loss if stay of execution is not granted and thus the Appeal will be rendered nugatory. Further that the Application herein should be allowed as it has been brought to court without any hint of delay. The Appellants urged this court to allow the application dated **29<sup>th</sup> January, 2021 in the interest of justice**.

13. In response, the Respondent filed a Replying Affidavit sworn on **1<sup>st</sup> March, 2021** and stated that on **20<sup>th</sup> April 2018** via Plaintiff she sued the Appellants seeking damages arising from an accident caused by a motor vehicle registered to the 2<sup>nd</sup> Appellant.

14. She deponed that the Appellants entered appearance but did not file a Defence within the prescribed period and consequently an interlocutory Judgment was entered on **24<sup>th</sup> August 2018** and the suit proceeded for formal proof hearing on the **7<sup>th</sup> May 2019** and a Judgment delivered on **12<sup>th</sup> July 2019**.

15. That the Appellants filed an application on the 14<sup>th</sup> October 2019 and sought to set aside the interlocutory Judgment and leave to file a Defence to the suit. The trial court delivered a Ruling on the **3<sup>rd</sup> March 2020** to that effect but set conditions that the Appellant file their documents within 15 days and do pay throw away costs of **Kshs.60,000/=**.

16. It was the Respondent's averment that the Appellants did not comply with the conditions as set by the Ruling delivered on **3<sup>rd</sup> March 2020** and further filed an application to stay the orders issued in the said Ruling.

17. The Respondent stated that she stands to suffer prejudice if the orders sought herein are allowed as she will be denied the right to enjoy

the fruits of her Judgment and that this application is a delay tactic as the Appellants have been filing various applications before various courts.

18. It was further stated that if the orders sought herein are issued, the same may be done in futility since the execution process of the Judgment delivered on **12<sup>th</sup> July 2019** is already in its final stages having already proclaimed some the Appellants' assets.

19. The Respondent averred that the Appellants have not been compliant with any orders issued by the trial court that gives rise to the said Appeal and their disobedience should not be entertained nor enabled by this Honourable Court.

20. This Court was urged by the Respondent to dismiss the instant application as the Appellants have not met the threshold under **Order 42 Rule 6** of the **Civil Procedure Rules** to warrant a stay of execution.

#### **DIRECTIONS OF THE COURT**

21. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they will be relying on the said written submissions. The Appellant/Applicants' submissions are dated the **24<sup>th</sup> May 2021** and filed on an even date while those of the Respondent are dated **11<sup>th</sup> May, 2021** and filed on **13<sup>th</sup> May 2021**.

22. I have had the benefit of reading the written submissions. They replicate much on the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein.

#### **ANALYSIS AND DETERMINATION**

23. After perusing all the pleadings filed in this case and the written submissions by the parties herein, I find that Prayer No.2 and 3 were sought *ex parte* but the same were not granted. The issue thus for determination is whether prayer No. 4 can issue pending the hearing and determination of the Appeal.

24. The main issue for determination is whether this court can issue an unconditional stay of execution of the **Judgment** delivered on **12<sup>th</sup> July 2019** and **Ruling** delivered on **28<sup>th</sup> July, 2021** pending the hearing and determination of the Appeal.

25. The Court notes that the Ruling delivered on **18<sup>th</sup> July, 2021** cannot be stayed as there present a negative order incapable of being stayed. The trial court in the Ruling dismissed an Application as was filed by the Appellants. See the Court of Appeal case **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR.**

26. Stay of Execution is provided for under **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides: -

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.***

***(2) No order for stay of execution shall be made under subrule (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.***

27. The above Rule thus provides that before a court can grant an order of stay of execution pending hearing and determination of the Appeal, it must be satisfied that there is proof of substantial loss to be suffered by the Applicant; the application was made without unreasonable delay and that the Applicant is ready to provide such security as the court may impose.

28. The Appellant claims that he will suffer substantial loss if execution is allowed to proceed as he is a man of modest means and his Company, the 2<sup>nd</sup> Appellant is a modest start-up and will collapse if required to fulfil the trial court's Judgment. 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 Applicant's submission to that extent.

29. The Appellants claim that the stand to lose substantially if stay of execution is not granted as they will be condemned to pay the Respondent a large sum of **Kshs.907, 050/=** unheard. That further the Appellants will suffer loss as they will be forced to comply with the

harsh conditions set by the trial court to pay **Kshs.60,000/=** throw away costs that is inordinately high in their opinion that is also subject of the Appeal.

30. The Respondent on the other hand has stated that the Appellants have been given various opportunities to file their Responses but they have failed to do so and that further they have failed to comply with conditions as were set by the trial court on **3<sup>rd</sup> March 2020** to put in their Defence within 15 days.

31. I find the Appellants' concern that they might be condemned to pay the Respondent unheard a valid reason that may occasion substantial loss. This court is therefore satisfied that the Appellants have proved they will suffer substantial loss and the Appeal may be rendered a mere academic exercise if stay of execution is not granted.

32. On whether or not the application was brought without undue delay, this application was filed on **29<sup>th</sup> January, 2021** while the **Judgment** was delivered on **12<sup>th</sup> July 2019**. Clearly, there has been a one (1) year and five (5) months delay that has not been explained.

33. The final requirement for stay of execution to issue is the willingness of the Applicant to provide security for costs as may be directed by court. At **paragraph 24** of the 1<sup>st</sup> Appellant/Applicant's Affidavit filed with the application herein, he has indicated that he is ready and willing to abide by any reasonable condition that may be imposed by court.

34. In view of the above it is evident that the Appellants have fulfilled two of the requirements for stay of execution being that they will suffer substantial loss and their willingness to provide security for costs for the settlement of the Judgment as delivered by the trial court.

35. The upshot is that I allow the application dated **29<sup>th</sup> January, 2021** and grant a stay of execution of the **Judgment delivered on 12<sup>th</sup> July 2019; the Proclamation of Attachment of Movable Property dated 9<sup>th</sup> October, 2019; and Warrants of Attachment of Movable Property dated 3<sup>rd</sup> August 2020** on the condition that: -

*a) The Appellants do pay the Respondent half of the decretal that being Kshs.453,525/=.*

*b) The other half being Kshs.453,525/= be deposited in a joint interest earning account in the name of both Advocates of the parties herein.*

*c) Orders (a) and (b) above be complied with within forty (45) days of the date of the Ruling hereof.*

*d) If the Appellants do not comply with (a) and (b) above their application dated 29<sup>th</sup> January, 2021 shall stand dismissed with costs to the Respondents.*

**It is so ordered.**

**DATED AND SIGNED AT MOMBASA THIS 14<sup>TH</sup> DAY OF JULY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**DELIVERED VIRTUALLY AT MOMBASA THIS 15<sup>TH</sup> DAY OF JULY, 2021.**

**A. ONG'INJO**

**JUDGE**