



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. E007 OF 2021

CHARLES ORIEDE OTIENO.....APPLICANT

-VERSUS-

GLO (Minor suing through her next friend) EAS.....RESPONDENT

RULING

On 22/12/2020 the trial court in **Rongo SRMCC No. 62 of 2017** delivered a judgement in favour of the respondent (plaintiff) for the sum of **Kshs. 205,000/=** together with costs and interest of the suit against the appellant/ applicant (defendant).

Being dissatisfied with the judgement and decree passed by the trial court, the applicant lodged a Memorandum of Appeal (the 'appeal') being Migori Civil Appeal No. E007 of 2021 on 25/1/2021. Contemporaneously with the appeal, the applicant filed a Notice of Motion application dated 25/1/2021 seeking the following orders: -

i. Spent.

ii. Spent.

iii. That this honourable court be pleased to grant a stay of execution of the judgement/decree in this matter delivered on 22/12/2020 pending the hearing and full determination of the appeal herein.

iv. That upon grant of prayers No. 3 above, this Honourable Court be pleased to order that the applicant do provide sufficient security in form of a suitable bank guarantee from a reputable financial institution to secure the judgement herein of Kshs. 205,000/=.

v. That the costs of the application be in the cause.

The grounds upon which the application is premised are in the body of application and the supporting affidavit of the applicant **Charles Oriede Otiemo**. The applicant's was aggrieved by the entire judgement he instructed his advocates on record to file the instant appeal; that the appeal has a high chance of success; that there is no order for stay of execution in force; that the decretal sum is a substantial amount of **Kshs. 205,000/=** which if paid to the respondent and the appeal is successful, the applicant will not be able to recover the same thus rendering the whole appeal nugatory; that the respondent is a person of straw and will not be able to refund the decretal sum if he is allowed to execute and the appeal thereafter succeeds; that the respondent will not be prejudiced as he is willing and ready to furnish security by providing a Bank guarantee as security for the whole decretal sum.

The application was opposed. The respondent **GLO**, opposed the application and filed her replying affidavit dated 12/12/2021 on 15/12/2021. The respondent deponed that she had been advised by her advocates on record that stay of execution pending appeal can only be granted upon satisfying the conditions laid down under the law which the applicant has not satisfied; that the applicant has not proved the substantial loss he is likely to suffer; that the instant motion is a delaying tactic, frivolous and vexatious and intended to deny her the fruits of her judgement; that there is need to strike a balance between the tortfeasor and the victim; that this court should dismiss the application since it is an abuse of the court process; that in the event the court is inclined to grant the orders sought, the applicant should deposit half of the decretal sum in a joint account in the names of both advocates and the other half to be paid to the respondent through her advocates.

On 24/2/2021, the court directed that the application be canvassed by way of written submissions. Both parties duly complied, and the applicant filed his submissions on 24/3/2021 while the respondent filed hers on 13/4/2021.

I have duly considered both submissions. There will be no need to rehearse them again.

The application is one of stay pending appeal. Order 42 Rule (6) (1) and (2) makes provision for stay pending appeal as follows:-

(1) 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.

(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.”

The four (4) salient ingredients precedent to grant of an order of stay of execution are: -

- a. That the applicant shall suffer substantial loss if stay is not granted;
- b. That the application has been filed without unreasonable delay;
- c. The applicant is willing to furnish security for the due performance of the decree;
- d. The applicant has an arguable appeal.

On the issue of substantial loss, it is the applicant’s submission that the decretal sum of Kshs. 205,000/= is a substantial amount and since the respondent’s source of income is unknown; the appeal will be rendered nugatory and the applicant shall suffer irreparable loss in the event the respondent will not be able to refund the money if the appeal succeeds. In case of **Silverstein v Chesoni (2002) 1 KLR 867** cited in **Superior Homes (Kenya) Limited vs Musango Kithome (2018) eKLR** the Court of Appeal held as follows:

“...issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

The assurance that the applicant will not suffer substantial loss is the ability of the respondent to refund the decretal sum if the appeal succeeds. In **Superior (Homes) Kenya Limited vs Musango Kithome (supra)**, the court held:-

“...The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

A similar finding was made in **Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua (2001) eKLR** as follows:-

“...Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so. An undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient.”

Unfortunately, the respondent did not attempt to address or prove to this court her source of income. She has not sufficiently discharged that burden. It means that if the decretal sum is paid to her, the applicant may suffer substantial loss if the appeal succeeds and the appeal will be rendered nugatory.

On whether there was unreasonable delay in bringing this application, **Section 79G of the Civil Procedure Act** provides that appeals from subordinate courts should be filed within thirty (30) days from the date of judgement. The judgement herein was delivered on 22/12/2020 and the instant application was filed on 25/1/2021. Even without counting the excluded time period as provided for by **Order 50 Rule 4 Civil Procedure Rules**, the application was filed well within time. I therefore find there was no delay.

On security for the due performance of the decree, the applicant has proposed to offer a bank guarantee of the whole decretal sum from a reputable financial institution namely Diamond Trust Bank. In **Arun C Sharma vs Ashana Raikundalia T/A Rairundalia & Co. Advocates Gikonyo J** held inter alia that **“the purpose of the security under Order 42 is to guarantee the due performance of such decree or order as may be ultimately binding on the applicant...”** As I observed before in **Misc Application No. E005 of 2020 Jairus Momanyi Buranda & Another vs Ojwang Emmanuel Ochieng (Unreported)**, it is the court which ultimately exercises its discretion on the kind of security if at all. The court is not bound by the offer a party makes. Although the applicant has proposed security in the form of a

bank guarantee, I note the amount herein is not huge to warrant a bank guarantee.

Whether the applicant has an arguable appeal: the applicant is disputing the award in damages as being exorbitant compared to the nature of the injuries sustained by the respondent. In addition, the applicant faults the trial court for apportioning liability at 100% liability. These are arguable issues. Since the applicant will provide security for the due performance of the decree, then the respondent will not suffer any prejudice.

In the end, I make the following orders: -

- a. There be a stay of execution of the decree/judgement delivered on 22/12/2020 in SRMCC No. 62 of 2017 on condition that the applicant deposits Kshs. 205,000/= in an interest earning account of both counsel for the applicant and the respondent within thirty (30) days from today's date;**
- b. In default, the order of stay to lapse automatically;**
- c. Costs of this application to abide the appeal.**

DATED, DELIVERED AND SIGNED AT MIGORI THIS 7TH DAY OF JULY, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant

Mr. Odero holding brief for Ouma for the Respondent

Nyauke Court Assistant