



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. E008 OF 2021**

**NGODE ABIRA EZEKIEL.....APPLICANT**

**VERSUS**

**JEREMIAH OPIYO OSINDO.....RESPONDENT**

**RULING**

On 22/12/2020, the trial court in **Rongo SRMCC No. 29 of 2019** delivered a judgement in favour of the respondent (plaintiff) for the sum of **Kshs. 207,400/=** together with costs and interest of the suit against the 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. 8 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 delivered on 22/12/2020 pending the hearing and full determination of the appeal in MIGORI HCCA No. 8 of 2021.**

**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. 207,400/=.**

**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 **Ngode Abira Ezekiel**. It is the applicant's contention that he was aggrieved by the entire judgement issued by the trial court and he instructed his advocates to file the instant appeal; that the appeal has high chances of success; that there is no order for stay of execution in force; that the decretal sum is a substantial amount of **Kshs. 207,400/=** which if paid to the respondent and the appeal is successful, the applicant will not be able to recover the same because the Respondent is a man of straw. Thus, the whole appeal will be rendered nugatory; that the respondent will not be prejudiced as the applicant is willing to furnish security by providing a Bank guarantee as security for the whole decretal sum.

The application was opposed. The respondent filed a replying affidavit sworn by **Jeremiah Opiyo Osindo** dated 12/12/2021. The respondent deponed that he had been advised by his 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 demonstrated that he will suffer substantial loss that the instant motion is a delaying tactic, frivolous and vexatious intended to deny him the fruits of his 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 his 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 his 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. Under Order 42 Rule (6) (1) and (2) Civil Procedure Rules which provides 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 that the applicant should establish for orders of stay of execution to issue are: -

- a. Whether substantial loss will be suffered if stay is not granted;
- b. That the application has been filed without unreasonable delay;
- c. Whether 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. 207,400/= is a substantial amount and since the respondent’s source of income is unknown; the respondent may not be able to refund the money if the appeal succeeds and the applicant will suffer loss and the appeal will be rendered nugatory. In the 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 if 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 immediately. 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.”

The applicant specifically deponed that the respondent is a man of straw and not able to repay the decretal sum in the event the appeal succeeds. Unfortunately, the respondent did not attempt to address or prove to this court his source of income if any or that he is a propertied person. He has not sufficiently discharged that evidential burden placed on him. It means that if the decretal sum is paid to him, he may not be able to repay in the event the appeal succeeds and the applicant will suffer substantial loss 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 inordinate 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. The Respondent proposed that half the decretal sum be paid to him and the rest in an interest earning account but since the respondent did not disclose his means, I prefer that the money be kept in the bank account of both counsel.

**Whether the applicant has an arguable appeal:** the applicant is disputing the award in damages for being exorbitant and not comparable to the nature of the injuries sustained by the respondent. In addition to that, the applicant faults the trial court for apportioning liability at 100%. This is arguable. 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. 29 of 2019 on condition that the applicant deposits Kshs. 207,400/= 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 7<sup>th</sup> day of July 2021**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of:-**

No appearance for the Applicant

Mr. Odero holding brief Ms. Ouma for the Respondent

Ms Nyauke Court Assistant