



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL APPLICATION NO. E025 OF 2020

PETER MUGAMBI KILINGU.....APPLICANT

VERSUS

JADIEL MUNGATHIA.....RESPONDENT

RULING

1. Before the Court is an application dated 29th March 2021 seeking stay of execution of the Judgment and/or Decree delivered on 29th October 2020 by Hon. T. Gesora (SPM) in Maua CMCC No. 180 of 2020. This is a second application of stay, the first one, which was filed in the trial Court having been denied on 11th February 2020.

Applicant's Case

2. The Application is supported by the grounds on the face of it and by the Applicant's supporting affidavit. The Applicant's case is that he has an arguable appeal and that he is apprehensive that if the decretal amount is paid, the Respondent will not be in a position to refund the same. He further urges that the Respondent has not furnished the Court with any documentary evidence to prove his financial standing. He urges that he has come without unreasonable delay and that he is ready to furnish the Court with security up to a maximum of Ksh 3 Million as the limit set by the Insurance (Motor Vehicle Third Party Risks) Act Cap 405.

Respondent's Case

3. The Respondent opposes the application by his replying affidavit sworn on 15th June 2021. The Respondent avers that the application lacks merit and has been made in bad faith in that the Applicant was granted 30 days stay in the trial Court but he failed to utilize that. That they delay is unreasonable and inordinate. That he has suffered severe bodily injuries as a result of the accident and that the Applicant who has a good insurance cover has been bringing unnecessary applications meant to defeat due process. He urges that if stay is granted, half of the decretal amount plus costs be paid to her and the other half be deposited in Court.

Issue for Determination

4. The only issue for determination is whether or not the Court should grant the Applicant stay of execution pending hearing of the Appeal.

Determination

5. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

a) substantial loss will result to applicant if stay is not granted; and

b) security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and

c) the application has been brought without unreasonable delay.

Arguable Appeal

6. Arguability of appeal as a condition for stay has not been expressly provided for in the Civil Procedure Rules. Nonetheless, this Court has a duty to ensure that any such intended Appeals are indeed arguable and not frivolous. An arguable appeal is not one which must necessarily succeed. The intended appeal herein against a Judgment on liability and quantum inviting the Court to consider the principles in ***Butt v Khan***

is indeed an arguable appeal.

Substantial Loss

7. In money decrees, substantial loss is proven by the Respondent's inability to make a refund should the Appeal be determined in the Appellant's favour. Such eventuality renders the appeal nugatory and leaves the Applicant with a Judgment, the fruits of which he cannot enjoy. This does not reflect the course of justice hence the need to order for stay of execution.

8. The Applicant has expressed fears of inability of the Respondent to refund the monies. The Respondent, quite unfortunately omitted to address his ability to pay. He merely highlighted the fact that the Applicant is represented by an able insurance company. In such applications for stay, once an Applicant raises doubt as to the Respondent's ability to settle the decretal sum, the burden shifts to the Respondent to show that she has the means to pay since that is a matter which is peculiarly within his knowledge as per Section 112 of the Evidence Act. This Court held as much in the case of ***Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020***. See also ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR***. As the Respondent failed to indicate whether he has the financial muscle to pay should the Applicant be successful, this Court finds that the Applicant has demonstrated the likelihood of suffering substantial loss.

Security for due performance of decree

9. The Applicant has indicated his willingness to offer security for the due performance of the decree, only that the same should be within the supposed Ksh 3 Million limit. The Respondent has asked that half of the amount be released to him and to have the other half be deposited in Court. This Court finds that it would be in the best interests of justice to allow the application on condition that security is provided.

Delay

10. Judgment in the trial Court was delivered on 29th October 2020. The Applicant made an application for stay at the trial Court for which Ruling was delivered on 11th February 2021 dismissing the same. This Application was filed on 29th March 2021, 46 days later. This period is relative but cannot be termed as inordinate.

Orders

11. Accordingly, for the reasons set out above the court makes the following orders: -

i) The court grants an order for stay of execution of the Judgment and/or Decree delivered on 29th October 2020 by Hon. T. Gesora (SRM) in Maua CMCC No. 180 of 2020 pending the hearing and determination of the appeal.

ii) The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 181,100/= being approximately 1/3 of the decretal sum.

iii) The Applicant shall within Thirty (30) days deposit the balance of the decretal amount being the sum of Kshs 330,000/= in a joint interest earning account opened in the names of the parties' respective Advocates.

iv) In default of the payment and deposit as per orders ii) and iii) above, the stay of execution herein granted shall lapse and be of no effect.

v) The costs of this application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 15TH DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & Co. Advocates for the Applicant

M/S Mutembei & Kimathi & Co. Advocates for the Respondent