



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL APPLICATION NO. E048 OF 2021

RUKIA KATHENDO.....APPLICANT

VERSUS

DOUGLAS KAIMENYI (Suing as the guardian and the next friend of

DOMINIC MUTUMA KITHINJI).....RESPONDENT

RULING

1. Before the Court is an application dated 8th June 2021 primarily seeking stay of execution of the Judgment and/or Decree delivered on 26th February 2021 by Hon. M. A. Odhiambo (RM) in Meru CMCC No. 30 of 2020. It also seeks to quash the purported illegal decree extracted by the Respondent. This is a second application for stay, the first one having been dismissed by the trial Court for failure to deposit Ksh 103,985 which was the condition attached to stay earlier granted.

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 lodged his appeal timely before the lapse of the 30 days' timeline. She claims that the Judgment is of a substantial sum and he is apprehensive that if the decretal amount is paid, he might not be able to recover the same from the Respondent. She further urges that the Respondent has not furnished the Court with any documentary evidence to prove his financial standing. She urges that she 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 for a claim by one person.

3. She claims that she had indeed complied with the conditions set by the Court requiring deposit of Ksh 103,895/= in Court as conditional stay save that the proof of payment was not availed in Court.

Respondent's Case

4. The Respondent opposes the application by his replying affidavit sworn on 16th June 2021. The Respondent avers that the Applicant made an application for stay dated 23rd March 2021 at the trial Court, which application as made after the lapse of the 30 days window period. That conditional stay was granted pending inter parties hearing of the application but the Applicant failed to comply with the condition requiring payment and proof of payment has not been availed to date. That the appeal was filed beyond the 30 day timeline and the applicant is being untruthful in alleging that the appeal was filed in time. That the Applicant is an indolent litigant who never had any intention of defending the suit and is out to frustrate his enjoyment of fruits of judgement. He says that he is not a man of straw as alleged by the Applicant. That the Applicant does not have an arguable appeal. That if the Court is inclined to grant stay, then half of the amount should be paid to him and the other half be deposited in a joint interest earning account. 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

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

Determination

6. 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

7. The Applicant has annexed a Memorandum of Appeal 23rd March 2021 and filed on 26th March 2021. The Respondent said that this Memorandum of Appeal was not filed within the 30 days' window period. This Court however finds otherwise since by 26th March 2021, the Applicant was within the 30 day window period which started running from the date of delivery of Judgment on 26th February 2021. The Memorandum of Appeal seeks to challenge both liability and quantum. 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

8. Substantial loss is proven by the Respondent's inability to make a refund should the Appeal be determined in the Appellant's favour. The Applicant has expressed fears of inability of the Respondent to refund the monies. The Respondent has however indicated that he is not a man of straw as alleged and he is capable of paying. He is rightfully discharged the burden of proving ability to pay as is required of any such Respondent whose financial ability has been questioned. See 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**. This Court finds that his averment is sufficient for this purpose. This Court also observes that the sum of Ksh 207,970/= awarded by the trial Court is not a substantial sum. To this end, this Court finds that the Applicant has not successfully demonstrated that she is likely to suffer substantial loss.

Security for due performance of decree

9. The Applicant has indicated her 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 a joint interest earning account.

10. This Court has also observed that the trial Court had previously issued conditional stay on condition that the Applicant deposits half of the decretal amount. The Applicant failed to do so. The court proceedings bear witness that this failure was consecutive in that the conditional stay was issued on 27th April 2021 requiring payment to be done in 14 days. Come 18th May 2021, this had not been done and the Court was gracious enough to grant the Respondent a further 7 days to comply. Come 25th May 2021, this was still yet to be done. In her application, despite claiming that payments were done save for the fact that proof of the same was availed later, the Applicant has not annexed any such proof. This Court finds that the Applicant has been untruthful in her averments and has not demonstrated an eagerness to have this matter progress fairly.

11. The matter of making applications in the face of disobedience of court orders issued over similar applications was dealt with by the Court of Appeal in the case of **Hunker Trading Co. Ltd v Elf Oil Kenya Limited, Civil Application No. 6 of 2010 (2010) eKLR** where E. M. Githinji, A. Visram and J. G. Nyamu JJA held as follows: -

“It seems to us that in the exercise of our powers under the “O2 principle,” what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are “O2” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “O2 principle” could easily become an unruly horse....

....We trust that in the matter before us we have walked the talk. Disobedience of a court order that was intended for the same purposes being pursued by the applicant in this Court is a clear violation of the “O2 principle” as demonstrated above and we hereby invoke the power vested in us under section 3A to dismiss the application.”

Delay

12. Judgment in the trial Court was delivered on 26th February 2021. The Applicant made an application for stay at the trial Court for which Ruling was delivered on 25th May 2021 dismissing the same. This Application was filed on 8th June 2021. This period is not unreasonable but this Court has to consider this issue alongside the other issues discussed above.

ORDERS

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

i) The Applicant's application for stay of execution dated 8th June 2021 is hereby dismissed.

ii) The Respondent shall have the costs of the application.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF JULY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

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

M/S Kaimba Peter & Co. Advocates for the Respondent