



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. E462 OF 2020

STEPHEN ONYANGO APONDI.....RESPONDENT

-VERSUS-

CHRISPO THEURI WAMBUGU.....APPLICANT

RULING

1. This ruling relates to the Notice of Motion dated 9th November, 2020 taken out by the applicant herein and supported by the grounds set out on its face and the facts stated in the affidavit of advocate Lena Mwangi. The applicant sought an order for a stay of execution of the judgment and decree issued by the trial court in CMCC NO. 1333 OF 2019 pending the hearing and determination of an appeal against the aforesaid judgment.
2. In answer to the Motion, the respondent filed the replying affidavit he swore on 19th November, 2020.
3. The Motion was canvassed by way of written submissions, which I have considered together with the grounds set out on the body of the Motion and the facts deponed to in the supporting and replying affidavits.
4. As earlier indicated, the substantive order sought is that of stay of execution of the decree pending appeal. The guiding provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions in determining an application for stay.
5. The first condition states that the application must have been made without unreasonable delay. Lena Mwangi through her supporting affidavit avers that the present Motion has been brought without undue delay. This position was echoed in the submissions by the applicant. The respondent did not address this particular subject.
6. From the record, none of the parties has availed a copy of the impugned judgment for this court's reference. Nonetheless, going by the averments of the parties, the aforementioned judgment was delivered on 9th October, 2020. I note that there has been a lapse of about one (1) month between the date of delivery of the judgment and the bringing of the instant Motion. I am therefore satisfied that the delay is not unreasonable.
7. The second condition concerns the substantial loss likely to be suffered by an applicant if the order for stay is denied. In her supporting affidavit, advocate Lena Mwangi states that the respondent has threatened to execute the decree and that the applicant stands to suffer substantial loss since it is likely that he will not be able to recover the decretal sum from the respondent if the same is paid and the appeal succeeds. In his submissions, the applicant went further on to argue that the decretal amount is colossal in nature and that the respondent has not disclosed his financial capabilities. Reference was made to the case of **Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & another [2014] eKLR** in which the court determined that the burden of proving the ability to refund the decretal sum shifts to the respondent as soon as an applicant doubts the respondent's financial resources.
8. The respondent submits that the applicant has not demonstrated substantial loss and that he is lawfully entitled to enjoy the fruits of his judgment. He relied on the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** where the court held that an applicant ought to establish other factors to demonstrate substantial/irreparable loss.
9. Upon weighing the above contending positions, I will address the same by borrowing from the reasoning in the case of **Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & another [2014] eKLR** (supra) and further, the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where the Court of Appeal determined that:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

10. Going by the record, the respondent did not bring any evidence to indicate or ascertain his financial standing and ability to refund the decretal amount if the same is paid to him and which decretal amount appears to be colossal. In the circumstances, I am satisfied that the applicant has reasonably shown the likelihood of substantial loss occurring.

11. Under the final condition which is the provision of security for the due performance of such decree or order, the applicant has indicated his readiness and willingness to provide a bank guarantee, whereas the respondent urges that the applicant be ordered to pay 2/3 of the decretal amount to him and to deposit the remaining 1/3 in a fixed deposit joint account. In that case, I must balance the interests of the parties.

12. Consequently, the Motion dated 9th November, 2020 is allowed in terms of prayers 3, giving rise to the following orders:

a) There shall be a stay of execution of the judgment delivered on 9th October, 2020 in CMCC NO. 1333 OF 2019 on the condition that the applicant releases 1/3 of the decretal sum to the respondent and further provides a bank guarantee for the remaining balance of the decretal sum from any reputable bank to be agreed upon between the parties, within 45 days from today, failing which the order for stay shall automatically lapse.

b) Costs of the application to abide the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS DAY OF.....2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Mrs. Biage for respondent

Mrs. Wanjira for the applicant