



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E364 OF 2021

NAVIN MEGHJI PATEL.....1ST APPELLANT/APPLICANT

STEPHEN ONSERIO OIRA.....2ND APPELLANT/APPLICANT

VERSUS

PATRICIA KATUNGWAS KAMAU &

CATHERINE NDINDA JOSHUA (Suing as the

administrators to the estate of the late

JOSHUA KINYANZWII (DECEASED).....RESPONDENT

RULING

1. The appellant/applicant filed a notice of motion dated 28/6/2021 brought pursuant to **Sections 1A, 1B & 3A of the Civil Procedure Act Order 42 Rule 6 and 9, Order 51 Rule 1 of the Civil procedure Rules, 2010** seeking for orders that;

a) Spent

b) Spent

c) That pending the inter parties hearing of the appeal, this honorable court be please to order stay of execution of the judgment delivered on 4/6/2021 and the resultant decree and processes.

d) That this honorable court be pleased to make any further order and/or direction

e) That the cost of this application be provided for.

2. The application is based on the grounds stated on the face of the motion and those set out on the supporting affidavit of Sharon Mukania where she deponed that on 4/6/2021 Hon D. O. Mbeja entered judgement in favour of the plaintiff/respondent in the sum of Ksh. 2,169,745 vide Nairobi CMCC no. 5716 of 2019. Being aggrieved, the applicant filed this appeal against the said decision. The applicants are apprehensive that the respondent may proceed with execution of the decree resulting from the said judgement if an order stay is not granted.

3. The applicants further averred that the applicant has an arguable appeal with high chances of success and in the circumstances the appeal would be rendered nugatory if the orders sought are not granted. In addition, that if the decretal sum is paid there is a likelihood that they would suffer irreparable loss as the respondent will be unable to reimburse the decretal sum in the event that the appeal is successful.

4. The applicant stated he is willing to procure a bank guarantee for the sum of Ksh. 2,169,745 or such other sum this honorable court may deem fit.

5. The application is opposed by the respondents who filed the replying affidavit they jointly stated that the application is fatally defective as the supporting affidavit is sworn by a stranger to this suit.

6. They added that the application was procured in bad faith as its motive is to deny them the fruits of their judgement. The judgement therefore ought not to be disturbed as it will aid the appellant/applicants in their intent to delay the recovery of the decretal sum. The applicants have not demonstrated the loss they stand to suffer if the orders are not granted.

7. They stated that in the alternative, the defendant/applicant be ordered to pay 2/3 of the decretal sum being Kshs. 1,553,712 and deposit the other 1/3 being Ksh. 776,856 in a fixed deposit in the joint account of both advocates forthwith and failure to which execution proceed.

8. This court has considered the grounds stated on the application, the facts deponed in the affidavits and the submissions. The issue for determination is **whether the order for stay of execution should be granted?**

9. The principles to be considered in determining an application for stay of execution of the decree pending appeal is set out in Order 42 Rule 6 of the Civil Procedure Rules 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 appeal case of 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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) ...

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the aforesaid conditions. An applicant must show (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

11. On whether the application has been made without unreasonable delay. The application was filed on 28/6/2021, 28 days after the delivery of judgement of the lower court. The delay therefore is not unreasonable

12. The applicant has expressed apprehension that the respondent may not be in a position to refund the decretal amount and the respondent had not said anything about their finances. The issue of the burden of proof of the fact of inability of the respondent to pay back the decretal sum is governed by the authority of the Court of Appeal in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR where the court (Omolo, O’Kubasu & Githinji, JJA.)** stated inter alia:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. 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 — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

13. The applicant has additionally offered security for the decretal sum and therefore it is in order to balance the interests of this court consequently makes the following orders:

i. The court grants an order for stay of execution of the Judgment and Decree of Hon D. O. Mbeja in CMCC 5716 of 2019 delivered on 4/6/2021 pending the hearing and determination of the appeal.

ii. That the appellant shall within 30 days to deposit the decretal sum in an interest earning account in the joint names of the advocates appearing on record.

iii. In default the order for stay of execution granted herein shall lapse and the respondents will be at liberty to execute.

iv. The cost of the application shall abide by the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent