



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 36 OF 2021

PETER OSORO OMAGWA..... 1ST APPELLANT/APPLICANT

KEFA OKWARE.....2ND APPELLANT/APPLICANT

-VERSUS-

BATHSEBA MWANGO MAIKINI.....RESPONDENT

RULING

1. The application for consideration before this court is dated 22nd April, 2021. It primarily seeks an order for stay of execution of the decree issued on 26th March, 2021 in Kisii CMCC No. 106 of 2019 by the Honourable D.O. Mac'Andere Resident Magistrate pending the hearing and determination of this appeal.
2. The respondent was awarded a sum of Kshs. 2,120,750/= as damages plus costs and interest in the suit before the subordinate court. Dissatisfied with that decision, the appellants filed the instant appeal contesting the court's finding on liability and assessment of damages.
3. The 1st appellant, in an affidavit sworn in support of the application for stay, averred that he and his co-applicant were apprehensive that the respondent would levy execution against them which would render their appeal nugatory causing them to suffer irreparable loss and damage. He pointed out that the respondent had not disclosed nor furnished the court with any documentary evidence to prove his financial standing.
4. The 1st appellant averred that his insurer, Directline Assurance Company Limited was ready and willing to offer security in form of a bank guarantee from a reputable bank for the decretal sum up to a statutory limit of Kshs. 3,000,000/=. He urged the court to grant the application as it would serve the interest of justice.
5. On 11th May 2021, the respondent filed the following grounds of opposition to the application;
 - a. The application dated the 22nd day of April 2021 has no merit as it is merely calculated at delaying the execution process which has been triggered at my instance.
 - b. The preferring of the appeal per se does not automatically attract a stay hence the judgment debtor should surrender to the decree holder 3/4 of the decretal sum and deposit 1/4 thereof in joint names.
 - c. The prayers sought are so sought mala fide as the execution process as triggered is procedural, the stay period having lapsed.
 - d. It shall be in the interest of justice if the application herein is dismissed in limine as the security proposed by the applicant serves no purpose.
 - e. The application merely seeks to derail the plaintiff from realizing the fruits of a successful litigation as the appeal is premised on quantum per se.
 - f. The application is based and premised on falsehoods and discrepancies the same should be dismissed with the contempt it deserves as the respondent is a person of means having engaged an advocate.
 - g. Whereas the plaintiff stands to suffer substantial loss and irreparable damage if this application is allowed the applicants does not so stand in the event the same is declined.

h. Applications of this nature are merely, meant to misuse the court's precious time and should be discouraged by all and sundry.

6. The parties disposed of the application by way of written submissions. The appellants asserted that they had met the conditions precedent for grant of the order for stay of execution in their submissions. They argued that the decretal sum of Kshs. 2,120,750/= was a substantial amount and seeing that the Respondent had not sworn an affidavit of means demonstrating that she was a person of means, there was a possibility that the respondent would be unable to refund the said amount should the appeal be successful. They would therefore suffer substantial loss and the appeal would be rendered nugatory if the intended execution was not stayed.

7. On the provision of security, this court was urged to take cognizance of the effects of the Covid 19 Pandemic on the transport industry and allow the bank guarantee offered as security. The appellants cited the case of **Shanzu Beach Resort Limited Vs. Crown Marble & Quartz Ltd [2020] eKLR** where the court took note of the effect of the Covid 19 Pandemic on the applicant's business and extended the time within which the Appellant was to provide a bank guarantee as security.

8. The appellants also referred to the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**, where the court held that an applicant who proposed to provide security demonstrated that the application was made in good faith and was not merely meant to deny the respondent the fruits of judgment. That however, it was the discretion of the Court to determine the security.

9. The appellants also submitted that the application had been brought without undue delay as the application for stay had been brought less than a month after the judgment had been delivered.

10. The respondent on the other hand reiterated the grounds of opposition in her submissions. In particular, she emphasized that the applicant had not demonstrated that she was a person of straw since they were strangers. She submitted that if she had no means she would not have met the cost of litigation.

11. This court was invited to make a finding that 3/4 of the judgment sum be released to the respondent and 1/4 thereof be deposited as a security. She argued that the appellants had proposed an unsuitable security in form of a bank guarantee and there was a possibility of the bank not honouring the bank guarantee as the bank that would issue the same would not be a party to the suit herein making it difficult for the respondent to enforce any orders it would get regarding the said bank guarantee.

12. The respondent relied on the case of **Benard Kigada & Another v Tom Ochieng Odeny [2021] eKLR** and **Electric Link (East Africa) Limited and another vs Mary Mueni Kioko & Another [2015] eKLR** in support of her submissions.

ANALYSIS AND DETERMINATION

13. The law governing applications for stay of execution pending appeal is **Order 42 Rule 6** of the **Civil Procedure Rules** which provides as follows;

Stay in case of appeal [Order 42, rule 6.]

(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.

14. From the above provision the conditions to be satisfied for the court to grant stay of execution are the establishment that a substantial loss is likely to occur if the application is not granted, demonstration that the application has been made without unreasonable delay and lastly, the furnishing of security.

15. As a principle a successful party is entitled to the fruits of his judgement. That must however be balanced against the applicant's right to appeal. The power of the court to grant or refuse an application for a stay of execution is a discretionary power which should be exercised in such a way as not to prevent an appeal. (See **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** and **Butt vs Rent Restriction Tribunal [1982] KLR 417**.)

16. This court is satisfied that the application for stay was made without unreasonable delay. The decision challenged in this appeal was rendered on 26th March 2021 and the application for stay was filed promptly on 22nd April 2021.

17. As to whether they are likely to suffer substantial loss if the orders sought are not granted, the appellants have pointed to the failure by the respondent to disclose her financial standing as a demonstration that there is a likelihood that she will not be capable of refunding the amount if she is allowed to levy execution against them. The appellants argued that the decretal sum of Kshs. 2,120,750/= was a substantial

amount and their appeal would be rendered nugatory if the sum was paid out to the respondent whose income is unknown.

18. The respondent countered that the appellants had not demonstrated that she was a person of straw. It was submitted that if she had no means she would not have catered for the costs of litigation but since she had, the application ought to be dismissed.

19. I concur with the finding by Kimaru, J in the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** that the financial status of the parties is key in determining whether a substantial loss is likely to be suffered in applications to stay the execution of money decrees. The learned judge held;

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

20. While the onus is upon the applicant to demonstrate that he is likely to suffer substantial loss it is not likely that he will know the particulars of the respondent’s financial status. The burden is therefore upon the respondent to prove her financial capability. That was the position taken by the Court of Appeal in the case of **National Industrial CreditBank Ltd vs. Aquinas Francis Wasike Civil Application No. 238 of 2005 [2006] eKLR** where it held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the 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.”

21. The appellants have expressed doubt as to the respondent’s financial capacity to refund the decretal sum if she is allowed to proceed with execution. The submissions by the respondent’s counsel that the respondent is a person of means as she had been able to cater for the costs of litigation does not in any way assuage the appellants’ reasonable apprehension that the respondent may be incapable of reimbursing the decretal sum. This claim by counsel is incapable of being relied on as it relates to facts that are not within his own knowledge. Moreover, such factual matter ought to be deposed to in an affidavit and not submissions. The respondent did not swear an affidavit to demonstrate that she was financially capable of refunding the decretal sum to the appellants. The appellants have therefore shown that they are likely to suffer substantial loss if the intended execution is not stayed.

22. On the requirement to furnish security, the appellants offered to give security in form of a bank guarantee from a reputable bank for the decretal sum. The appellants relied on the case of **Shanzu Beach Resort Limited Vs. Crown Marble & Quartz Ltd [2020] eKLR** where the court accepted a bank guarantee as sufficient security.

23. However, in the case of **Benard Kigada & another v Tom Ochieng Odeny [2021] eKLR** which was cited by the respondent, the court held;

27... this court took the view that security in form of a bank guarantee was not suitable considering that there was a possibility of the bank not honouring the bank Guarantee as the bank that would issue the same would not be a party to the suit herein making it difficult for the Respondent to enforce any orders it would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished would be in form of money.

24. The decretal sum payable in the above case was Kshs. 600,000/= . In this case however, the decretal sum payable is a significantly higher amount of Kshs. 2,120,750/=.

25. The courts have largely accepted bank guarantees as an acceptable mode of furnishing security. In the cases of **Justin Mutunga David vs China Road & Bridge Corporation (K) Limited [2019] eKLR**, **National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates [2021] eKLR**, **Charles Wesonga Mbingi v Commissioner of Investigations and Enforcement [2021] eKLR** and **Mbukoni Services Limited & another v Mutinda Reuben Nzili & 2 others [2021] eKLR** the courts allowed the applicants to give bank guarantees to cover the whole or part of the decretal sum. I therefore find that a bank guarantee would also be sufficient security in this case.

26. Keeping in mind the principle that no party should be worse off by virtue of an order of stay of execution given the rights of the parties on the one hand to pursue their appeal and on the other hand to benefit from the fruits of their judgment, I hereby issue the following orders;

- a. There shall be stay of execution of the decree issued by the court in Kisii CMCC No. 106 of 2019 on 26th March 2021 pending the hearing and determination of this appeal subject to the conditions set out hereafter;
- b. The Appellants shall pay a sum of Kshs. 500,000/= to the respondent and provide a Bank Guarantee from a reputable financial institution covering the balance of the decretal sum for the duration of the appeal within 45 days;
- c. In default of (b) above, this application shall stand dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF SEPTEMBER, 2021.

A. K. NDUNG’U

JUDGE