



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT CRIMINAL APPEAL NO. 18 OF 2020**

**ABDINOOR SALAD ALI..... 1<sup>ST</sup> APPELLANT**

**BARE RAHAMA .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MOLI NDALINGA.....1<sup>ST</sup> RESPONDENT**

**MUSYOKI KITHEKA.....2<sup>ND</sup> RESPONDENT**

**FATHER JOSEPH NZELU ..... 3<sup>RD</sup> RESPONDENT**

***(Being an Appeal against the Judgement delivered by M. ONKOBA, PM on 24<sup>th</sup> April, 2020 in RMCC No. 10 of 2015 at MWINGI.***

**RULING**

1. The Appellants/Applicants have moved this court through a Notice of Motion dated 7<sup>th</sup> April 2021 for the following reliefs namely: -

*a) Spent*

*b) That there be a stay of execution of the lower court decree in Mwingi Senior Resident Magistrate Court Civil Case Number 10 of 2015 pending the hearing and determination of this application.*

*c) That there be a stay of execution of the lower court's decree in Mwingi Senior Resident Magistrate Court Civil Case Number 10 of 2015, pending the hearing and determination of this appeal.*

2. The grounds upon which the above orders are sought are listed as follows: -

***(i) That the Applicants were aggrieved by the whole judgment delivered on 24<sup>th</sup> April 2020 and filed the appeal herein.***

***(ii) That their application for stay at the lower court was granted albeit with conditions that are difficult to fulfill.***

***(iii) That the Respondent stands to suffer no prejudice if the stay is granted.***

3. The Applicants have supported their application with the affidavit of Abdi Noor Salad Ali, the 1<sup>st</sup> Applicant, sworn on 7<sup>th</sup> April 2021. The 1<sup>st</sup> Applicant has reiterated the above grounds adding that, the condition he was given for stay in the lower court in effect, meant that he was required to pay Kshs. one million. He avers that it is hard to raise that amount in these hard economic times.

4. The Applicants claim that unless a stay is granted, they stand to suffer irreparably.

5. In their written submissions done through their learned Counsel, Kinyua Mwaniki & Wainaina Advocates, the Applicant reiterate that, the amount of Kshs. one million which they were required to pay is too high and that they are likely to be either, be committed to civil jail or have their household goods auctioned.

6. The Applicants submit that they are likely to suffer irreparably unless a stay is granted. They contend that their appeal is both on quantum

and liability.

7. They submit that, a deposit of Kshs. 150,000 would be fair and reasonable in their view and have relied on an unreported case of **Ruth Maweu versus Fransicah Peter Gavissa (Garissa HCCA No. 18 of 2014)**.

8. They further contend that they have raised 3 major issues in their appeal which are;

(i) *Apportionment of liability.*

(ii) *Proof of earning.*

(iii) *Excessive award*

They submit that they have an arguable appeal and have relied on **Nairobi Hospital versus Purity Kemunto [2018] eKLR**, where the court of appeal held that, an Applicant must demonstrate that he/she has an arguable appeal and not a frivolous one.

9. The Applicants have also relied on the case of **Kenya Ports Authority versus Kustrom (K) Ltd. [1995] eKLR**, where, the Court of Appeal held that the point to consider is whether if the stay is not granted the intended appeal if successful, will be rendered nugatory.

The court also considered the fact that the amount in issue was substantial and the Respondent's capital base had not been stated and therefore, if payment was to be made, the same mend has been beyond the reach of the Appellant if successful.

10. The Respondents have opposed this appeal and have told this court that they had no problem with the stay so long as the respondents fulfill the conditions given by the lower court.

11. They further have submitted that the Applicants have not satisfied conditions for a stay under **Order 42 Rule 6(2) of Civil Procedure Rule**.

They contend that they have not established that they will suffer any substantial loss. They submit that, a grant of stay is a discretionary matter, and that in the absence of fulfillment of all conditions under **Order 42 of the Civil Procedure Rule**, they cannot ask this court to exercise its discretion in their favor. In this regard, they rely on **James Wangawa & Another versus Agnes Naliaka Cheseto [2012] eKLR**.

12. They contend that ability to refund the amount paid per se, is not a factor for consideration, adding that the Applicants must demonstrate more. They rely on **Simba Coach Ltd. Versus Kitiiyu Merchants Auctioneers [2019] eKLR**.

13. They submit that, the Applicants cannot ask for an unconditional stay and that the law requires them to offer adequate security.

14. This court has considered this application and the response made by the Respondents through written submissions. For the record, the Respondents did not file either a replying affidavit or grounds of objection and if they did, then the same is not on the file. Nonetheless, the application is opposed on a point of law which is the allegation that the Applicants have not fulfilled the conditions for the stay of execution under **Order 42 Rule 6**.

15. The singular issue in this application is whether the Applicants have satisfied the conditions for stay. **Order 42 Rule 6 of the Civil Procedure Rule** provides: -

**“..... (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 my 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 the application being made, to consider such application and to make such order thereon as may to it seems 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 sub-rule (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....”**

16. The Applicants have filed the Appeal herein, which form the basis for this application but as seen from the above provisions, an appeal in itself cannot operate as a stay of execution. That means a party cannot just file an appeal and ask the court to grant a stay of execution merely on grounds that, the appeal will be rendered nugatory. An Applicant must show more. In my view, an Appellant must first show “sufficient cause” which should be a demonstration that the appeal filed is an arguable one as opposed to an appeal just preferred to buy time. It is not enough to state that the amount awarded is substantial. An Applicant must demonstrate the amount awarded is for example relatively excessive in relation to the injuries suffered.

It will not suffice to just state that execution is likely to take place or that one's goods are likely to be auctioned because execution is a lawful process. A sufficient cause must be shown and in addition, an Applicant should show that a substantial loss is likely to result unless a stay of execution is granted. It is not enough to state that the Respondent is impecunious or that he/she is a poor man/woman. This is because, poverty in itself, is not a crime and one should not be prejudiced solely on grounds of his social status as that would offend **Article 27 of the Constitution**. An Applicant should demonstrate that his/her appeal has a high chance of success. He/she must also satisfy the court that the

chance of success is high and that the same is likely to be rendered nugatory or academic if payment is made. In that event, the court may consider that it might be just to order that the decretal amount be deposited in court in a joint interests account, rather than paying the decree-holder who may not be able to refund the money.

17. In this instance, the Applicants have failed to demonstrate that their appeal has a high chance of success. They have not exhibited the memorandum of appeal in their application and even if I was minded under **Article 159 2(d)** to overlook that technicality and look at the appeal filed herein, I am handicapped by the fact that there is no copy of the pleadings or proceedings or in the very least, the copy of the judgment to inform this court based on the award in the lower court. In the absence of the proceedings, copy of pleadings, or the copy of the judgment this court is unable to determine if the Applicants have satisfied the conditions for stay stipulated above. This court is unable to determine the chances of success in this appeal.

In the premises, this court is unable to find that the conditions set by the lower court for stay are onerous or unjust to the Appellants/Applicants. The application dated 7<sup>th</sup> April 2021 therefore, is unmerited and on that ground, it is disallowed in its entirety.

**Dated, Signed, and Delivered at Kitui this 4<sup>th</sup> day of October 2021.**

**HON. JUSTICE R.K. LIMO**

**JUDGE**