



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. E015 OF 2021

THE GUARDIAN COACH.....1ST APPELLANT/APPLICANT

HENRY MACHARIA.....2ND APPELLANT/APPLICANT

VERSUS

PHAUSTINE ONGACHI OJIJO.....RESPONDENT

JUDGMENT

1. The Application coming for consideration in this ruling is the one dated 22/4/2021 seeking stay pending appeal. The Applicant had filed another Application dated 6/1/2021 which was seeking to set aside the Exparte proceedings dated 9/12/2020.
2. The current Application also dated 22/4/2021 is seeking stay pending appeal against the dismissal order. The Applicant filed a Supporting Affidavit to the said Application stating that he has an arguable appeal in that the Respondent sustained soft tissue injuries and yet was awarded Kshs.755,00/=.
3. The Respondent opposed the Application dated 22/4/2021 and filed a Replying Affidavit dated 20/5/2021 in which it is deposed that the said Application is frivolous, vexatious, incompetent and otherwise an abuse of the court process and should be dismissed.
4. The Respondent further stated in the Replying Affidavit that the Supporting Affidavit to the said Application is full of falsehoods and half-truths and that it is aimed at misleading the court so as to derail the course of justice.
5. The Respondent further deposed that the Applicants were always aware of the trial and that they participated from the beginning but failed to turn up in court for the hearing on 29/1/2020 or to file written submissions and the case proceeded Ex-parte.
6. The parties were directed to file written submission in the Application dated 22/4.2021. The Applicant submitted that the Application is premised on order 22 rule 22, order 42 rule 6 and order 5, rule of the Civil Procedure Rules and also sections 3A and 100 of the Civil Procedure Act.
7. The Applicant relied on the case of **HALAI & ANOTHER VS. THORTON & TUPIN (1963) LTD [1990] KLR 365** which was cited in **INDUSTRIAL CASE NO.1715 of 2011, ELENA DOUDOLADOVA KORIR V KENYATTA UNIVERSITY [2014] KLR** where the court held that the High court's discretion to order a stay of execution of its order or decree is fettered by three conditions; Firstly the Applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly that the Applicant must furnish security. The application must of course be made without unreasonable delay.
8. The Applicant submitted that the award of 755,000 for soft tissue injuries was excessive and further that the case proceeded ex parte and the Applicant stands to suffer substantial loss should the stay not be granted.
9. Further, the Applicant submitted that the Applicant has been filed without unreasonable delay that he is willing to furnish security and finally that the appeal has a high chance of success.
10. The Respondent vehemently opposed the application and submitted that the Applicant was granted stay pending the hearing and determination of the Application dated 6/1/2021 on condition that the Applicant pays the Respondent's costs and the Auctioneers costs before release of motor vehicle Reg No. KCL 241P but the Respondents costs have not been paid to date.
11. The Respondent also submitted that the Applicant's aim is to deny or delay the Respondents from enjoying or reaping the hard earned fruits of the judgment and further that the Applicant have not demonstrated clean hands but are merely bent to delay justice.
12. The Respondent relied on the case of **SHAH VS. MBOGO [1968] EA 93** where the legal parameters for exercise of judicial discretion

was set out as follows;

“... A Court of Appeal should not interfere with the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice...”

13. The Respondent further submitted that whereas the power to strike out and dismiss pleadings is drastic and should be used sparingly in clearest of cases, a balance must be struck between the principle and the policy consideration that the Respondent should not be kept away from her judgment by unscrupulous Applicants whose intentions are simply to delay the finalization of the case.

14. I find that the principles for granting stay pending appeal are set out under **order 42 rule 6** of the Civil Procedure Rules, 2010 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 sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order 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.

15. **SAMVIR TRUSTEE LIMITED VS. GUARDIAN BANK LIMITED NAIROBI (MILIMANI) HCCC 795 OF 1997** Warsame J. (as he then was) stated that :-

“ ... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions...”

16. In the current case there's no denying that the case proceeded ex parte at the trial court.

17. The Applicant has already filed an appeal No. 15 of 2021 and it is therefore not true that no substantive appeal has been filed.

18. I find that the Applicant has met the conditions for grant of stay pending appeal.

19. The Applicant is also willing to deposit security for costs. I allow the date 22/4/2021 on the following conditions:

(i) THAT the Applicant deposits half of the decretal sum in an interest earning account held jointly by both the Applicants' and the Respondent's Advocates within sixty (60) days.

(ii) THAT the Applicant pays the Respondents costs of this application and the costs earlier ordered to be agreed upon by the parties or assessed by the Deputy Registrar of this court.

(iii) The intended appeal to be filed and served within 30 days of this date,

DELIVERED, DATED AND SIGNED AT KERICHO THIS 1ST DAY OF OCTOBER 2021.

A. N. ONGERI

JUDGE