



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT CIVIL APPEAL CASE NO. 30 OF 2021**

**JULIUS KIVALA.....APPELLANT**

**VERSUS**

**MUNYOKI JOSEPH KANGE.....1<sup>ST</sup> RESPONDENT**

**EDWARD KAMBO KARIUKI.....2<sup>ND</sup> RESPONDENT**

***Being an Appeal against the Judgement delivered by the PM's Court***

***in Mwingi on 20<sup>th</sup> May 2021 in Mwingi PMCC No. 10 of 2018***

***(Munyoki Joseph Kange & Edward Kombo vs Julius Kivala***

**RULING**

1. This is a ruling in respect of an application by the Appellant by way of Notice of Motion dated 28<sup>th</sup> May 2021. The Applicant in that application is seeking the following reliefs: -

- (i) That this application be certified as urgent, it be heard ex parte and service thereof be dispensed with at the first instance.*
- (ii) That this Honourable court be pleased to stay execution of the judgement and decree in Mwingi PMCC No. 10 of 2018 (Munyoki Joseph Kange & Edward Kombo Kariuki versus Julius Musyoka Kivala pending the interpartes hearing and determination of the application herein.*
- (iii) That this Honorable Court be pleased to stay execution of the judgment and decree in **Mwingi PMCC No. 10 of 2018 (Munyoki Joseph Kange & Edward Kombo Kariuki versus Julius Musyoka Kivala)** pending the inter-partes hearing and determination of the appeal herein.*
- (iv) That costs of this application be provided for.*
- (v) That this honorable court be pleased to grant any other orders and further orders that it deems fit to grant.*

2. The grounds upon which this motion is premised are listed on the face of the application as follows namely: -

- (i) That Hon. Onkoba (PM) delivered judgment in (Mwingi PMCC No. 10 of 2018 (Musyoki Joseph Kange & Edward Kombo Kariuki Versus Julius Musyoka Kivala on 28<sup>th</sup> April 2021 awarding the Respondent a sum of Kshs. 3,914,198-together with costs of the suit.*
- (ii) That if a stay of execution is not granted, the Appellant may suffer a substantial loss, as once the said decretal sum is paid to the Respondent, it may not be recoverable in the event the appeal herein, succeeds.*
- (iii) That is a stay is not granted, the Appellant will suffer irreparable loss since he was neither the lawful owner nor in possession of the motor vehicle which allegedly caused the accident.*
- (iv) That the Appeal has overwhelming chances of success and if execution is carried out, it will be rendered nugatory.*

(v) *That this application has been brought timeously.*

(vi) *That the Appellant is willing to abide by any conditions and terms as to security as the court may deem fit to impose.*

(vii) *That the Respondent is likely to execute the decree herein at any time as nothing is preventing him from doing so.*

(viii) *That no party shall suffer prejudice of the orders sought herein is granted.*

(ix) *That further grounds to be adduced at the hearing hereof.*

3. The Applicant has supported his application with an affidavit sworn on 28<sup>th</sup> May 2021 where he has reiterated the above grounds adding that any prejudice suffered by the Respondent as a result, of stay, will be compensated by way of interests.

4. In his written submissions dated 7<sup>th</sup> June 2021 done through his learned counsel, the Applicant submits that he has satisfied conditions for stay adding that, the application has been filed timely and without any delay adding that, he stands to suffer substantial loss because of the amount awarded which is Kshs. 3,914,198. He contends that if the amount is paid, he is unlikely to be refunded if he succeeds on appeal.

5. The Applicant further states that he is ready to furnish security by way of a bank guarantee to the tune of Kshs. 500,000 and has relied on the case of *Commissioner of Domestic Taxes versus Brook House Schools Limited [2021] eKLR*, to support his contention.

6. The Respondents have opposed this application through an affidavit sworn on 3<sup>rd</sup> June 2021 by Edward Kambo Kariuki, the 2<sup>nd</sup> Respondent. The Respondents aver that the Applicant has not offered security for due performance and that failure to satisfy.

7. The Respondents also contend that the Applicant has failed to demonstrate that he has arguable appeal. They have relied on *Everlyne Jennifer Mwakha versus Nubra Ltd. (Nairobi HCC No. E035 of 2020)* to buttress their contention that an applicant for a stay of execution must deposit security which shall achieve the due performance of the decree.

8. The 2<sup>nd</sup> Respondent contends that he was the owner of a motor vehicle damaged and cannot be described as a pamper. He claims that the Applicant is required to demonstrate that he would suffer substantial loss and according to him, the Applicant in this application has failed to do so.

9. This court has considered this application, and the response made. The Applicant has invoked the provisions of *Order 42 of Civil Procedure Rule 6 and Section 3A Civil Procedure Act*, in seeking for stay of execution. The provisions of *Order 42 Rule 6 (1) and (2) of 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 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 made such orders 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...”*

10. The grant of stay of execution is a discretionary matter to a court and they are guiding principles that have developed over time through both the law and case law.

In *Butt versus Rent Restriction Tribunal [1979]eKLR*, the Court of Appeal noted that the power of the court to grant or refuse an application for stay of execution is discretionary and the discretionary should not be exercised in such a way to prevent an appeal and secondly, that the general principle to be considered is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be tendered nugatory should the appeal succeed and thirdly allow the application if there are good grounds to do so.

The above position was evident in the case of *RWW versus EKW [2019] eKLR*, where the court held as follows: -

*“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.*

*Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”*

11. To balance the scales of justice fairly, the guiding factors as stipulated under the provisions of *Order 46 Rule 6(2) of Civil Procedure Rules*, are: -

- (i) A good cause for example shows a good appeal with high chances of success.
- (ii) That substantial loss would be occasioned to the Applicant unless a stay is granted.
- (iii) That the application has been made without unreasonable delay.
- (iv) Offer for security for the due performance of such decree or order passed against the Applicant.

12. So what is described as substantial loss?

In my view, a substantial loss is where an Applicant stands to suffer a considerable amount of loss which in monetary terms can be considered as a colossal sum of money that is unlikely to be refunded or recovered regardless of whether he succeeds on appeal. The standard in my view is that of a reasonable man. It is always the Applicant who should establish or prove that he/she is likely to suffer considerable loss or that his/her success in the appeal will be negated by the inability of the decree-holder to refund the amount paid in satisfaction of the decree.

13. In **Equity Bank Limited versus Taiga Adams Co. Limited [2006]**, eKLR the court held as follows: -

***“... The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent—that is execution is carried out in the event the appeal succeeds, the Respondent would not be in a position to pay/reimburse- as he is a person of no means..”***

14. This court notes that, in this instance, the Applicant has alleged that the Respondent will not be in a position to refund the decretal amount in the event he succeeds on appeal. The 2<sup>nd</sup> Respondent has however countered this by stating that being the owner of a motor vehicle, he cannot be described as a man of straw. The Respondent in my view should however have gone a step further to show that he owns the vehicle and show the value of the vehicle currently though he does not carry the burden of proof. There is normally a thin line here in respect of who bears the burden of proof, and courts in the past, have tried to navigate this thin line. In **Peter Karke Mutie & Another versus Patricia Ndunge Mwazia [2020]** eKLR, Odunga-Judge, when faced with a similar situation held as follows: -

***“Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nairobi Case No. 344 of 1999.***

***The law, however, appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.***

***While the general rule is that poverty of the judgment creditor is not necessarily a ground for granting a stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account.”***

15. The Applicant has made allegations that he stands to suffer irreparable loss pointing out that the amount awarded of Kshs. 3,914,198 is high and while this court agrees that the decretal amount which is approximately Kshs. 4 million taking into account interests, is a considerable sum which could be a challenge to refund if the Appellant succeeds in his appeal, he was under obligation to lay sufficient basis to establish his fears. His allegations that the Respondent will not refund because he is just a driver are not enough.

16. The Applicant, however, has raised a significant ground which in my view has shown that he has established a good cause to warrant consideration by this court. He says that liability was denied because of the dispute of ownership of the motor vehicle that caused the accident. I have perused through the grounds of appeal herein and find that the issue is central in the appeal and the issue is far from being frivolous. The Applicant is entitled to ventilate his grievance in his appeal and deserves some level of fortitude through preserving the subject matter of his appeal.

17. I have considered the time taken to prefer this application and note that the Applicant cannot be faulted for indolence because the application was filed timely. The judgment, the subject of this appeal was delivered on 28<sup>th</sup> April 2021 and this application was filed on 31<sup>st</sup> May 2021. There was a delay of about 30 days which cannot be termed unreasonable considering the time it takes to notify a client about delivery of judgment and the time it takes to digest and react to such judgment.

18. I am persuaded by the school of thought that, while a Respondent should demonstrate prove that he/she can refund to reconstitute a successful Appellant to financial position he/she was before execution, a litigant should not suffer merely on account of poverty or humble background.

19. Taking everything into consideration and carefully balancing the scales of justice, I am satisfied that this application is merited albeit with a condition that meets the end of justice. The application dated 28<sup>th</sup> May 2021, is allowed in terms of prayer 3 on the condition that, half the decretal amount be paid to the Respondent and the other half to await the outcome of the appeal. The Applicant is granted 30 days from the date of this ruling to pay the half decretal amount to the decree-holder to enable him to access at least half the fruits of his judgment.

The cost of this application shall be in the main appeal.

**DATED, SIGNED, AND DELIVERED AT KITUI THIS 12TH DAY OF OCTOBER 2021.**

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

**JUDGE**