



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. E282 OF 2020**

**JAMES WANGANGA.....APPELLANT/APPLICANT**

**VERSUS**

**WILBERFORCE SITUMA MULATI.....RESPONDENT**

**RULING**

1. The application dated 22<sup>nd</sup> February 2021 was filed on 25<sup>th</sup> February 2021 and seeks the following orders:

**i) & ii) Spent**

**iii) THAT** this honourable Court be pleased to order stay of execution of the judgment delivered on 9<sup>th</sup> October, 2020 in Milimani Cmcc NO. 1236 of 2017 pending the hearing and determination of this application and appeal herein.

**iv) THAT** costs be in the cause.

2. It is supported by the affidavit of Joyce Chirchir (Applicant's advocate) plus the grounds on the face of the application. The main ground is that the appellant/applicant has filed an appeal and if the stay sought is not granted he will suffer irreparable damage and the appeal will be rendered nugatory. A similar application had been made before the trial court but it was dismissed due to the applicant's failure to attend court as a result of failure to access the virtual court session.

3. She depones that the applicant is able and willing to give a reasonable security in the form of a bank guarantee by Diamond Trust Bank.

4. A replying affidavit sworn on 19<sup>th</sup> May 2021 by Salome M. Beacco the respondent's advocate was filed. She deponed that the applicant failed to comply with the Judgment delivered on 9<sup>th</sup> October 2020 and his application for stay of execution before the trial court was dismissed on 16<sup>th</sup> February 2021.

5. She averred that the applicant has not satisfied the mandatory conditions under Order 42 Rule 6 of the Civil Procedure Rules. That he has not furnished this court with any security for costs that would bind him for due performance of the decree being challenged. She further depones that he has not shown what substantial loss if any he will suffer if stay is not granted. He has not also shown that the respondent will not make a refund in the event of a successful appeal.

6. She further depones that this application has been filed after an unexplained inordinate delay. That the applicant has not demonstrated that he has an arguable appeal. The application she avers is a ploy to deny the respondent the fruits of the Judgment yet he needs the money for treatment of the injuries suffered. She urges the court to dismiss the application.

7. The application was canvassed by way of written submissions. The applicant's submissions by Kimondo Gachoka advocates are dated 7<sup>th</sup> July 2021. Counsel submitted that the impugned Judgment was delivered on 9<sup>th</sup> October 2020. Further that the applicant has satisfied the requirements for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.

8. Counsel submits that the appeal is against both liability and quantum and if execution proceeds the appeal will be rendered nugatory and the appellant's right to appeal extinguished. He referred to the case of **RWN v EKW [2019] eKLR** to support his argument.

9. On security for costs counsel referred to a host of authorities namely:

*i) Absalom Dova v Tarbo Transporters [2013] eKLR;*

*ii) Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR*

*iii) Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd [2019] eKLR.*

*iv) Arun C. Sharma v Ashana, Raikundalia & Co. Advocates & 2 others [2014] eKLR.*

*v) Focin Motorcycle Co. Ltd v Ann Wambui Wangui & another [2018] eKLR*

10. Relying on the cited cases counsel has urged this court to balance the two rights of the parties herein i.e the applicant's right to appeal against the respondent's right to enjoy the fruits of the judgment. He added that the applicant has all along been willing to give the respondent a bank guarantee with Diamond Trust Bank.

11. Finally, he submits that the appeal was filed within 30 days of the judgment. Further that this application was filed after the first one was dismissed by the trial court for non-attendance.

12. The firm of Wanyonyi and Muhia advocates filed submissions dated 21<sup>st</sup> July 2021 on behalf of the respondent. M/s Deacco for the respondent submitted while relying on the case of **Macharia t/a Macharia & co. Advocates v East African Standard [2002] eKLR** that the application lacks merit and is merely intended to deny the respondent immediate access to the fruits of his judgment. That the matter had been pending in court from 2017 to 2020 when it was finalized.

13. She further submits that the applicant has not satisfied the conditions laid out in Order 42 Rule 6 of the Civil Procedure Rules. On substantial loss it's her argument that the applicant had a duty to prove that he'd suffer such loss if the stay is not granted which duty he has not discharged. That he has not shown that in the event of a successful appeal the respondent would not refund the money. She cited the following cases in support of this submission:

*i) Machira (Supra);*

*ii) Equity Bank Ltd V Taiga Adams Company Ltd [2006] eKLR;*

*iii) Antoine Ndiaye v African Virtual University [2015] eKLR.*

14. Counsel further submits that the applicant has not furnished security for the due performance of the decree being appealed from. She contends that security must be provided for. She referred to the case of **Masisi Mwiti v Damris Wanjiku Njeri [2016] eKLR** to support this. She contends that the discretionary relief of stay of execution pending appeal is designated for the benefit of both parties, and for substantive justice to be administered to both parties. She adds that the respondent sustained serious injuries from the accident and needs the decretal sum for purposes of treatment.

15. In her submission that the appeal will not be rendered nugatory if stay is not granted. She relied on the case of **Kenya Shell Ltd v Bibiru & another court of appeal civil application No 97 of 1986** where the Court of Appeal held that appeals in money decrees are never rendered nugatory and one must prove substantial loss.

16. Counsel further submitted there was inordinate delay in filing this application considering that judgment was delivered on 9<sup>th</sup> October 2020 and the delay has not been explained. She referred the court to the following cases to support her submissions;

*i) Absalom Dova (supra),*

*ii) Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others [2013] eKLR;*

She further argued that the rights of both parties must be balanced. She referred to **Equity Bank Ltd (supra)** and **Mohamed Salim t/a Choice Butchery Nasserpuria Memon Jam [2013] eKLR** in support of this submission. She therefore urged the court to dismiss the application.

#### **Analysis and determination**

17. I have duly considered the application, affidavit, annexures, both submissions and authorities cited. The issue for determination is whether the applicant has met the threshold for issuance of the order of stay of execution pending appeal.

18. The conditions to be fulfilled by an applicant in such a matter are found in Order 42 Rule 6 (2) of the Civil Procedure Rules which states as follows:

*(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.”*

19. As correctly put by counsel for the respondent, what must be satisfied by an applicant seeking a stay of execution is the following:

*a) Substantial loss may result to the applicant unless the order is made.*

*b) The application has been made without unreasonable delay and*

*c) The applicant has furnished security for the due performance of the decree being appeal from.*

20. The impugned judgment was delivered on 9<sup>th</sup> October 2020. The appeal herein was filed on 4<sup>th</sup> October 2020 which was within the stipulated time under section 79G of the Civil Procedure Rules. He applied for stay of execution before the trial court vide an application dated 27<sup>th</sup> November 2020. The same was dismissed on 16<sup>th</sup> February 2021 for want of prosecution and the respondent has explained the reason for failure to attend court. The current application is dated 22<sup>nd</sup> February 2021 and was filed on 25<sup>th</sup> February 2021. This present application was only made because the applicant was not granted the orders sought before the trial court.

21. This is allowed under Order 42 Rules 6 (1) of the Civil Procedure Rules which 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 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.”*

The applicant did not make any error in filing the present application. Secondly I find that both applications for stay of execution were promptly made i.e before the trial court and before this court.

22. From the memorandum of appeal, the applicant is appealing against the findings on both liability and quantum. The trial court apportioned liability at 50:50 and made an award of Kshs. 350,000/= . From the memorandum of appeal, it is not clear whether the award of Kshs. 350,000/= is before or after the 50% contribution. I say this because none of the parties annexed a copy of the Judgment and/or decree in the application and/or response for this court to read it.

23. Be it as it may, the applicant had a duty to demonstrate the substantial loss he would suffer if the order of stay of execution is not granted. Both counsel have cited very helpful authorities on this. The purpose of stay of execution is to preserve the subject matter which in this case is the decretal sum. The applicant must therefore demonstrate that the respondent is not in a position to refund the decretal sum if paid out to him and the appeal succeeds. That would then amount to substantial loss as he would not be in a position to recover the money paid out to the respondent. **See Equity Bank Ltd** (supra).

24. In **Machira t/a Machira & company advocates** (supra) the court stated:

*“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.”*

Also see **Antonie Ndiaye** (supra)

25. Perusal of the grounds and the supporting affidavit only shows that the applicant is requesting for stay because he has filed an appeal. The deponent states at:

**Paragraph 5**

*“THAT if this application is not granted the appellant will suffer irreparable damage and this application together with the appeal will be rendered nugatory.”*

**Paragraph 6**

*“THAT the appellant is ready, able and willing to give a reasonable security in the form of bank guarantee as security herein.”*

It is nowhere indicated that the respondent is a person of no means and would therefore not be in a position to refund any money paid out to him. I therefore find that the applicant fell short of demonstrating that he will incur substantial loss if stay of execution is not granted.

26. The next issue is on the security of due performance of the decree. I have considered the cases cited by both parties and other decided cases on this. The bottom line is in all fairness unless a respondent has been adjudged a pauper which the court must consider, take care of, the interests of both parties. The key interests are that the appeal is not rendered nugatory and secondly that the successful party before the trial court does enjoy the fruits of the judgment. The court must as much as possible balance these two interests.

27. After considering all the above, I find that the application has merit and is allowed. There shall be stay of execution on condition that the respondent is paid half of the decretal sum through his advocates within 21 days.

ii) The balance to be secured by way of a bank guarantee from Diamond Trust Bank within 30 days.

iii) Failure to comply with clause (i) and (ii) or either of them will lead to vacation of the order of stay of execution.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG'UDI**

**JUDGE**