



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. E081 OF 2021**

**KITUSHI MOTOR LIMITED.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JAMES MUEMA KITETE.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**JUSTUS MWATU MWILU.....RESPONDENT**

**RULING**

1. By a Motion on Notice dated 21<sup>st</sup> May, 2021, the applicants herein substantially seek stay of execution of the judgement and decree in Machakos Chief Magistrate's Court Civil Suit No. 756 of 2019 pending the hearing and determination of this appeal.

2. The said application is supported by the affidavit sworn by **Kelvin Ngure** who deposed that he is the Defendant/Applicant and the owner of motor vehicle registration no. KCT 393F at whose instance the suit before the trial court was defended. According to the deponent, on 24<sup>th</sup> February, 2021, judgement was delivered against the Applicants in favour of the Respondent in the sum of Kshs 200,000/- general damages and Kshs 5,750/- special damages making a total of Kshs 205,750/- plus costs and interests. Aggrieved by the said decision, the Applicants instructed their advocates to appeal against the whole judgement hence this appeal which the Applicants contended is merited, arguable and raises pertinent points of law hence has overwhelming chance of success.

3. In the Applicants' view the said award was excessive in terms of the quantum awarded hence this appeal has high chances of success.

4. According to the deponent, there is a reasonable apprehension on the part of the applicants that the Respondent may proceed and levy execution against them unless the stay sought is granted hence rendering this appeal nugatory and thus occasioning them irreparable loss and damage.

5. It was deposed that the judgement is of substantial amount and there was apprehension that if the Respondent is paid, he may deal with the same in a manner prejudicial to the applicants and in the event that the appeal succeeds, the applicants might not be able to recover he same from the Respondent who has not disclosed or furnished the Court with any documentary evidence in proof of his financial standing. The Applicants deposed that their insurer was ready and willing to provide a Bank Guarantee as security for stay of execution during the pendency of tis appeal.

6. It was the Applicants' view that the application was made in good faith and that it will not occasion any prejudice to the Respondent. The Applicants indicated that the appeal is particularly against the quantum of damages which in their view is excessive.

7. In opposing the application, the Respondent swore an affidavit in which he deposed that the supporting affidavit was sworn by stranger to the proceedings and ought to be struck out. It was further averred that there is no proper appeal since this appeal was filed on 4<sup>th</sup> June, 2021 out of time without leave of the Court hence no stay can be granted pending a non-existing appeal. It was further deposed that the application is speculative as there is no evidence to show the Respondent's inability to repay the decretal sum if paid to the Respondent. Accordingly, no prejudice has been shown that the Applicants stand to suffer if the orders sought herein are not granted. On the other hand, the Respondent lamented that he has waited since 28<sup>th</sup> November, 2019 when the suit in the trial court was filed which arose from the Applicants' negligence, negligence which is not disputed and hence the non-payment of the decretal sum is prejudicial to him a victim of the accident.

8. To the extent that the appeal only intends to challenge the quantum and not liability, it was the Respondent's view that the appeal is wishful and has no chances of success but only seeks to delay the payment of the decretal sum. It was the Respondent's contention that the application itself has been brought with undue delay after the lapse of the 30 days stay granted by the trial court on 24<sup>th</sup> April 2021.

9. On without prejudice the Respondent however urged that since liability is not disputed, in the event that this court is inclined to allow the application, the court should direct that the Applicants release to her half the decretal sum with costs and interests and provide a Bank Guarantee for the balance of the decretal sum pending the determination of the appeal, if any.

10. The Applicants in their submissions relied on **Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi [2015] eKLR** for the position that in such application, the Applicant is not required to prove that he has an arguable appeal. They also relied on **Esther Wamaita Njuria & 2 Others vs. Safaricom Limited [2014] eKLR** as regards the principles applicable in applications requiring the exercise of discretion. As for principles guiding stay of execution pending appeal, they relied on **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR**.

11. On the issue of substantial loss, it was reiterated that the Applicants were ready and willing to issue a banker's guarantee and that the Respondent's means were unknown hence is unlikely to refund the decretal sum in the event that the appeal is successful. Based on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**, it was submitted that the Respondent is the only one who can specifically show that she has the means to repay the decretal sum if the appeal succeeds. According to the Applicant the amount awarded is substantial and in the event that the Respondent is unable to refund the same and the appeal succeeds the said success would be rendered nugatory and the Applicants would be exposed to irreparable damage.

12. It was submitted that there was no inordinate delay in making the application and that the Applicants were willing to furnish security. It was therefore submitted that the Applicants had fulfilled all the necessary conditions for the grant of the orders sought hence the same ought to be granted.

13. On behalf of the Respondent it was submitted, while reiterating the contents of the replying affidavit, that all the requirements of Order 42 Rule 6 of the ***Civil Procedure Rules*** have to be met before the Court can exercise its discretion in favour of the applicant and the onus lies on the applicant to demonstrate the existence of the same and in this regard the Respondent relied on **Antoine Ndiaye vs. African Virtual University [2015] eKLR**. Based on the same decision it was submitted that the applicant had not satisfactorily shown that if a stay of execution is not granted, he was bound to suffer any substantial loss. Further it was submitted that the applicants were guilty of undue delay since the application was made 4 months after the delivery of the judgement without leave.

#### **Determination**

14. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

15. As pointed out by the Respondent, the affidavit in support of the application is sworn by one **Kevin Ngure** who has deposed that he is the Defendant/Applicant. However, the 1<sup>st</sup> Applicant herein are indicated as **Kitushi Motor Limited** while in the other documents, it is indicated as **Khushi Motor Limited**. The 2<sup>nd</sup> Applicant is indicated as **James Muema Kitete**. It is therefore unclear who the deponent is in these proceedings as the copy of the judgement exhibited does not indicate that the said deponent is a party to these proceedings. To that extent, the said affidavit is incompetent and being incompetent it cannot be the basis upon which the application may be granted.

16. Secondly, the judgement sought to be appealed from is dated 24<sup>th</sup> April, 2021. This appeal was filed on 4<sup>th</sup> June, 2021, clearly more than 30 days prescribed for lodging the appeal. There is no indication that leave was sought and obtained to lodge the appeal out of time. Without evidence that there is in place a valid appeal, the application seeking stay pending that very appeal may well be stillborn.

17. Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** provides as follows:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”***

18. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. Apart from that there is no basis for forming the view that the Respondent will not be able to refund the decretal sum if the same is set over to him.

19. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

20. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

**“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”**

21. 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. Nai. 344 of 1999**.

22. I therefore agree with the opinion expressed in **Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

**“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”**

23. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

24. In this case apart from a bare allegation, the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. Where the sum involved is colossal the Court may well take notice of the fact that the payment of such large amount may cripple the activities of the Applicant and may well discourage it from pursuing its appeal. In this case the amount involved is not more than Kshs 250,000.00. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers. Accordingly, I am unable to find that the Applicants have proved that substantial loss may result to the applicants unless the order is made.

25. Consequently, both on the competency and merits of the application, the same fails to meet the legal threshold. It is therefore dismissed with costs to the Respondents.

26. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Ochoki for Mr Morara for the Applicant**

**Mr Munyoki for the Respondent**

**CA Susan**