



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. E034 OF 2020

BETWEEN

NGUMBI MBELENZI.....1ST APPELLANT/APPLICANT

GODFREY GITONGA MUSA.....2ND APPELLANT/APPLICANT

VERSUS

SAMWEL MACHARIA NJENGA.....RESPONDENT

RULING

1. **NGUMBI MBELENZI** and **GODFREY GITONGA MUSA**, the appellants have appealed against the judgment before the Thika Chief Magistrate's court in the case Civil Suit No. 70 of 2020. They filed this appeal against that judgment.

2. By Notice of Motion application dated 21st April, 2021, they seek stay of execution pending this appeal. That application is supported by the affidavit of **GODFREY GITONGA MUSA**. In that affidavit, the deponent stated he and his co-appellant are aggrieved by the trial court's finding that they were 100% liable for the accident where the respondent **SAMUEL MACHARIA NJENGA** was injured. The deponent stated further that the respondent might not be in a position to refund the amount awarded by the trial court in the event this appeal is successful. The deponent has requested that this Court do accept the bank guarantee issued by **Diamond Trust Bank**.

3. The respondent has opposed the application citing the dismissal of a similar application by the trial court, citing the delay in approaching this Court and faulting the bank guarantee on the basis that the bank's offer in that guarantee expired on 6th November, 2021.

ANALYSIS AND DETERMINATION

4. The respondent erred to cite the fact the trial court dismissed the appellant's similar application as a basis of denying appellants their prayer. That position is not supported by **Order 42 Rule 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 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.” (underlining mine)

5. It is explicit from the above that a party who does not succeed before the trial court can again approach the court appealed to, in seeking stay of execution.

6. The appellants, in order to obtain stay of execution ought to have satisfied the provisions of **Order 42 Rule 6(2)** of the Civil Procedure Rules which provides:-

“(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.”

7. The first condition the appellant needed to satisfy this Court is to show they will suffer substantial loss if stay is not granted. Substantial loss was considered in the case VICTORY CONSTRUCTION V. BM (a minor suing through next friend on PMM) (2019) eKLR as follows:-

“15. The same position was adopted by Kimaru, J in CENTURY OIL TRADING COMPANY LTD VS. KENYA SHELL LIMITED NAIROBI (MILIMANI) HCMCA NO. 1561 OF 2007 where he stated that:-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

8. The appellant stated in support of their ground that they would suffer substantial loss because of the probability that the respondent has no means of refunding the judgment amount in the event that this appeal does succeed. Unfortunately, although the burden of proving that the respondent could refund the judgment fell on the respondent he failed to shift that burden. It is therefore very probable the appellants will suffer substantial loss if stay is not granted.

9. The judgment of the trial court is a money judgment. This Court, in my view, ought to balance the rights of the appellants against those of the respondent in considering the application for stay of execution. I find support in the case TASSAM LOGISTICS LTD VS. DAVID MACHARIA & ANOTHER (2018) eKLR as follows:-

“49. In the case of MOHAMMED SALIM T/A CHOICE BUTCHERY –vs- NASSERPURIA MEMON JAMAT (2013)eKLR, The court upheld the decision of M/S PORTREITZ MATERNITY –vs- JAMES KARANGA KABIA Civil Appeal No. 63 Of 1997 and stated that:

‘That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right ...’

10. I am in agreement with the depositions of the respondent that the bank guarantee provided and attached to the appellants’ application cannot be relied upon. That guarantee expired on 6th November, 2021 and secondly, the bank indicated its willingness to guarantee **Directline Assurance Company Limited**. That entity is not a party in this appeal and therefore, that offer of a guarantee will not secure the respondent’s judgment.

11. Accordingly and bearing the above discussion on my consideration of the Notice of Motion dated 21st April, 2021, I grant the following orders:-

(a) There shall be conditional stay of execution of the decree of Thika Chief Magistrate’s Court in Civil case No. 70 of 2020 on condition the appellants do deposit into a joint interest earning account of both advocates that decretal sum within 21 days from today, in default execution shall proceed.

(b) The costs of the notice of motion dated 21st April, 2021 shall abide with the outcome of this appeal.

RULING DATED AND DELIVERED AT KIAMBU THIS 11TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: MOURICE

FOR APPELLANTS: MS. LABOSO H/B MS. MULINGE

FOR RESPONDENT: MR. CHUIRU

COURT

RULING DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE