



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 55 OF 2019

LUCY KAGWERA MWENDA.....1ST APPELLANT/APPLICANT

CMC MOTORS GROUP LIMITED...2ND APPELLANT/APPLICANT

VERSUS

ZAKARIA NJUE NJIRU.....RESPONDENT

RULING

A. Introduction

1. This is a ruling for the application dated 27th September 2019 in which the applicants seek orders for stay of execution in respect of the judgement delivered on 30th August 2019 in Embu CMCC No. 242 of 2018 pending the hearing and determination of the instant appeal.
2. It is the applicants' case that their appeal has high chances of success and that if the instant application is not allowed they stand to have their goods being carried away and sold as the respondent has already instituted execution proceedings.
3. The applicants' also state that if execution is allowed and the judgement sum paid, the respondent may not be able to refund the decretal amount if the appeal is successful. It is also stated that the applicants are willing to provide security as ordered by court.
4. In rejoinder, it is the respondent's case that the instant application is devoid of merit as it fails to meet the conditions warranting grant of stay of execution. The respondent states that the applicants have failed to demonstrate what substantial loss they stand to suffer.
5. Further it is stated that the mere fact that the applicants have filed an appeal does not automatically render it meritorious and that the right of appeal must be balanced against the respondent's right to enjoy fruits of his judgement failure of which he stands to suffer prejudice.
6. The respondent states that the applicants should be asked to release half the decretal amount to him and deposit the rest in a joint interest earning account.
7. The parties filed written submissions to dispose of the matter.

B. Applicant's Submissions

8. It is submitted that the prejudice to be suffered by the applicants if execution is allowed cannot be compared to the inconvenience of waiting just a while longer by the respondent as that inconvenience will be compensated by an award of costs.
9. On substantial loss, it is submitted that the respondent has the evidential burden to show that he has the resources to pay back the decretal amount if the same is released to him pending the appeal as this is a matter within the respondent's knowledge. Reliance was placed on the findings in the case of **Civil Appeal No. 144 of 2018; Kapa Oil Refineries Limited v Festus Mutuku Muinde [2018] eKLR.**
10. The applicants further submitted that the respondent was not a person of means and that he may be unable to refund the decretal amount if the appeal is successful as the same has not been rebutted by any evidence. Reliance was placed on the Court of Appeal decision which upheld the same proposition in **Nairobi Civil Application No. 238 of 2005, National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR)** which was quoted with approval in the case of **Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa [2016] eKLR.**
11. The applicants also relied on the case of **Johnson Mwiruti Mburu v Samuel Macharia Ngure [2004] eKLR** where it was found that the application was made without unreasonable delay and that the offer to deposit the decretal amount qualified the applicant in respect of the

final requirement concerning adequate security for the performance of the decree. The applicants further state that the respondent's proposal to have half the decretal amount released to him is untenable as it is a high amount to expect the respondent, who has not shown any evidence of a steady income, to reimburse would the appeal succeed.

C. Respondent's Submissions

12. It is submitted that the applicants have failed to demonstrate what irreparable loss they stand to suffer if stay is not granted and that in any case in the unlikely event the appeal succeeds, the respondent will be able to refund the decretal amount to the applicants. Reliance is placed on the case of Antoine Ndiaye v African Virtual University [2015] eKLR.

13. On security, it is submitted that for the applicants' application to succeed, they should be required to furnish the entire decretal amount with half being held in a joint interest earning account and the other half being released to the respondent. Reliance on this proposition is placed on the cases of Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR and that of Francis Kirwa Magut & Another v Grace Agiso [2015] eKLR.

D. Analysis & Determination

14. In the cases of Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Benjamin Karuga Kibiru [1986] KLR 410, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

15. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

- 1. Substantial loss may result to the applicant unless the order was made;*
- 2. The application was made without unreasonable delay; and*
- 3. 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.*

16. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"**. It connotes that all three (3) conditions must be met simultaneously.

17. It is my considered view that substantial loss does not have to be loss of substantial funds. It is sufficient if an applicant seeking a stay of execution demonstrates that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

18. As can be seen hereinabove, there was no affidavit evidence by the respondent on his ability to refund the decretal amount if the same is advanced to him as put forth by the applicants. This therefore left the court in a quagmire especially as regards the ability of the respondent to pay back the decretal sum in the event the applicant was successful in his appeal herein. In the absence of proof of their ability to pay back the said sum, this court is satisfied that the applicants would suffer substantial loss. The applicants, in my view, have satisfied the first condition of being granted a stay of execution pending appeal.

19. Turning to the second issue, this court found a period of less than one month for filing the present application does not amount to undue delay and this serves the second requirement satisfactorily.

20. The Applicants have demonstrated their willingness to furnish security demonstrated in their supporting affidavit as well as their submissions.

21. In the case of Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus:

"...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful..."

22. As this very court held in the case of Siegfried Busch vs MCSK [2013] eKLR, thus: -

"A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment..."

23. Accordingly, having considered the parties' pleadings, affidavits, written submissions and the case law relied in support of their respective arguments, it is the considered view of this court that the applicants have met the conditions warranting grant of orders of stay of

execution provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.

24. Further, this court is alive to the fact that the applicants are entitled to exercise their right of appeal, it was in the interests of justice that a stay of execution pending the hearing and determination of the Appeal of the Learned Trial Magistrate's judgment be granted so as not to render his appeal nugatory.

25. Accordingly, the upshot of this court's ruling is that the applicants' Notice of Motion application dated 27th September 2019 is merited and the same was hereby allowed in the following terms: -

a) That there shall be a stay of execution of the judgment delivered on 30th August 2019 pending the hearing and determination of the intended appeal on condition the applicants shall deposit into an interest earning account in the joint names of the advocates for the parties the whole decretal sum within the thirty (30) days from the date hereof.

b) For the avoidance of doubt, in the event, the applicants shall default on the deposit the conditional stay of execution shall automatically lapse.

c) Costs of the application to be in the cause.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Kiai for Mr. Wanjihia for the Applicant

Ms. Muriuki for Mugendi for the Respondent