



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 586 OF 2019

MICHAEL JOSEPH SANDE.....1ST APPELLANT

MARGARET V MARALE SANDE.....2ND APPELLANT

-VERSUS-

MADINA MUTHONI KABURU (Suing as the friend and next kin of

CHRISTIAN MUTUA KIHU).....RESPONDENT

RULING

1. Before me for determination are two (2) applications. The first is the Notice of Motion dated 15th October, 2019 taken out by the 1st and 2nd appellants herein, in which they sought for an order for stay of execution of the judgment delivered on 1st October, 2019 and all consequential proceedings pending the hearing and determination of the appeal.
2. The aforementioned Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of the 2nd appellant.
3. In opposing the Motion, the respondent put in a replying affidavit.
4. The second application is the Notice of Motion dated 30th October, 2019 brought by the respondent in which she is seeking a substantive order that the appellants do pay $\frac{3}{4}$ of the decretal sum and the remaining $\frac{1}{4}$ be deposited in court as security.
5. The Motion is similarly supported by the grounds laid out on its face and the facts stated in the affidavit of the respondent.
6. The appellants put in Grounds of Opposition dated 4th November, 2019 to challenge the second Motion, raising the following grounds:
 - a) *The application is incompetent, fatally defective and hence devoid of any merit.*
 - b) *The orders sought render the appeal an academic exercise and are incapable of being granted.*
 - c) *The application is being brought to prejudice and embarrass the fair determination of the appeal.*
 - d) *The application is otherwise frivolous, vexatious and an abuse of the court process.*
7. When the parties' respective counsels appeared before this court, they opted to rely on the averments made in their respective applications.
8. I have taken into consideration the grounds set out in the bodies of the two (2) Motions; the facts deponed in the respective affidavits supporting them; the replying affidavit and the Grounds of Opposition challenging the Motions.
9. I will begin with the Motion of 15th October, 2019.
10. The guiding provision in considering an application seeking an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions in determining an application for stay.
11. The first condition is that the application must have been made without unreasonable delay. It is apparent that the Motion was filed less than one (1) month following delivery of the impugned judgment on 1st October, 2019. I am satisfied that the Motion was timeously filed.

12. Under the second condition, the appellants must show to this court's satisfaction the substantial loss they would suffer if the order for stay is denied. In her affidavit, the 2nd appellant stated that not only do the appellants stand to lose their property if a stay is denied, but they are apprehensive that the respondent will not be in a position to refund the decretal sum once the same is paid and the appeal eventually succeeds.

13. In reply, the respondent averred that if payment is made, the appeal will not be rendered nugatory since a consent was entered between the parties on liability.

14. The courts have rendered that where a party has raised an issue of the opposing party's likely inability to refund the decretal sum, the burden shifts to the opposing party to demonstrate his or her financial capability to repay the decretal sum.

15. In the present instance, the respondent neither indicated nor demonstrated her ability to refund the decretal sum.

16. I am therefore satisfied that in the present circumstance the appellants have shown that they stand to suffer substantial loss.

17. The final condition is on the provision of security for the due performance of the decree or order. On their part, the appellants indicated their readiness to abide by the conditions that will be imposed by this court.

18. The respondent did not touch on this subject.

19. Before I proceed to make my final orders, I will address my mind to the Motion of 30th October, 2019 which essentially concerns itself with the security for the due performance of the decree. I noted that the respondent also sought for an order for the review, setting aside and/or modification of this court's orders made on 17th October, 2019.

20. I wish to clarify that on the aforesaid date, this court issued interim orders for a stay of execution which orders are now spent. In the premises, there are no stay orders in place to be reviewed or set aside.

21. On the subject of security for the due performance of the decree, it was the respondent's assertion that she urgently requires a substantial amount of the decretal sum to enable Christian Mutua Kihu ("*the minor*") seek specialized medical treatment for the injuries he sustained as a result of the accident.

22. It is noted that the respondent did not avail any documents to support the above assertion. On the same note, I have already found that the respondent did not demonstrate her ability to refund the decretal sum in the event of a successful appeal.

23. It therefore follows that I am unable to grant the order being sought in the second Motion.

24. In the end, the Motion dated 15th October, 2019 succeeds in terms of prayer (iii) while the Motion dated 30th October, 2019 is hereby dismissed with no order as to costs.

25. Consequently:

(a) There shall be an order for stay of execution pending the hearing and determination of the appeal on the condition that the appellants do deposit the entire decretal sum in court within 30 days of this day, failing which the stay order shall lapse.

(b) Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 21st day of January, 2020.

.....

J.K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondent