



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO. 7 OF 2018**

**THE BOARD OF TRUSTEE ANGLICAN CHURCH**

**OF KENYA DIOCESES OF MARSABIT.....APPELLANT**

**VERSUS**

**HALAKHE WAKO GOLICHA**

**TUME HALAKE WAKO** (*suing thru her*

*father and guardian and litem*)..... **RESPONDENT**

*(from the original Civil Suit No.2 of 2017 in the Principal Magistrate's Court at Marsabit*

**RULING**

The application dated 7<sup>th</sup> November, 2019 seeks the following order:

***That this honourable court be pleased to issue an order for stay of execution of the judgment and decree herein pending the hearing and determination of the Appeal therefrom which is pending before the Court of Appeal of Kenya at Nyeri.***

The application is supported by the affidavit of **Manasses Kariuki Karoki** Advocate. The respondent replied to the application through an affidavit sworn by **Charles O. Orayo** sworn on 18<sup>th</sup> November, 2019.

Mr. Kariuki, Counsel for the applicant, submitted that the appellant is not satisfied with the judgement of the Court delivered on 9<sup>th</sup> April, 2019. The appellant immediately lodged a notice of appeal at the Court of Appeal in Nyeri which appeal is pending. The respondent has instructed auctioneers who have proclaimed the applicant's goods in execution of the decree. Counsel further maintain that the decretal sum currently stands at Ksh.10,077337 and this amount is quite substantial. If execution is allowed to proceed, the respondent will not be able to refund it in restitution leading to substantial loss to the applicant.

It is further submitted for the applicant that it is ready to provide reasonable security for due performance of the decree. The notice of appeal was lodged on 12<sup>th</sup> April, 2019 just four days after the delivery of the judgment. The appeal was not filed out of time as alleged. This Court cannot strike out the appeal as the rules governing the appeal are those of the Court of Appeal. Under order 42 Rule 6(4), an appeal to the Court of Appeal is deemed to have been filed if a notice of appeal is given. The notice of appeal suffices as an appeal.

Mr. Orayo, learned counsel for the respondent, opposed the application. Counsel contend that the application is aimed at delaying the finalization of the matter. The notice of appeal was filed out of time and the applicant has failed to comply with the Court of appeal rules. Under Rule 75(1) of the court of Appeal rules, a notice of appeal is an expression of a desire to appeal and is not tantamount to institution of appeal. Under rule 82 of the same rules, the applicant is required to lodge a memorandum of appeal, record of appeal, prescribed fees and security for costs within 60 days.

Mr. Orayo further contend that the respondent was supposed to be served with the notice of appeal within seven (7) days after it was filed. No such notice has been served so far. Parties agreed on the costs payable at Kshs.397,705 by consent recorded on 2.4.2019 and the respondent expected the applicant to settle the decretal sum. There is no basis upon which a stay of execution can be granted.

The issue for determination is whether the execution process initiated by the respondent should be stayed pending the appeal. In the case of **Mungai –V- Ndaba (1981) KLR, 367**, the court of appeal held inter alia:-

***“Before a stay of execution can be granted the applicant must satisfy the Court that there is good reason to do so. In exercise of its discretion the court looks at the circumstances and facts of the case.”***

**In NEW STANLEY HOTEL LIMITED –V ARCADE TOBACONNISTS LIMITED, [1986] KLR, 756 Porter J. held:-**

***Before making an order staying the execution of the judgment the court has to be satisfied that substantial loss may result to the applicant unless the order was made and the application was made without unreasonable delay.***

The dispute herein involves damages arising out of a road traffic accident. Parties recorded a consent on liability whereby the applicant admitted 80% liability. The amount involved is quite substantial and I do agree that given the respondent's condition as a result of the accident, she will not be in a position to refund the entire decretal sum if it is fully paid. Counsel for the respondent raised issues relating to the appeal itself. In my view, whether the notice of appeal was filed out of time and whether the applicant has failed to comply with the court of Appeal rules requiring the filing of a memorandum of Appeal and record of appeal within sixty (60) days cannot be issues to be determined by this Court. This court cannot strike out the notice of appeal to the court of Appeal as it lacks the jurisdiction to do so.

The judgment of the Court was delivered on 9<sup>th</sup> April, 2019. The applications herein was filed on 8<sup>th</sup> November, 2019, a period of about seven months. This is quite a long period. However, there is no evidence that in between parties were negotiating on how the decretal sum would be paid as alleged by the respondent. The delay is excusable taking into account the circumstances of the case. In an application for stay of execution the court has to weigh between of the respondent's right to enjoy the fruits of her judgement against the applicant's right to pursue an appeal. It is evident that should the court allow the execution to proceed and the decretal sum paid, the appeal shall be rendered nugatory.

The applicant has expressed its willingness to offer reasonable security. The nature of the claim is such that the possibility of the respondent not being awarded any form of damages is for too remote. The respondent's father is incurring costs in supporting her. She is bed ridden and cannot support herself. It is prudent that part of the decretal sum be released to the respondent so as to mitigate her suffering. I do find that the application herein is merited and is granted on the following terms:

- (i) The applicant to pay the respondent a sum of Kenya shillings one million (1,000,000) within forty-five (45) days hereof.
- (ii) The applicant to deposit a further sum of Kenya shillings two million (Kshs.2,000,000) in Court within the same period of forty five (45) days.
- (iii) Costs of the application shall follow the outcome of the appeal.

**Dated, Signed and Delivered at Marsabit this 19<sup>th</sup> day of February, 2020**

**S. CHITEMBWE**

**JUDGE**