



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 96 OF 2019

ROYAL STAR ENERGY LIMITED.....APPELLANT

VERSUS

CATHERINE KANINI MUTI.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Garane & Somane Advocates for the Appellant

Lewa Advocate for the Respondent

RULING

The genesis of the notice of motion dated 13.12.2019 arises out of the Judgment at the trial court referred as **PMCC NO. 124 OF 2017** in which the respondent obtained a decree for the appellant to pay compensation award in tort for pain and suffering and loss of amenities. The Learned trial Magistrate assessed quantum of Kshs.681,300/= plus costs and interests.

The appellant immediately upon delivery of Judgment, gave notice of seeking leave to appeal and an interim order of thirty (30) days stay of execution was granted pending the filing of the intended appeal.

The appellant duly registered Civil Appeal No. 96 of 2019. A further order has been sought vide notice of motion filed on 13.12.2019 for an order that a stay of execution of the Judgment be enlarged in view of the fact that the initial one before the trial court for an interim period of only thirty (30) days, has since expired.

The subject notice of motion is supported with an affidavit deposed by **Mohammed Abdullahi** dated 13.12.2019 and a replying affidavit by the respondent **Catherine Kanini Muti**. I would be considering the merits and demerits of the notice of motion in view of the affidavit of evidence by both parties.

Analysis

The notice of motion is underpinned under Order 42 Rule (6) of the Civil Procedure Rules. In deciding whether or not to grant stay of execution the underlying objective is the extract from the **Annual Practice at paragraph 59/131**, where it says:

“The court does not make a practice of depriving a successful litigant the fruits of his litigation, and locking up fruits to which prima facie, he is entitled pending an appeal.”

Further among other conditions to be met are:

- (a). Whether the application has been brought without undue delay.***
- (b). A further consideration to yield fairness is for the applicant to demonstrate substantial loss.***
- (c). In regard to the pending decree to be satisfied provision for security in the interim for the due performance of the decree.***
- (d). As a safeguard measure the execution should not be allowed to proceed in a manner that might render the appeal nugatory.***

See – **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another Nairobi CA No. 50 of 2001, Global Tours and Travels Ltd HCWC NO. 43 OF 2000, Reliance Bank Limited v Norlake Investments Ltd {2002} 1EA 227, Stephen Wanjohi v Central Glass Industries Ltd HCCA NO. 6726 OF 1991.**

Looking at the principles in the above cases, conditions for grant of stay of execution on substantial loss, security for due performance sufficient cause, undue delay or the appeal being rendered nugatory should be fashioned with the principles in **Hammond Soddard Solicitors v Agrichem International Holdings Ltd {2001} EWCA 2065** where the court held that:

“Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks, of the appeal being shifted? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the Judgment? On the other hand, if a stay is refused and the appeal succeeds, and the Judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent.”

When I mirror the above principles in the instant application it should be noted that the applicant filed his motion timeously starting with the interim order immediately after delivery of Judgment. It follows therefore, as provided for in the rules, the affidavit evidence alludes to stay of execution to the court which is set to hear the appeal.

The respondent in replying affidavit opposes any enlargement of the orders of stay of execution on grounds that she has successfully obtained Judgment against the appellant after long period of litigation.

In both these affidavits, the question that then arises for consideration is whether the applicant has discharged the key test on substantial loss. I bear in mind further principles illuminated in **Colecha Inspection S.A v Hems Group Trading Co. Ltd Civil Application No. 303 of 2000, HZ Company Ltd v Samuel M. Njaria Civil Application No. 214 of 2000.**

That the discretion to grant or refuse stay of execution by the court is unfettered, but has to be exercised judiciously and on the merits. It follows therefore in this application there is already an appeal filed by the appellant. The risk of suffering irremediable substantial loss has to be discharged eventually. In **Madhu Paper v Crescent Construction Nairobi Civil Application No. 60 of 1990** the court observed inter alia:

“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 of 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 that its appeal is successful (See also Odunga J, G. V. Digest on Civil Case Law and Procedure Pg 7269 at para 117 – 2 (a)).

In **Stephen Wanjohi v Central Glass Industries Ltd Civil Case No. 6726 of 1991 UR** among the other issues discovered by:

“The court was the aspect of financial ability of a decree holder solely should not be the reason for allowing or refusing stay of execution. It is enough that the decree holder is not a dishonorable miscreant without any form of income.”

In this context, although I am in concurrence with the textualism of Order 42 Rule 6 on substantial loss, in this light it makes a world of a difference not to limit the right to appeal based at this condition. Quite astutely the most attractive interpretive model under Order 42 Rule 6 of the rules is to preserve the underlying subject matter of the appeal so as not to render it nugatory pending the determination of the content of those rights on appeal.

With regard to traffic accident claims it would do a great injustice to allow impecunious of the Judgment creditor/decreed holder to stand on the way on the right of at appeal process. Why do I say so, the first step towards establishment of substantial loss is the Law redirecting an inquiry on the affidavit of means of the Judgment. This excess ordinary condition can only be accomplished by the decree-holder which in most case is never the approach taken by parties seeking stay of execution.

Following this point, the background material indicated explicitly on each particular case should act as a guide in coming to terms with the conduct on substantial loss.

In main testation both for the pecunious or impecunious decree holders, the desire for the enjoyment of the fruits of the Judgment in money decrees handed down by the court cannot be limited to avail the outcome of the appeal. By the same token the issue of loss being in place beyond the reach of the Judgment debtor may apply to both classes of respondents.

It is also legitimate to consider the nature of the claim. The impugned Judgment was entered in terms of the effects of the tort of negligence in a traffic accident which occurred on 4.6.2016 involving the respondent as the claimant and the appellant as a tortfeasor. The net result of the award of damages was based on personal injuries suffered on the material day totaling to Kshs.680,300/= in favor of the respondent.

In the circumstances, there is a plausible argument particularly compelling that if the decretal sum is paid out to the respondent, she may not be in a position to repay it back to the appellant in the event the appeal succeeds.

The upshot of all this is that I hereby grant a stay of execution of the decree in the lower court on condition that security for due performance of the decree in the sum of Kshs.681,300/= or a bank guarantee of identical amount be deposited with the Deputy Registrar High Court at Malindi pending the hearing and determination of the appeal within thirty (30) days from today's date.

At the heart of the appeal is the fundamental jurisdiction under Employment and Labour Relations Act. Though, the stay of execution orders have been made by invoking the inherent and concurrent jurisdiction under Order 42 Rule 6 of the Civil Procedure Code, the decision on the substantive appeal shall be determined by the Employment and Labour Court on circuit at Malindi. The costs of the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

R. NYAKUNDI

JUDGE