



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 159 OF 2019

GEOFFREY KARINGURI MWIRICHIA.....1<sup>ST</sup> APPELLANT

J. M. IGWETA COMPANY LTD.....2<sup>ND</sup> APPELLANT

VERSUS

CHARITY MWONJIRU MBAABU.....RESPONDENT

RULING

1. On 9/12/2019 the applicant filed a notice of motion brought under order 42, rule 6 and order 51 rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A of the Civil Procedure Act seeking the following orders;

- a. That this application be certified as urgent
- b. That pending inter-parte hearing of this application, the honorable court be pleased to grant an interim order for stay of execution of the judgement dated 14/11/2019 and the resultant decree.
- c. That the honorable court be pleased to grant an order for stay of execution of the judgement dated 14/11/2019 and the resultant decree pending the hearing and determination of the appeal
- d. That in the event the court is minded to make an order as to security for costs, the applicants be granted leave to deposit an insurance bond or a bank guarantee as security in lieu of cash deposit.
- e. That costs be in the cause.

2. The application was based on the grounds on the face of it and on the supporting affidavit of Martin Njeru Nyaga Advocate who averred that judgement was delivered on 14/11/2019 in favor of the Respondent for the sum of Kshs 850,336 as damages as well as the cost and interest of the suit. The Applicants have filed an appeal against the award and contend that their appeal has a high chance of success and also that they stand to suffer damage and substantial loss if the court declines to grant the order for stay.

3. The application was opposed by the replying affidavit of Charity Mwonjiru Mbaabu dated 16/1/2020 where she stated that the Appellant has not proved how he stands to suffer substantial loss if the decree in Meru CMCC No. 222 of 2018 is executed other than stating that she may not be in a position to refund the decretal sum should the appeal succeed. The Applicant argued that she is a woman of means with a reliable source of income, being an employee County Government of Meru and will be able to refund the decretal sum to Applicants in the event their appeal against her succeeds.

4. The Applicants in their submissions argued that their appeal raises triable issues as they seek the courts guidance on the measure of damages for the particular injuries. The Applicants have no intention to deny the Respondent the fruits of her judgement. That in **Mombasa Maize Millers Co. Ltd & Another v. Western Cross Express Co. Ltd [2016] Eklr** the learned judge granted a stay of execution solely to serve substantive justice and to assent to the principle of overriding objective. It was therefore their submission that they have an arguable appeal and that the Respondent has not in any way whatsoever demonstrated to this court that they would suffer any loss or damage if the orders sought were granted

5. The Respondents on the other hand argued that Order 42 Rule 6 gives the court power to issue orders of stay of execution however certain conditions must be met. Order 42 (6) (2) provides that;

**“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.”**

6. I have carefully perused through the application, affidavit, submission and the record in its entirety and the issue to be determined is **whether to grant an order for stay of execution of the judgement dated 14/11/2019 and the resultant decree pending the hearing and determination of the appeal?**

7. The relief of stay or execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules the relief is discretionary although, as it has been said often, the discretion must be exercised judiciously and upon defined principles of law and not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules that:

**a) The application is brought without undue delay.**

**b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and**

**c) 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.**

8. The judgement of the court was delivered on 14/11/2019 and the application herein was filed on 11/12/2019 almost one month later and before the stipulated period for appeal had not lapsed. Although the Applicants have not given an explanation why it took them almost one month after the judgement to file this application this court finds that the period cannot be construed to be inordinate delay.

9. On the issue of substantial loss, the Applicant argued that the Respondent may not be able to refund the decretal sum in case the appeal is successful. They however, indicated that they were willing to deposit an insurance as security for costs. On the other hand, the Respondent showed that she had resources which could enable her refund the decretal sum in case the appeal by the Applicants succeeds as she works for the County Government of Meru. The evidential burden that had shifted to the Respondent to show what resources she had was therefore discharged as was held in the case of **National Industrial Credit Ltd Vs Aquinas Francis Wasike Court of Appeal Civil Application No.238 of 2005 .**

10. In consideration that the Appellants are appealing against the entire judgement of the trial court on different grounds and in consideration that the Applicants have offered to deposit security for the decretal sum the application dated 9<sup>th</sup> December 2019 is allowed in the following terms;

**I. The Applicants shall deposit Ksh.425,168/= being half of the decretal sum in a joint interest earning account in the names of the advocates for the parties on record within 14 days from the date of the ruling herein .**

**II. The Applicants shall also pay to the Respondent the other half of the decretal sum being Ksh.425,168/= within 14 days from the date of the ruling herein.**

**III. In the event that any of the above two conditions are not met by the Applicants the Respondent shall be at liberty to execute the decree in the Magistrate's court without reference to the court.**

**IV. The cost of the application shall be paid to the Respondent.**

**V. The appeal herein shall be heard by way of written submissions.**

**VI. The Appellant is hereby directed to file and serve records of appeal concurrently with written submissions within 30 days from the date of the ruling.**

**VII. Upon receipt of service of the records of appeal and the written submissions the Respondent will have 14 days within which to file her written submissions.**

**VIII. The Deputy Registrar to call for the records of the lower court for purposes of preparing for the hearing of the appeal herein.**

**IX. Mention on 9<sup>th</sup> July 2020 to confirm compliance and to take a date for judgement.**

HON.A. ONGINJO

JUDGE

**RULING DATED AND DELIVERED AT MERU VIA EMAIL THIS 21<sup>ST</sup> DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15<sup>TH</sup> MARCH 2020 AND SUBSEQUENTLY ON 7<sup>TH</sup> APRIL 2020 DUE TO COVID-19 PANDEMIC.**

**HON. A. ONGINJO**

**JUDGE**