



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL. NO. 41 OF 2019

1. JOSEPH MASILA

2. BONIFACE WAWAKA MOSES.....APPELLANTS

VERSUS

JOHNSON MWAMSAE MWACHAO.....RESPONDENT

RULING

The Application

1. The Applicant's application is contained in the Notice of Motion dated 8th March, 2019. The motion seeks for the following orders:

(a) Spent.

b) THAT this Honourable Court be pleased to order a Stay of Execution of the Judgment by Hon. Mutunga in RMCC No. 995 of 2011 pending hearing and final determination of the appeal filed herein.

c) Spent.

d) THAT the costs of this Application be provided for.

2. The motion is premised on the grounds set out therein and is supported by a Supporting Affidavit sworn by **Josphat Masila**.

3. The Applicant's case is that:

a) the Appellant/Applicant is totally aggrieved by the entire Judgment of the Learned Magistrate that was delivered on 30th January, 2019, in favour of the Respondent against the Appellant for the sum of Kshs. 549, 150/=.

b) the 30 days granted for the payment of the decretal sum are due to expire and the threat of execution against the Applicant is imminent and as such execution would render the Appeal filed herein nugatory.

c) the motor vehicle in the accident in this case was the Applicant's only source of income and has since been grounded as the Insurance Company declined to settle the Respondent's Claim as the motor vehicle was not insured for carriage of passengers and that the Applicant will therefore be expected to meet the decretal sum from his meagre resources in the event that the Appeal herein does not succeed.

d) the Respondent is not formally employed and has no fixed source of income and that if payment is made, he will be unable to refund the sum upon success in the Appeal.

The Response.

4. In response to the Application the Respondent filed Grounds Of Opposition dated 15th March, 2017 wherein the Respondent avers that:

- a) there is no valid Appeal before Court as the Memorandum of Appeal is filed outside the limitation period without leave of Court.
- b) there is no substantial and irreparable loss disclosed in the supporting Affidavit.
- c) the Appellant is not offering security for the decretal amount contrary to the rules and finally, that the application and supporting affidavit are incompetent and incurably defective.

Analysis & Determination

5. I have carefully considered the application, the affidavit in support and response thereto, submissions by the parties as well as the cited statute and case law.

6. I do note that Judgment in this matter was entered at Kshs. 549, 150/= on 30th January, 2019 and the Appellant being dissatisfied with the same filed for an Appeal and the Memorandum of Appeal dated 4th March, 2019 on record which challenges the entire Judgment.

7. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** which empowers this court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“No order for stay of execution shall be made under subrule (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.”

8. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

9. With regard to whether the application has been made without unreasonable delay, I find that it is not the case here since the judgment was delivered on 30th January, 2019 and the application filed at the expiry of the 30 days the applicant had been granted for payment of the decretal sum. Even then, this was not raised by the Respondent.

10. On the issue of whether the Appellant will suffer substantial loss by a stay of execution being granted, I have perused the Memorandum of Appeal and find that the Appellant’s appeal is against the decision on liability and quantum. I do not wish to make any comments on this as it would amount to preempting and or speculating on the outcome of the appeal. However, I find it is unlikely the Respondent will suffer any prejudice if stay is granted.

11. Lastly, on the issue of whether the applicant can provide security for the due performance of the decree, it is my view that this is in the interest of both parties, so that the Respondent is not denied the fruits of his judgment and the Appellant from losing the amount in case the appeal succeeds.

12. In the interest of balancing the competing interests of the parties herein, the application dated 8th March, 2019 is allowed in terms of prayer No.2 on condition that:

a) the Applicant deposits an equivalent of the decretal sum in a joint interest earning account in the names of both advocates on record as security within Thirty((30) days from the date of this ruling;

b) the applicants /Appellants to prepare and file a record of appeal within 60days from today,failure to which the Respondent be at liberty to execute;

c) mention on 23.7.2020 for directions on the hearing of the appeal.

d) The Costs of this Application shall abide the outcome of the Appeal.

13. Orders Accordingly.

Dated, Signed and Delivered in Nairobi this 14th day of May,2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes