



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 107 OF 2019

SALOME ALICE AKINYI..... APPELLANT

VERSUS

ARIDEMPTA VERONICA OOKO.....1ST RESPONDENT

EDDY OTIENO OKELLO.....2ND RESPONDENT

(Suing on behalf of the Estate of Bon Aggrey Okello)

RULING

1. In her Notice of Motion application dated 2nd October 2019 and filed on 3rd October 2019, the Appellant sought an order for stay of execution of the judgment that was delivered on 9th November 2017 pending hearing and determination of the appeal herein. She swore her affidavit in support of the present application on 2nd October 2019.
2. In opposition to the said application, on 31st October 2019, the 1st Respondent swore a Replying Affidavit. The same was filed on 1st November 2019.
3. There was no dispute that on 18th December 2017, the Appellant settled the entire decretal sum of Kshs 687,378/= and that what was outstanding were the costs in the sum of Kshs 176,765/= together with interest from the date of judgment. Parties were not agreed on whether a sum of Kshs 187,378/= being special damages ought to have been paid. It was the Appellant's contention that the same was not payable as the Respondents never adduced in evidence invoices and receipts in support thereof.
4. Being aggrieved by the decision, in particular to the award of special damages as aforesaid, the Appellant was apprehensive that if she was not granted an order for stay of execution, then the Respondents would execute against her for the costs as aforesaid and thus render her appeal nugatory.
5. All the parties were agreed on when the court could exercise its discretion to grant an order for stay of execution pending appeal. Indeed, for an applicant to succeed in being granted an order for stay of execution, he has to demonstrate the following conditions as has been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-
 - a. That substantial loss may result unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. Such security as the court orders for the due performance of the decree has been given by the applicant.
6. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "**and**". It connotes that all three (3) conditions must be met simultaneously.
7. The court carefully considered the Written Submissions and the case law that each of the party relied upon and determined that the Respondents had not filed an Affidavit of Means to demonstrate that they were financially able to refund the Appellant the decretal sum if the same was paid to them before the Appeal herein could be heard and determined.
8. In the absence of proof to demonstrate their ability to refund the Appellant the decretal sum, this court was satisfied that she would suffer substantial loss. She had thus satisfied the first condition of being granted a stay of execution pending appeal.

9. The decision the Appellant intended to appeal against was delivered on 9th November 2017. She filed her Memorandum of Appeal dated 26th February 2019 on 27th February 2019 after being granted leave to file the same out of time on 14th February 2019. Bearing in mind that the period between the time the said leave was granted and the filing of the present application and further taking into consideration that the Appellant could not have sought an order for stay of execution pending appeal without first having been granted leave to file an appeal out of time, it was the considered opinion of this court that a period of about eight (8) months could not be said to have been inordinate.

10. This court therefore took the view that the present application was filed without undue delay and hence the Appellant had satisfied the second condition for the granting of an order for stay of execution pending appeal.

11. There was no dispute that the decretal amount had been paid and what remained unpaid were the costs which had been assessed at a sum of Kshs 187,378/= and interest thereon. This court noted that although the Appellant had not indicated her readiness and willingness to provide security that could be ordered for the due performance of the decree, it could impose its own conditions before granting an order for stay of execution pending appeal.

12. It was therefore the considered opinion of this court that the third condition of being granted an order for stay of execution pending appeal had been met.

DISPOSITION

13. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application that was dated 2nd October 2019 and filed on 3rd October 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

1. THAT there shall be a stay of execution of the judgment that was delivered on 9th November 2017 in Nairobi CMCC No 5760 of 2014 Aridempta Veronica Ooko & Eddy Otieno Okello (suing on behalf of the estate of Bon Aggrey Okello) vs Salome Alice Akinyi pending the hearing and determination of the Appeal on condition the Appellant shall deposit into an interest earning account in the joint names of her counsel and counsel for the Respondents, the sum of Kshs 176,765/= within the thirty (30) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 13 (1) hereinabove, the conditional stay of execution shall automatically lapse.

3. Either party is at liberty to apply.

4. Costs of the application will be in the cause.

14. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of May 2020

J. KAMAU

JUDGE