



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 25, 26 & 27 OF 2020

JUSTINE NYAMWEYA OCHOKI.....1ST APPELLANT

JARED NYANG'AU OBINO.....2ND APPELLANT

VERSUS

JUMAA KARISA KIPINGWA alias JUMA KARISA KIPINGWA.....RESPONDENT

AND

JUSTINE NYAMWEYA OCHOKI.....1ST APPELLANT

JARED NYANG'AU OBINO.....2ND APPELLANT

VERSUS

PRUDENCE ANNA MWAMBU.....RESPONDENT

AND

JUSTINE NYAMWEYA OCHOKI.....1ST APPELLANT

JARED NYANG'AU OBINO.....2ND APPELLANT

VERSUS

FRANCIS NDURYA THOYA alias FRANCIS NDURY THOYA alias

FRANCIS NDURI THOYA.....RESPONDENT

(Being an appeal from the Judgment and decree of the Senior Principal Magistrate's Court

at Kilifi dated 3rd June 2020 in SPMCC No. 150 of 2019, SPMCC No. 151 of 2019

and SPMCC No. 161 of 2019 by Hon. S. D. Sitati (RM)

CORAM: Hon. Justice R. Nyakundi

Munyao Muthama & Kashindi Advocate for the appellants

Wambua Kilonzo Advocate for the respondent

RULING

The trial Court delivered Judgments in favour of the respondent in **SPMCC No. 161 of 2019, 150 of 2019 and 151 of 2019** and made the following orders under **SPMCC No. 161 of 2019** liability at 100% quantum of Kshs.502,550/= plus costs and interest. In **SPMCC No. 150 of 2019** Liability at 100% subtotal quantum of Kshs.302,550/= plus costs and interest. Lastly in **SPMCC No. 151 of 2019** liability at 100% subtotal quantum of Kshs.652,550/= plus costs and interest.

Being aggrieved with the entire Judgment the applicants have preferred an appeal and seek a stay of the decrees of the trial Court. The notices of motions dated 22.6.2020 and filed in Court on 23.6.2020 in the three matters all speak to one issue relief for grant of stay of execution of the Judgments (Decrees) pending the hearing and determination of the appeal. The motions are premised under Article 159 of the Constitution Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules.

The applicants swore and asserted what they consider admissible evidence in support of the applications as against the respondent. The respondent opposed the application for stay of execution by placing reliance on the replying affidavits.

Determination

The approach to be adopted by this Court to exercise discretion on applications of this nature for stay of execution is outlined in various precedent setting authorities. **Stephen Wanjohi v Central Glass Industries Ltd Civil Case No. 6726 of 1991, Ravji Halal v Thoraton & Turpin Civil Application Number 15 of 1990 {1990} LLR.** The stated principles are as follows:

1. *Sufficient cause*
2. *substantial loss*
3. *no unreasonable delay*
4. *and security for due performance of the decree*
5. *the grant of stay is discretionary and is also an equitable remedy*
6. *financial ability of a decree holder solely is not a reason for allowing stay.*

It is enough that the decree holder is not a dishonorable miscreant without any form of income. (See also **V. Odunga's Digest on Civil Cases Law and Procedure at page 3750 paragraph 8087**).

*“In essence also it must be emphasized that in considering stay of execution exercise of discretion ought to address the question formulated in the motion whether or not to refuse or grant stay is likely to render the intended or an appeal already filed to be rendered nugatory. This is what the Court opined in **Evanford Properties Ltd v Cheshire County Council {1974} 2 ALL ER 448.**”*

The right to access to the Courts is a matter that the Courts themselves guard strictly. Judicial intervention by way of an interim stay of execution pending an appeal has been justified in terms of classic Constitutional principle. The paramountcy of the discretion requires the Courts to give effect to the principles in **Hammond Suddard Solicitors v Agrichem International Holdings {2001} EWCA 2065**:

“Whether the Court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is that whether there is a risk of injustice to one or other or both parties if grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? 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.”

With reference to the facts of the motions before Court, its discernible from the record the appeal arises out of the award in damages. the application has already structured the grounds upon which the appeal would be based at that opportune time. Looking at the issue on stay of execution holistically, its clear that the applicant filed the appeal and corresponding the reliefs on stay without undue delay.

The substance of the equitable remedy for the applicant lies on the condition for substantial loss. (See the principles and enunciation on this criteria in the case of **Shell Ltd v Kibiru & Another {1986} KLR 410, Socfinac Company Ltd v Nelphat Kimotho Muturi {2013} eKLR, Daniel Chebatui Rotich & 2 others v Emirates Airlines Civil Case No. 368 of 2001**)

Let me be guided that in the sphere of the so called substantial loss the rules of the game run on the pretext that an applicant is likely to suffer irreparable harm if stay is not granted and if the respondent makes good to execute the Judgment for payment of the decretal sum.

In broaching the question on the applicability of the legal principles a stay of execution, a corresponding scheme was articulated in **Trad v Harbour Radioply Ltd {2010} NSW 41** thus:

“Courts in approaching applications for a stay will not generally speculate about the applicants prospect of success, given that argument, concerning substance of the appeal is typically and necessarily attenuated, this does not prevent then considering the specific terms of a stay that will be appropriate fairly to adjust the interest of the parties, from making some preliminary

assessment about whether the appellant has an arguable case. This consideration is protective of the position of a Judgment creditor where it may be plain that an appeal, which does not require leave, has been lodged without any real prospect of success and simply in the hope of gaining a respite against immediate execution upon the Judgment.”

From this point the stream of decisions in this categories provide invaluable assistance to the conclusions, I am about to make in respect of the three notices of motions. The weight to be attached to these decisions are such that they impact positively on the unfettered discretion of the Court to give effect to the application in terms of Order 42 Rule 6 (1) of the Civil Procedure Rule.

In the result, I allow the triple motions filed by the applicant dated 22.6.2020 in the respective challenged Judgments referenced as **SPMCC No. 150, 151 and 161 of 2019** that the stay of execution against the aforementioned Judgments be conditioned with a requirement for deposit of security in a joint earning interest account of both counsels on behalf of the parties to the appeal within thirty (30) days from today's Ruling. That the applicant/appellant to move pursuant to Order 42 of the Civil Procedure Rule to file the record of appeal and have it served upon the respondent. Costs shall be costs in the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY 2020

R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consents signed by both counsels dated **16.7.2020 (See Gazette Notice No. 3137 of 17.4.2020)**