



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 431 OF 2019

GILBERT CHOMBA.....1ST APPELLANT/APPLICANT

ROBERT WALLACE MURIITHI...2ND APPELLANT/APPLICANT

-VERSUS-

TITUS KITHOME.....RESPONDENT

RULING

The appellants/applicants have moved this court vide the Notice of Motion dated the 13th February, 2020 seeking an order for stay of execution of the judgment/decree dated the 4th July, 2019 in Nairobi CMCC No. 8057 of 2016 pending hearing and determination of the appeal.

The application is premised on the grounds set out on the body of the same and its supported by the annexed affidavit sworn by Caroline Kimeto, on the 14th February, 2020.

In the said affidavit, the deponent avers that judgment in CMCC No. 8057/2016 was delivered on the 4th July, 2019 and being dissatisfied with the same, the applicant has filed an appeal against the same. That the applicants filed an application for stay of execution at the lower court which was allowed on condition that the decretal sum be deposited in a joint interest earning account. That the appellants through their insurer prepared a cheque for the judgment sum Kshs. 825,890/- and delivered the same to the respondent's Advocate for the opening of the account but counsel declined

She states that Counsel for the appellants held the cheque and was sent the Decree on 6th December, 2019 but thereafter he prepared and delivered to the Respondent's counsel a cheque for the costs at kshs. 170,050. That, as this was happening, on the 13th February, 2019 the trial court proceeded to waive the temporary stay and failed to issue directions on the hearing of the Appellants' application dated 29th July, 2019 as a consequence of which they withdrew the same and promptly filed the application herein. They have offered to furnish security through their insurers.

In his replying affidavit sworn on the 17th February, 2020, the respondent avers that the application lacks merit in view of the earlier application dated 29/07/2019 in which, stay of execution had been granted by trial court. He contends that the present application is Res Judicata, in that, the applicants were granted a stay on condition as stated hereinabove which condition they failed to meet.

That the applicants filed another application dated 30/01/2020 for extension of time within which to comply with the condition for stay of execution but yet they failed to comply even after an extension of a further 14 days and with no explanation why the court order was not complied with.

He states that he is a man of means and he is capable of refunding the decretal sum if the same is paid to him and in the unlikely event that the pending appeal is successful. He has urged the court to dismiss the application.

The applicants filed a supplementary affidavit on the 12th June, 2020 sworn by Eric Mugo advocate, who is in conduct of the matter on their behalf. He confirms that the applicants were granted a stay of execution on condition that the decretal sum be deposited in a joint interest earning account in the joint names of the parties advocates.

That following the said order, the insurers prepared the cheques for the decretal sum but counsel for the respondent frustrated the applicants' effort to open the joint account within the time that had been ordered by the court. He denied that the application is Res Judicata as alleged by the respondent.

The application was disposed off by way of written submissions which this court has duly considered together with the application and the affidavits filed herein.

The guiding principles for granting a stay of execution pending appeal are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows;

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.

On the issue of delay, it is not disputed that the ruling by the trial court for the application dated the 21st September, 2015 seeking stay of execution was delivered on the 17th November, 2015. The application herein was filed on the 3rd December, 2015. In my view, the application was filed without undue delay.

On security, the applicant has offered to secure the decretal sum and they are willing to furnish any form of security as the Honourable Court will order.

On the question of substantial loss, the appellants/applicants contend that if stay is not granted, the appeal will be rendered nugatory. In the supporting affidavit, the appellants have annexed a copy of the official search for motor vehicle KBC 792M which they jointly own and have averred that if the said vehicle is sold, they shall suffer irreparable loss as the same is used for business of carrying goods and generating income for themselves and their families.

In the supplementary affidavit, they stated that if the decretal sum is paid to the respondent, he will not be in a position to refund the same should the appeal succeed. They have relied on the case of *Lucy Nyamu Kimani vs. Lawrence Mburu Muthiga (2006) eKLR* where the court stated that;

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment of the decretal sum prior to the hearing of the appeal would put the same beyond reach of the applicant.”

On the part of the respondent, he submitted that the appellants have not demonstrated the substantial loss that they will suffer if the orders sought herein are not granted. They relied on the case of *Kenya Shell Limited vs. Kibiru C.A N. 179 of 1986 (Nairobi)* where the court stated;

“There is no evidence of substantial loss to the applicant either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose money.”

The court has considered the submissions of the parties on this issue. The applicants have expressed doubts that the respondent may not be in a position to refund the money if it is paid to him and in the event that the appeal is successful.

It is trite that substantial loss is the corner stone on which a stay of execution pending appeal will be granted. The respondent states that he is a man of means and he will be able to pay back the money if the appeal succeeds.

In the case of *Stanley Karanja Wainaina & Another vs. Ridon Ayanu Mutubwa Nairobi Hcca. 427/2015* the court stated;

“It is not enough for the respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the respondent has evidential burden to show that he has resources since this is a matter that is purely within his knowledge”.

Further, in the case of *National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another (UR)CA 238/2005* cited in the case of *Focin Motorcycle Company Limited vs. Ann Wambui Wangui & Another (2018) eKLR* the court stated;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

In view of the aforesaid, I find that the appellants have discharged their legal burden but the respondent did not discharge his evidential burden of proving his financial capability to pay back the decretal sum.

On whether the application is Res Judicata it is my considered view that the same is not, under Order 42(6)(1) of the Civil Procedure Act.

Finally, when dealing with an application for stay of execution the court is under duty to balance the interests of the parties taking into account the fact that an appellant has undoubted right of appeal whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason. Towards this end, I find that the appeal is only on quantum. It is only fair that half of the decretal sum be paid to the respondent and the balance of the decretal sum be deposited in a joint interest earning account in the joint names of the advocates on record for the parties herein.

The two conditions be met within 21 days from the date of this ruling, failing which, the stay order shall lapse.

Costs of the application shall abide the outcome of the appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 15th day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicants

..... for the Respondent