



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA NO. 7 OF 2020

GERALD MUTHENGI NDATHO.....APPELLANT

VERSUS

PETER MARIGU KIRERA (Suing as the legal representation of the Estate of

MARK MURIMI MARIGU)

(Being an Appel against the decision and Judgment of the Senior Resident Magistrate's Court

at Marimanti (Hon. Nyaga- SRM) in Marimanti CMCC No. 15 of 2019

delivered on 9th July 2020.)

R U L I N G

1. The application pending before this court is the one dated 3rd August 2020 and brought under **Order 42 rule 6 and Order 51 Rule 1 Civil Procedure Rules, Section 1A & 1B & 3A Civil Procedure Act Cap 21 Laws of Kenya**. The application seeks an order that there be a stay of execution pending the hearing and determination of the intended appeal. The application is based on the following ground:-

(a) The Applicant was aggrieved by the decision and judgment of the trial court both on Liability and Quantum and is in the process of preferring an Appeal therefrom in the HIGH COURT AT CHUKA.

(b) The intended Appeal is well grounded and has got high chances of success but the same will be rendered nugatory unless an order for Stay of Execution of the Judgment and/or Decree herein is made forthwith.

(c) The Applicant is apprehensive since there are no orders of stay in place and the Respondent may start execution any time thus rendering the intended appeal nugatory.

(d) The Respondent has no known assets and/or property and in the event of execution, he will not be able to refund the decretal sums herein should the Appeal succeed.

(e) The Applicant is ready, able and willing to deposit an insurance bond or a bank guarantee herein as security for the due performance of any resultant decree that may be passed against the Applicant at the conclusion of the intended Appeal.

(f) This Application has been brought to court without undue delay and has been made in utmost good faith and the prayers being sought for, if granted, will not in any way prejudice the Respondent's case, if any.

2. The application is supported by the affidavit of Gerald Muthengi Ndatho sworn on 3rd August 2020 and has reiterated the above grounds. He further deposes that the respondent has no known assets or property and may not be able to refund the decretal sum if stay is not ordered and the appeal is successful. He further deposes that he is ready and is able to deposit an insurable bond or bank guarantee as security for due performance of any resultant decree that may be issued against the applicant at the conclusion of the appeal. He deposes that the application has been brought without undue delay and the respondent will not be prejudiced in any way.

3. The Respondent Peter Marigu Kirea opposed the application and filed a replying affidavit sworn on 19th August 2020 and deposes that the application is frivolous and an abuse of court process and ought to be struck out. That no documents were annexed to the applicant's affidavit to show that the Respondent was in the process of execution. That the application is meant to delay and deny him the right to enjoy

the fruits of Judgment. He further depones that if stay is ordered, the applicant be ordered to pay half of the decretal sum.

4. The matter was filed under a certificate of urgency during High Court vacation. The parties appeared before High Court Meru, **Gikonyo J.** and failed to agree on the conditions for stay. The applicant proposed that they be allowed to deposit a bank guarantee while the respondent proposed that the applicant be paid half of the decretal sum and the balance be deposited in an interest earning account in the names of the advocates for the parties. The applicant on the other hand stated that he was only willing to deposit the entire sum in an interest earning account. The Judge set the matter for ruling on 18th November 2020. The ruling was to apply in this file and file No. 8 of 2020. However, the files were returned to this court for the judge to write the ruling. The parties appeared before me on 29th September 2020 and counsel for the applicant informed the court that they have agreed to abandon the application so that the appeal may be heard. The appeal is however yet to be admitted. The applicant then decided to proceed with the application. Parties relied on their affidavits.

5. I have considered the application. This is an application which seeks to invoke the discretionary powers of the court. It is trite that discretionary powers must be exercised judiciously. The substantive prayer in the application is brought under Order 42 rule 6 (2) of the Civil Procedures. The rule give the court jurisdiction to order stay of execution pending the hearing and determination of the appeal. It sets out the conditions which are to be met by a party seeking stay of execution. Order 42 rule 6 (2) states 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The principles which the court has to consider when deciding whether or not to order stay of execution pending appeal were laid down by the court of appeal in the case of **Butt -v- Rent Restriction Tribunal (1982) KLR 417** where it was stated-

“1. The power of the court to grant or refuse an application for 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 no 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 appellants had undoubted right of appeal.”

5. The court in exercising its powers under Order XL1 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.”

The main contention by the applicant is that the respondent will not be able to refund the decretal sum if stay is not ordered and the appeal succeeds. The respondent in his affidavit has not deponed that he will be able to refund nor has he disclosed his source of income. The Court of Appeal has reiterated that once the applicant alleges that he would suffer substantial loss and the appeal be rendered nugatory on account of the Respondent being unable to refund the decretal, the burden is on the respondent to prove that he has the ability to refund. The court held in the case of **National Industrial Credit Bank Limited -vs- Aquinas Francis Wasike & Another (UR) as cited in Stanley Karanja Wainaina and Another -V- Ridon Anyangu Mutupwa (2016) eKLR**, states;

“ This court has said before and 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 able to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the applicant 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.”

The respondent has not disclose any source of income that he would use to refund the decretal sum to the applicant if the appeal success. The applicant has established that it will suffer substantial loss if stay is not ordered. Furthermore, if the appeal succeeds, it may be rendered nugatory. As stated in the case of **Butt-v- Rent Restriction Tribunal, (Supra)** the court should exercise discretion in such a way as not to prevent the appeal.

The second consideration is whether the appeal was filed timeously and without unreasonable delay. The Judgment of the trial magistrate was delivered on 8th July 2020. The memorandum of appeal was filed on 5th August 2020 together with this application. It was filed within the period stipulated under the Civil Procedure Act for filing the appeal, see Section 79 G. There was therefore no in- ordinate delay in filing the application.

Finally, the applicant has indicated that he is ready to provide security. I note that it is the discretion of the court to determine the kind of

security that the applicant should or ought to deposit. The applicant is appealing against the apportionment of liability and the quantum of Damage. The court should therefore give him the opportunity to pursue the appeal without him suffering substantial loss. A security that ensures that at the end of the day the respondent would get some gains would be appropriate.

In Conclusion:

I find that the application has merits. I order as follows:-

- (a) There will be stay of execution pending the hearing and determination of the appeal
- (b) The applicant shall provide security by depositing the decretal sum in an interest earning bank account within 30 days from today in the joint names of the advocates for the parties.
- (c) The ruling to apply in court filed NO. HCCCA No. 8/20.
- (d) Costs in the cause.

Dated, signed and delivered at Chuka this 2nd day of November 2020.

L.W. GITARI

JUDGE

2/11/2020

Ruling read out in open court, Mr. Kiriimi holding brief for Mr. Kaiba and Mr. Maheli for the applicant and the Respondent.

C/A Muriuki this 2nd November 2020.

L.W. GITARI

JUDGE

2/11/2020