



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 79 OF 2018**

**NANCY NDUTA KIARIE.....1<sup>ST</sup> APPLICANT**

**PHILIP KAMAU KIARIE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**STEPHEN KIMANTHI MIRITL.....RESPONDENT**

**R U L I N G**

1. By way of Notice filed herein on the 29<sup>th</sup> day of **August, 2018** the Applicants seek stay of execution pending hearing and determination of the Appeal. The application is premised on grounds that on the 8<sup>th</sup> day of **August, 2018**, learned magistrate **Hon. K. Sambu** delivered judgment against the applicants and awarded the Respondent Kshs. **1,203,176/=** in damages and costs and interest; an appeal has been filed and if the order sought is not granted the Respondent will execute the judgment which will result into the applicants suffering substantial loss and irreparable harm; that the appeal has a high chance of succeeding and will be rendered nugatory if the execution is carried out and the application has been made without unreasonable delay.
2. The 1<sup>st</sup> Applicant swore an affidavit in support of the application where she deposed inter alia that they are ready and willing to furnish such security for due performance.
3. In response, the Respondent swore a replying affidavit where he deposed that the application is not made in good faith and its aim is to delay payments and derail him from enjoying fruits of the judgment. That there was a consent entered on liability as there was no dispute that the accident occurred therefore in event that the order is granted the court could order the applicants to pay half of the decretal sum.
4. The application was canvassed by way of written submissions that I have duly taken into consideration.
5. This court has the discretion to grant stay of execution, but, it must be guided by the principle provided in **Order 42 Rule 6 of the Civil Procedure Rules** that provides as follows:-

**“1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) 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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of**

that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

6. In the case of *Butt vs Rent Restriction Tribunal , Nai Civil Appeal No. 6 of 1979* the court of appeal stated that :-

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal...”**

7. The Lower Court delivered the judgment on the **8<sup>th</sup> August, 2018** and the application was filed **twenty one (21)** days later, there was no unreasonable delay in filing it.

8. It is the contention of the Applicant that in case the appeal succeeds the Respondent being a person of straw will not refund the decretal sum if the appeal is successful therefore they will suffer substantial loss.

9. The decree herein is for payment of money where the court would not be fast in granting stay of execution. In the case of *Ujagar vs Runda Coffee Estates Ltd [1966] E.A. 263* the court observed that;

**“It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in event that its appeal is successful...”**

10. The Respondent has contended that the applicant’s intention is to deny him enjoying fruits of the judgment as it is not in dispute that the accident occurred and he suffered injuries, a fact that led parties to enter into a consent judgment on liability. This fact prompted him to propose that half the decretal sum be released to him if the application is allowed.

11. It is important to note that he was required to dispel the allegation that he is a man of straw who may not refund the sum released to him in case the appeal succeeds. Of importance however, is the fact the appeal is not against liability but on quantum perse which is stated to be excessive.

12. In the premises I grant stay of execution on condition that the Applicants pay the Respondent the sum of **Kshs. 500,000/=** being part of the decretal sum and the outstanding balance shall be deposited in a joint earning account to be held by both advocates of the parties at a reputable financial institution within twenty 21) days from the date of this Ruling. In default execution to proceed.

13. Costs of the application shall abide the appeal.

14. It is so ordered.

**DATED, SIGNED and DELIVERED at KITUI this 9<sup>TH</sup> day of JANUARY, 2019.**

**L.N. MUTENDE**

**JUDGE**