



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 80 OF 2018

NANCY NDUTA KIARIE.....1ST APPLICANT

PHILIP KIARIE2ND APPLICANT

VERSUS

ANDREW TORONEI.....RESPONDENT

R U L I N G

1. By way of **Notice of Motion** filed herein on the **29th** day of **August, 2018**, the Applicants seeks stay of execution of the decision of the learned magistrate , **Hon. K. Sambu** delivered on the **8th** day of August, 2018, in **Mwingi CMCC No. 131 of 2016**, pending hearing and determination of the appeal .
2. The application is premised on grounds that judgment delivered against the Applicants was for a sum of Kshs. **1,442,840/=** in damages, costs and interest; no order of stay of execution was made; execution may be done at any time to the detriment of Applicants; the appeal has a high chance of succeeding; should execution proceed they will suffer substantial loss and irreparable harm and the application has been made without unreasonable delay.
3. The 1st Applicant swore an affidavit where she expressed their willingness to furnish security for due performance.
4. In response the Respondent swore a replying affidavit where he deposes that the application is intended to delay payments in the matter being made to him. That in event that the application is allowed, the defendants should be ordered to pay half of the decretal sum which should be released to him and the balance be deposited in a joint account.
5. The application was canvassed by way of written submissions that I have duly taken into consideration.
6. This court has the discretion to grant stay of execution. However, it must be guided by the principal provided in **Order 42 Rule 6** of the **Civil Procedure Rules** which provides thus:-

“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”.

7. 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...”

8. The Lower Court delivered its judgment on the 8th day of August, 2018 and the application was filed twenty one (21) days later, there no was unreasonable delay in filing it.

9. 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. Therefore they will suffer substantial loss. In the case of **Sewankambo Dickson vs Ziwa Abby the HCT -00-CC MA 0178 of 2005** the **High Court of Kampala** stated that :-

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...”

10. The decree is a monetary one where the court would not be fast in granting stay of execution. In the case of **Ujagar vs Runda Coffee Estates Limited (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...”

11. The Respondent has urged that the Applicant’s intention is to deny him to enjoy fruits of the judgment as there was no dispute that the accident occurred and he sustained injuries such that parties recorded a consent on liability. In that regard he argued that it would be just for the application to be allowed on condition that the applicant pays half the decretal amount.

12. What he has however not alluded to is whether or not he is a man of straw. This would therefore suggest that if the order sought is not granted and the appeal succeeds he may not repay the decretal sum. Of importance however, in this case is the fact that the appeal is only against the quantum of damages that the applicants contend was excessive.

13. In the premises, I grant stay of execution on condition that the applicants pay the Respondent the sum of **Kshs. 700,000/=** 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 one (21) days** from the date of this Ruling.

14. Costs of the application shall abide the appeal.

15. It is so ordered.

DATED, SIGNED and DELIVERED at KITUI this 9TH day of JANUARY, 2019.

L. N. MUTENDE

JUDGE