



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO 78 OF 2018

NANCY NDATA KIARIE.....1ST APPLICANT

PHILIP KAMAU KIARIE.....2ND APPLICANT

VERSUS

ROSELINE KIMURSOI.....RESPONDENT

RULING

1. The Applicants approached this court by way of **Notice of Motion** dated **24th August, 2018** filed herein on **29th August, 2018** seeking stay of execution pending hearing and determination of the Appeal.
2. The application is premised on grounds that: the learned trial Magistrate **Hon. Sambu** delivered Judgment on **8th August, 2018** where he awarded the Respondent **Kshs. 401,840/=** in damages plus costs and interest against the Applicants without making any orders for stay of execution; should the Respondent execute the judgment they will suffer substantial and irreparable loss since the Appeal has a high chance of succeeding therefore it will be rendered nugatory and the application has been made without unreasonable delay.
3. The 1st Applicant deponed an affidavit in support of the application where she stated *inter alia* that they are willing and ready to furnish security for due performance.
4. In response, the Respondent swore a Replying Affidavit where she deponed that the application which is not made in good faith is intended to delay payments in the matter and to derail her from enjoying fruits of the Judgment. That it is not in dispute that an accident occurred and parties entered a consent on liability. But she stated that should the application be allowed the court should consider ordering the Applicants to pay her half the decretal sum.
5. I do note that this court has the discretion to grant stay of execution but, it must be guided by Principles provided in **Order 42 rule 6** of the **Civil Procedure Rules** that stipulate that:

“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 its Judgment on the **8th August, 2018** and the application herein 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 in case the Appeal succeeds. This means that the Applicant will suffer irreparable damage.

9. The Decree herein is a Money Decree 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’s contention is that the Applicant’s intention is to deny her enjoyment of the fruits of the Judgment as it is not in dispute that the accident did occur and she was injured. Further, that as a result parties entered into a consent judgment on liability. It is for that reason that she seeks to be paid half the decretal sum.

11. The Applicant did not dispute the allegation that she is a person of straw who is not capable of paying back the sum in case the decretal sum is paid and the Appeal is successful. I also take into consideration the fact that the appeal is not against liability but quantum that is alleged to be excessive.

12. Therefore, I grant stay of execution on condition that the Applicants pay the respondent **Kshs. 200,000/=** 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 in default execution to proceed.

13. Costs of the application shall abide the Appeal.

14. It is ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2019.

L. N. MUTENDE

JUDGE