



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL CASE NO. 34 OF 2000**

**STEPHEN NDIRANGU.....PLAINTIFF**

**-VERSUS-**

**JOSEPHINE ONGACHI ANDWATI....1<sup>ST</sup> DEFENDANT**

**MICHAEL NJORGE.....2<sup>ND</sup> DEFENDANT**

**BENSON NJAU KAYAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Judgment in this case was delivered on the 31<sup>st</sup> October 2017 and a decree issued on the 10<sup>th</sup> January 2018. The 3<sup>rd</sup> Defendant being dissatisfied with the judgment filed a Notice of Appeal on the 23<sup>rd</sup> November 2011.

2. By an application Dated 14<sup>th</sup> December 2018 the 3<sup>rd</sup> Defendant, pursuant to provisions of Order 22 rule 25, order 42 rule 6 of the Civil Procedure Rules(CPR), seeks orders:

**1. That there be a stay of execution of the decree and all consequential orders pending the hearing and determination of the intended Appeal.**

**2. Costs**

3. The application is based on grounds stated on the face of the application and supported by an affidavit sworn by the applicant on the 14<sup>th</sup> February 2018.

The application is opposed by grounds of opposition filed on the 15<sup>th</sup> February 2019.

4. I have considered the applicant's averments in his supporting affidavit and the grounds of opposition.

The decretal sum as stated in the Decree issued is Kshs.983,735/=.

5. The grounds upon which an order of stay may be granted are stated under **Order 42 rule 6 CPR** that

**1. The applicant must establish a sufficient cause.**

**2. The Court must be satisfied that substantial loss would be occasioned by a denial of the stay order.**

**3. The applicant must furnish security for the due performance of the decree.**

**4. Application must be brought without delay.**

6. The applicant submits that a denial of the order would occasion it substantial loss as the respondent being unemployed may be unable to repay the decretal sum should the appeal succeed.

It further avers that the intended appeal has high chances of success. Apportionment of liability between the three defendants is at 50% against the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the one hand and 50% against the applicant. The 1<sup>st</sup> and 2<sup>nd</sup> defendants called no evidence.

7. It is to be noted that the Respondent was a passenger in the defendants accident vehicle and therefore liability cannot attach him. The dispute as to liability was between the three defendants. Would it then be fair and just to lock out the Respondent from fruits of his judgment by an order of stay? It is alleged that the Respondent may not be able to repay the decretal sum if appeal succeeds. No evidence has been adduced of his inability.

8. In **Josephine Seraphine Wadegu –vs- KPLC Ltd (2013) e KLR**, the court held that

**“Where a decree for payment of money was issued, the inability of the other side to refund was not the only thing that would render the appeal nugatory --- other factors had to be considered within the circumstances of each particular case....”**

9. Whether or not to grant stay of execution pending appeal is at the court’s discretion and the rules under Order 42 CPR are not exhaustive. They are guidelines to assist the court in the exercise of its discretion.

Security for the due performance of the decree is equally important. The decretal sum is **Kshs.983,735/=**. The offer by the applicant to deposit security of Kshs.50,000/= is but a mockery and lacks seriousness. Age of the case too is a matter for consideration the case being 18 years since it was filed.

10. A party cannot be locked out of its desire to be heard on appeal. Likewise the decreeholder should not be locked out of enjoyment of his judgment fruits, unless there are sufficient reasons.

11. This application was brought 14 months after delivery of the judgment. No reason has been adduced as to the inordinate delay. For the 14 months, the decreeholder has been holding a decree without the fruits. This in my opinion cannot be justice to the decree holder. In **Nakuru Civil case No.241 of 2011 (2018) e KLR**, the court found a delay of unexplained five months to have been unreasonable.

There is no gain saying that the delay being unexplained is unexcusable.

12. This is a money decree. I am not satisfied that the appeal would be rendered nugatory if the stay order is not granted. It is the Respondent, in my view, who would be prejudiced by a grant of the order of stay – **Machira t/a Machira & Co. Advocates – East African Standard (No. 2) (2002) e KLR**.

13. The applicant has offered security for the due performance of the decree though not sufficient and that it is willing to abide by terms that the court may state.

The liability to the applicant is **Kshs.983,735/=**.

There would be no justice whatsoever to lock the decreeholder totally from the judgment sum to await the determination of the appeal.

14. For the above reasons and in exercise of my discretion the following orders are issued.

**1. That the applicant (3<sup>rd</sup> defendant) shall pay to the plaintiff 70% of his share of the decretal sum being Kshs.688,615/= within 45 days.**

**2. The balance (30%) of Kshs.295,120/= shall be deposited in a joint interest earning account in the parties advocates names in a bank they may agree, within 45 days.**

**3. In default, these orders shall lapse and the Respondent/plaintiff shall be at liberty to execute the decree.**

It is so ordered.

**Dated, signed and delivered this 7<sup>th</sup> Day of March 2019.**

**J.N. MULWA**

**JUDGE**