



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 114 OF 2018**

**DHIRAJ MANJI.....APPELLANT/APPLICANT**

**-VERSUS-**

**FATIN KHASIANI *alias* TIFANY KHASIANI.....RESPONDENT**

**RULING**

[1] Before the Court for determination is the Notice of Motion dated **9 February 2019**. The application is expressed to have been filed under **Sections 1A, 1B, 3A and 79G** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 42 Rules 6 and 7, and Order 51 Rule 1** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] Spent

[c] That there be stay of execution and/or further execution in **Eldoret CMCC No. 701 of 2017** pending the hearing and determination of this appeal;

[d] That the orders of the lower court dated **1 February 2019** in **Eldoret CMCC No. 701 of 2017** be set aside;

[e] That costs be in the appeal.

[2] The Application was premised on the grounds that Judgment was delivered on **21 September 2018** in the lower court matter, being **Eldoret CMCC No. 701 of 2017** whereby an award of **Kshs. 569,600/=** was made in favour of the Respondent; and that being aggrieved by that decision, the Applicant has filed this appeal; which appeal may be rendered nugatory unless stay of execution is given. The application is supported by the Applicant's affidavit, sworn on **9 February 2019** wherein it was deponed that the appeal raised weighty legal issues and therefore has very high chances of success. The Applicant further averred that he is ready to abide by any reasonable conditions and to provide such security as the Court may order pursuant to the provisions of **Order 42 Rules 6 and 7** of the **Civil Procedure Rules**.

[3] The application was opposed by the Respondent; to which end Grounds of Opposition were filed herein dated **16 February 2019** to the effect that:

[a] The application is fatally defective and offends the mandatory provisions of **Order 42 Rules 6 and 7** of the **Civil Procedure Rules**;

[b] The application is *Res Judicata*;

[c] No substantial loss has been demonstrated;

[d] The affidavit in support of the application is defective and incompetent;

[e] There is a consent on liability and the Respondent prays that because the appeal is majorly on quantum of damages, half of the decretal sum plus full costs be paid to the Respondent whilst the remaining half of the decretal sum be deposited as security for the appeal.

[4] The application was canvassed by way of written submissions, pursuant to the directions made herein on **19 February 2019**. The Applicant's written submissions, filed on **8 March 2019**, reiterated his stance that the appeal has high chances of success; and that the Respondent may not be able to refund the decretal sum if the appeal succeeds. It was further the submission of Counsel for the Applicant that the application was made without unreasonable delay and that the Applicant is willing to furnish security for the performance of the decree, by depositing the entire decretal amount in a joint interest earning account in the names of the Advocates on record. Counsel relied on **Butt vs. Rent Restriction Tribunal, Nairobi Civil application No. 6 of 1979**; **Nairobi HCCA No. 716 of 2013: Johnson Mwiruti Mburu vs. Samuel Macharia Ngure**; **Mombasa HCCA No. 6 of 2008: Shadrack Kweta Maleve vs. Agnes Kavata Mutua**; and **Mombasa HCCA No. 40 of 2014: Kenya Orient Insurance Co. Ltd vs. Paul Mathenge Gichuki & Another** to buttress her submissions.

[5] On behalf of the Respondent it was submitted that since a similar application had been filed by the Applicant before the subordinate court in **Eldoret CMCC No. 701 of 2017** and was dismissed after hearing on the merits, the instant application is *res judicata*. It was further the contention of Counsel that, in any event, the Applicant has failed to demonstrate that he stands to suffer substantial loss, since the decretal sum herein is to be paid by the Applicant's insurers and not the Appellant himself. It was further pointed out by the Respondent that since consent was entered on liability at 80:20 in favour of the Respondent, the Applicant will ultimately have to pay damages; and therefore that he should be required to pay half of the decretal sum plus full costs; with the remaining half being deposited in a joint interest earning account as security.

[6] In respect of applications for stay of execution pending appeal, **Order 42 Rule 6(1) of the Civil Procedure Rules** provides that:

**"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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..."**  
(emphasis supplied)

[7] Thus, the jurisdiction of the appellate court to grant stay of execution attaches, irrespective of whether or not a previous application of a similar nature has been made before the lower court and declined. (see **National Bank of Kenya Ltd vs. Alfred Owino Bala [2015] eKLR**; **Lochab Transport Limited vs. Teresia Wangari & Another [2015] eKLR** and **Githunguri vs. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838**). Accordingly, the Respondent's argument that the application is *res judicata* is without foundation.

[8] Having given due consideration to the application and the written submissions filed herein, it is manifest to me that the instant application was filed without undue delay; granted that the first such application was made to the lower court on **23 October 2018**. It is also manifest that the parties are basically in agreement as to whether or not there should be stay; the Applicant having made an offer in clear terms at paragraphs 9 and 10 of the Supporting Affidavit to deposit the entire decretal amount in a joint interest earning account pending the hearing and determination of the appeal. Their divergence of positions is simply on the question as to whether the Applicant ought to pay half of the decretal sum to the Respondent; with the remaining half being deposited in a joint interest earning account as proposed by the Applicant. The Respondent's proposal was predicated on the fact that liability was settled by consent before the lower court; and that, in the final analysis, the Applicant will have to pay some amount as quantum.

[9] Accordingly, the only outstanding issue to consider is whether the Applicant has demonstrated that he stands to suffer substantial loss, should a stay order be made. In this connection, the Court of Appeal held in **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR**, that:

**"This Court has said before and it 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 unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear 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."**

[10] Thus, it was expected of the Respondent to allay the Applicant's apprehensions by demonstrating that she can repay the decretal funds should she be required to. As it is, the Respondent opted to file Grounds of Opposition and therefore did not respond to or rebut the factual aspects of the application as deposed to by the Applicant in his Supporting Affidavit. In the premises, and having weighed the competing interests of the parties, the orders that commend themselves to me are as hereunder:

[a] That the application dated **9 February 2019** be and is hereby allowed;

[b] That there be stay of execution and/or further execution of the decree issued in **Eldoret CMCC No. 701 of 2017** pending the hearing and determination of the appeal filed herein on condition that the entire decretal sum be deposited in an interest earning account in the joint names of Counsel on record herein within the next 30 days from the date hereof;

[c] That the costs of the application shall abide the outcome of the appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF JULY 2019

OLGA SEWE

**JUDGE**