



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 115 OF 2018**

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

**-VERSUS-**

**TYSON OUMA.....RESPONDENT**

**RULING**

[1] The Notice of Motion dated **9 February 2019** was filed herein on **12 February 2019** by the **Appellant/Applicant** pursuant to the provisions of **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. 720 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. 720 of 2017** be set aside;

[e] That costs be costs 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. 720 of 2017** whereby an award of **Kshs. 1,002,792/=** was made in favour of the Respondent; and that being aggrieved by that decision, the Applicant has filed this appeal; which appeal has very high chances of success and raises serious issues of law. It was further averred by the Applicant that, in its ruling delivered on **1 February 2019**, the lower court dismissed with costs the Applicant's application for stay of execution of the decree, thereby exposing him to the risk of substantial loss should execution be levied; hence the necessity for the orders sought.

[3] The application is supported by the Applicant's affidavit, sworn on **9 February 2019**, wherein it was deponed that the appeal raises weighty legal issues and therefore has very high chances of success and ought to be given a chance to proceed. The Applicant further averred that he is ready and willing to abide by any reasonable conditions, and to provide such security for the due performance of the lower court decree as the Court may order pursuant to the provisions of **Order 42 Rules 6 and 7** of the **Civil Procedure Rules**. He further averred that he stands to suffer substantial loss in the event of the appeal succeeding, should the Respondent proceed with execution of the decree before the hearing and determination of his appeal. His apprehension was that the Respondent has no means and/or assets sufficient to enable him refund the monies decreed in his favour. Hence, the Applicant offered to deposit the entire decretal amount in a joint interest earning account pending the hearing and determination of the appeal; and added that neither party will suffer any prejudice should the orders sought be granted.

[4] 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 to be suffered by the Appellant 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 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.

[5] 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.

[6] 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. 720 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, granted that consent was entered on liability at 80:20 in favour of the Respondent, the Applicant will ultimately have to pay some 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.

[7] 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)**

[8] Thus, the jurisdiction of the appellate court to grant stay of execution attaches, whether or not a previous application of a similar nature had been filed and determined by the lower court. (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 principle of *res judicata* is, in my respectful view, inapplicable to the facts herein.

[9] 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 to the lower court was determined on **1 February 2019**. It is therefore not correct for the Respondent to posit that the fate of the lower court application has not been disclosed by the Applicant. In the Supporting Affidavit, the Applicant deposed, at paragraphs 4 and 5, that he filed an application for stay dated **23 October 2018** in **Eldoret CMCC No. 720 of 2017**; and that the application was heard and a ruling delivered on **1 February 2019**, dismissing the said application.

[10] It is also manifest from the Supporting Affidavit and the written submissions filed herein 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 8 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. What is in dispute the question as to whether the Applicant ought to pay half of the decretal sum to the Respondent as proposed by 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 in his favour at 80:20 before the lower court; and that, in the final analysis, the Applicant will have to pay some damages.

[11] In the premises, 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 regard, I find instructive the decision of the Court of Appeal 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."**

[12] The onus was therefore on the Respondent to demonstrate that he is in a position to refund the decretal sums should he be required to; and to rebut the allegations in the Supporting Affidavit that he has no means and/or assets sufficient enough to enable him refund the decretal funds if paid. Instead he opted to file Grounds of Opposition in opposition to the application; and therefore did not refute the allegations of fact set out in the Supporting Affidavit; including the allegation that he is not in a position to repay the decretal sum in the event of the appeal succeeding.

[13] In the premises, I am satisfied that the application dated **9 February 2019** is meritorious. The same is hereby allowed and orders granted 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. 720 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**