



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO. 106 OF 2014

DOMINIC KIONGERAH(Suing as the legal administrator of the Estate of the Late

MAGDALINE NJERI KIONGERAH).....**APPELLANT**

-VERSUS-

ZACHARIA WACHIRA GATIGA).....**1ST RESPONDENT**

LAWRENCE MAINA GATIGA).....**2ND RESPONDENT**

RULING

(On Application dated 7th January 2019

1. Judgment in this appeal was delivered on the 28th November 2018. The trial court's award on damages in the sum of Kshs.850,000/= was enhanced to a sum of Kshs.3,145,000/= less the agreed 15% contributory negligence thus a sum of Kshs.2,295,000/=.

2. The applicants/respondents in the Appeal have preferred an appeal against the award of Kshs.2,295,000/= as being excessive. The Notice of Appeal was filed on the 4th December 2018.

3. By a Notice of Motion **application dated 7th January 2019** brought under **Sections 1A, 1B, 3A of the CPA and Order 42 rule 6 of the Civil Procedure Rules (CPR)** the applicants seek an order of stay of execution of the decree pending hearing and determination of the intended appeal, on grounds that should execution ensue the respondent may not be able to refund the enhanced sum of Kshs.2,295,000/= as his financial ability to repay is doubtful, and the applicant may suffer substantial loss.

It is deponed that the primary decretal sum of Kshs.850,000/= has already been paid out to the respondent, and duly acknowledged.

4. The Respondent objects to the grant of stay orders by a replying affidavit sworn on the 21st January 2019 and filed on same day.

He confirms having received Kshs.850,000/=. The respondent is a teacher. He exhibited his employment letter by the Teachers Service Commission and payslip for the month of December 2018. His earnings are Kshs.66,624/= per month. He will retire in February 2020. He submits that he would be able to repay the said balance of the decretal sum if the appeal is successful.

5. I have considered the rival submissions.

Under provisions of **Order 42 rule 6 CPR** it is trite that a party seeking an order of stay pending appeal ought to demonstrate that

- a) Substantial loss may result to the applicant unless the order is made
- b) The application has been made without undue delay
- c) Such security for due performance of the decree has been provided.

6. The decree hereof is a money decree and success of an appeal would ordinarily not render the appeal nugatory if the decree is satisfied, and more so if the court is satisfied that the respondent is financially able to repay the same if appeal is successful – **Housing Finance Company of Kenya –vs- Sharok Kher Mohamed Ali Hirji & Another (2015) e KLR, and Joseph Gachie T/A Joska Metal Works –vs- Simon Ndeti Mwema (2012) e KLR.**

7. Substantial loss is the cornerstone in an application for a stay order - **Boniface Kariuki Wahome –vs- Peter Nziki Nyamai & Another (2919) e KLR.**

I have noted that the respondent shall retire in 2020 February. No doubt his earnings will reduce. He has not provided any other source of income or assets from which it can be deduced that without the salary, and on a pension, he would be able to refund the sum of Kshs.2,295,000/= plus costs and interest should the appeal be successful.

8. There is reasonable apprehension as to the ability of the respondent to repay the said sum.

In the case **Barclays Bank of Kenya –vs- Mercy Wanjiru Maina (2015) e KLR**, the Court allowed an application for stay of execution stating that

“---although the Respondent has furnished evidence of her financial capacity with a payslip of net of Kshs.41,078.80-I am not convinced with her net income, she would be able to refund the decretal sum in the event that the appeal succeeds for the reason that the decretal sum is a colossal sum of Kshs.1,056,963/= and she must be having other responsibilities too. I find that the applicant has satisfied the second requirement.”

9. Upon evaluation of the parties submissions, I come to the same conclusion in the **Barclays case** above.

The application was filed timeously thus condition No. b) above is satisfied.

10. In an application such as is the one before me, there are two compelling interests, that of the decree holder and that of the judgment debtor. Both must be considered and balanced.

A successful litigant should not be denied enjoyment of the fruits of his judgment without good cause. At the same time the unsuccessful litigant should not be denied his right of appeal that should be safeguarded from being rendered nugatory.

11. To satisfy both interests, an order for security for due performance of the decree is necessary as the outcome of the appeal is awaited.

This guarantees that should the appeal be successful, the appellant would not be subjected to hardship in the recovery of the decretal sum from the decree holder.

12. The security that the court finds sufficient is one that should serve the above purpose. To that end, I shall allow the application dated the 7th January 2019. An order of stay of execution of the decree is allowed pending the hearing and determination of the preferred appeal, but upon the following conditions as security for the due performance of the decree:

1. That the applicants shall deposit 50% of the decretal sum, Kshs.1,572,500/= in an interest earning bank account in joint names of both Advocates for the parties within a period of 30 days from this ruling.

2. That the balance, (50%) being Kshs.1,572,500/= less the sum of Kshs.850,000/= already paid to the Respondent, being Kshs.722,500/= shall be paid to the respondent within 45 days from the date of this ruling.

3. In default or noncompliance by the applicants of the above orders, the stay order shall lapse, and stand vacated.

4. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

Dated, delivered and signed at Nakuru this 4th Day of July 2019.

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J.N. MULWA

JUDGE