

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 371 OF 2019

RAEL WAMUGI WAMBUGU.....APPLICANT

VERSUS

RONALD NYAKUNDI ONCHOMBA.....RESPONDENT

R U L I N G

This is an application by way of Notice of Motion under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 rule 6 and Order 51 Rule 1 of the Civil Procedure Rules for orders that warrants of attachment and sale, as well as the proclamation against the defendant's property be lifted, that there be a stay of execution of the lower court judgment pending the determination of the intended appeal, and that costs be provided for.

The application is supported by an affidavit sworn by the Advocate for the applicant alongside grounds set out on the face of the application. The application is opposed and there are two affidavits filed by the respondent in reply. Some authorities have also cited to assist the court in determining the application.

There is a judgment in favour of the respondent against the applicant. After the said judgment was delivered, going by the documents presented in court, there was some correspondence between the parties' advocates. In particular, there was a letter by the advocate for the applicant informing the respondent's advocate that they were calling for settlement funds in satisfaction of the decree. That letter is dated 1st March, 2017. It could be a contradiction to the orders sought by the applicant in view of that letter.

I have read the Memorandum of Appeal dated 15th April, 2019 and note the main complaint by the applicant is that the award of damages is considered high in view of the injuries sustained by the respondent.

The applicant has expressed fear that if the decretal sum is paid to the respondent it may not be recovered because there is no known source of income on the part of the respondent. The applicant has also offered to provide security in the form of insurance bond.

Where an applicant alleges that the respondent may not be in a position to repay the decretal sum in the event the appeals succeeds, the burden shifts to the respondent to dispute such an allegation. That notwithstanding, the respondent has a valid judgment he desires to execute while on the other hand the applicant has a right of appeal.

I am guided by the affidavit evidence which the parties agreed should form the basis of this ruling together with the cited authorities. In balancing the interests of the parties, I am inclined to allow the application on the following terms: -

i) The applicant shall pay to the respondent a sum of Ksh.800,000/- and the balance of the decretal sum shall be deposited in an interest earning account in the names of both advocates appearing for the parties.

The above condition shall be complied with within 15 days from the date of this ruling. The warrants of attachment and proclamation of sale shall be lifted upon compliance with the above conditions. The applicant shall pay the auctioneers charges together with the costs of this application.

Dated, signed and delivered at Nairobi this 11th day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE