



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 34 OF 2019

CLIFFORD OMONDI OTIENO.....APPELLANT/ APPLICANT

VERSUS

GEOFFREY MUTHIANI MUTISO.....RESPONDENT

(Being an appeal arising from the judgment of J. D. Karani – Resident Magistrate Makindu Law Courts SPMCC No. 270 of 2017 delivered on 23rd March, 2019)

RULING

1. The Appellant/Applicant filed the application dated 7th June, 2019 seeking the following orders:

1) Spent.

2) Spent.

3) **That** a stay of execution of the judgement dated and delivered on 28th day of March 2019, at Makindu, be granted preventing the Respondent, his agents, servants, assigns or anyone acting through him from in any way executing the orders therein against the appellant pending the hearing and determination of the Appellants appeal in civil appeal no. 34 of 2019.

4) **That** the costs of this application abide the result thereof.

5) **That** this honourable court be pleased to make such further or other orders as it may deem fit and just to grant.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Cyprian Onyony an advocate in the firm of Onyony & Co. advocates which is representing the Appellant/Applicant. The main ground is that if stay of execution of the decree in Makindu civil case No. 270 of 2017, is not granted, the Applicant will suffer unreparable loss and damage, and the appeal will be rendered nugatory. Further that the appeal has been made without unreasonable delay and the Respondent will not be prejudiced if the said orders are issued. Mr. Onyony deponed that the appeal filed has good grounds with high chances of success.

3. The Respondent in his replying affidavit has averred that the appeal is without merit. Further that he is a police corporal with a salary of Kshs.50,000/= per month and therefore capable of paying the decretal amount in the event of a successful appeal. He has deponed that the Appellant/Applicant has not offered any security.

4. The parties agreed to dispose of the application by way of written submissions, which they filed.

5. M/s Onyony for the Applicant submitted that the principles for granting stay of execution are laid down in Order 42 Rule 6(1) Civil Procedure Rule and as was held in the case of **Focin Motorcycle Co. Ltd –vs- Ann Wambui Wangui & Anor, (2018) eKLR** by **Justice L.W. Gitari**:

He contends that the Appellant has complied with the said principles and filed all the necessary documents with regard to its appeal. The Applicant's apprehension is based on the fact based on the fact that the Respondent has threatened to execute the decree which will invariably lead to irreparable loss and damage to the Applicant and render the appeal nugatory.

6. He has submitted that the Respondent earns a gross salary of Kshs.50,000/= with no other source of income. He wonders how the Respondent would repay the sum of Kshs.2,545,681/= in the likely instance that the appeal proves successful. Still relying on the Focin

Motorcycle case (*supra*) counsel submitted that it was more than evident that the Respondent had not shown his capability of refunding the decretal sum in the event of a successful appeal.

7. It was his further submission that the application for stay of execution was filed timeously and with no ordinate delay. He referred to the case of **JMM –vs- PM (2018) eKLR** where **Justice C. Meoli** held that:

“The principles upon which the court may stay the execution of orders appealed from are settled. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed. These are requirements stipulated in Order 42 Rule 6(2) of the Civil Procedure Rules.”

8. He added that the Applicant is ready and willing to abide by the court’s directions if granted the stay of execution orders. That they are ready to provide a bank guarantee for 50% of the decretal sum as security as per the requirements of the law in granting of such orders. He argued as per what was stated in the Focin case (*supra*) the Applicant had satisfied the ground of security though his willingness to deposit a bank guarantee.

9. Mr. Mutunga for the Respondent submitted that the application was opposed since the appeal lacks merit. That liability was admitted in the lower court and the same could not be appealed against. On the issue of the appeal being nugatory he submits that the Respondent is in gainful employment with the Kenya police service and with a salary of Kshs.50,000/= as stated. On the other hand, it is the Applicant who is not in gainful employment.

10. He objected to the indication that the Applicant can only raise a 50% bank guarantee for the decretal amount. To him, this was clear evidence that the Applicant has no means to satisfy the decree and was only buying time. He therefore prayed for dismissal of the application for stay of execution.

11. On a without prejudice basis, he submitted that if the court was not for the dismissal of the application then the Respondent insists that the decretal sum of Kshs.2,545,681/= be deposited with the court within seven (7) days by the Applicant and in default the application to stand dismissed with costs to the Respondent.

12. Having considered the application, affidavits, submissions and the law, I find the single issue for determination to be whether the Applicant has satisfied the conditions for grant of stay pending appeal as set out in Order 42 Rule 6 (1& (2) Civil Procedure Rules which provides:

Order 42, Rule 6 Stay in case of Appeal

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(2) No order for stay of execution shall be made under sub-rule (1) unless-

a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

13. First of all, the record confirms that the Applicant filed herein a memorandum of appeal dated 9th April, 2019 on 26th April, 2019. Therefore, he has a right to make this application by virtue of Order 42 Rule 6 (1) Civil Procedure Rules.

14. The Applicant has a duty to satisfy the conditions set out in Order 42 Rule 6(2) Civil Procedure Rules. The said conditions are the following:

i. The application must be made without undue delay.

ii. The Applicant must satisfy the court of substantive loss or damage to be suffered if stay is not granted.

iii. The security offered to cushion the Respondent against any loss.

15. The appeal herein was filed on 26th April, 2019. The application for stay of execution was filed on 14th June, 2019. This is roughly one and a half (1 ½) months after filing of the appeal. The Respondent has not raised any issue about this. The Applicant in his application stated that he was prompted to file the application when the Respondent wanted to execute the lower court’s decree. I therefore find that there was no delay in filing the application for stay of execution.

16. The next condition is proof of any substantial loss to be incurred by the Applicant if the decretal sum was paid and the appeal turned out

to be successful. The Applicant has submitted that the Respondent's gross salary would not be sufficient to enable him refund the decretal sum of Kshs.2,545,681/=. The Respondent in his replying affidavit has stated that he is a police officer of the rank of corporal in the Kenya police service earning a salary of Kshs.50,000/=. This has not been disputed by the Applicant.

17. For the Respondent to be a corporal he must have put in a number of years in the police service. It is not enough to look at the Kshs.50,000/= per month and dismiss him as a poor man. He does not have to be in possession of liquid cash to refund Kshs.2,545,681/=. We should look beyond that. Can he with the Kshs.50,000/= per month be able to secure a loan facility to refund the money? This coupled with the fact that the Respondent is in gainful employment removes him from men of straw. He is in a position to refund the money in the event of a successful appeal.

18. The 3rd condition is deposit of security by the Applicant. The Applicant submits that he is ready and willing to deposit a security of 50% of the decretal sum as security. This is however not acceptable to the Respondent.

19. Upon reading the judgment, I find that liability was not admitted before the lower court as submitted by counsel for the Respondent. Liability was an issue before the trial court which found the Applicant and another to be jointly and severally 100% liable for the said accident. That being the finding of the court, the Applicant cannot be estopped from challenging it in this appeal.

20. Be it as it may, the lower court was satisfied that the Applicant and another were liable for the occurrence of the accident and so liable for the injuries suffered by the Respondent. The Respondent should therefore not be denied the enjoyment of the fruits of his judgment. This court must therefore balance the interest of both parties, and make appropriate orders.

21. I therefore find merit in the application for stay of execution sought, for purposes of not rendering the appeal nugatory in case it is successful. I will allow the application dated 7th June, 2019 and grant stay of execution pending appeal on the following conditions:

- i. The Appellant/Applicant to pay the Respondent Kshs. One million (Kshs.1,000,000/=) within 21 days through his advocate.*
- ii. A further sum of Kshs.one million (Kshs.1,000,000/=) to be secured by the provision of a bank guarantee within 30 days.*
- iii. Costs to be in cause.*
- iv. The Appellant is urged to fast track the appeal.*

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE