



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 107 OF 2019

DANCAN KIGUNDA.....1ST APPELLANT/APPLICANT

ALEX GITHINJI2ND APPLICANT/APPELLANT

VERSUS

BONFACE KIGUNDARESPONDENT

RULING

1. This is a ruling on the Motion on Notice dated 4/10/19 brought pursuant to **Order 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules 2010, Sections 1A & 1B of the Civil Procedure Act, and Article 159 (2) (d) & (e) of the Constitution of Kenya**. In the Motion, the applicant seeks an order of execution of the judgment of **Hon. S. Ndegwa** in Githongo PMCC No. 94 of 2017 delivered on 2/8/19 pending the hearing and determination of the appeal herein.
2. The grounds upon which the application is grounded upon are set out in the body of the Motion and the supporting affidavit of **Brenda Wambui**, advocate sworn on 4/10/19. In it, she deposed that execution is imminent as the respondent has already proclaimed against the applicant's property; that if stay is not granted, the applicants will suffer irreparable damage and substantial loss as their appeal would be rendered nugatory.
3. She further deposed that if the decretal sum is paid over, the respondent would not be in a position to refund the same if the appeal is successful. Finally, that the applicants are willing and ready to abide by such orders and conditions made by the court regarding security.
4. The application was opposed by the respondent vide his replying affidavit sworn on 14/10/19. He contended that he is entitled to enjoy the fruits of the judgment that awarded him Kshs. 9,894,170/- plus costs of the suit as the appeal has no chances of success. That the applicants who have not demonstrated any likelihood of suffering substantial loss, wish to delay his enjoying the fruits of his judgment considering that he is in dire need of the money for treatment as a result of the injuries. That if a stay is granted, the Court should direct that half of the decretal sum be paid and the remainder be deposited in an interest earning account managed by advocates for both parties.
5. I have considered the affidavits and submissions of the parties. This is an application for stay of execution pending appeal. The principles applicable are set out under **Order 42 Rule 6 of the Civil Procedure Rules ("order 42 Rule 6")** These are that; the application should be made timeously, the applicant should demonstrate that substantial loss will be occasioned if a stay is not given and offer of such security as the court may deem just.
6. The impugned judgment was delivered on 2/8/19. There was an application for stay lodged before the trial court which was listed for hearing on 4/10/19 but the original file was forwarded to this Court before it could be heard. The present application was consequently filed on 4/10/19. To this Court's mind, the application was filed timeously.
7. As regards substantial loss, this is the cornerstone of any application under **Order 42 Rule 6** aforesaid. Where none is proved, an application for stay pending appeal cannot stand.
8. The supporting affidavit was sworn by an advocate and not any of the applicants. After deposing that she is the advocate who has conduct of the matter on behalf of the applicants, the deponent proceeded to depose in the relevant paragraphs as follows: -

"2. THAT I am conversant with the matter before this Court and well versed with the facts of this case and all circumstances touching on the subject matter of this suit and hence competent to swear this affidavit.

...

9. THAT unless the prayers in this application are granted, the Plaintiff/Respondent threatens to levy execution against the Applicants who stand to suffer irreparable damage and substantial loss in effect rendering the intended appeal nugatory.”

9. The respondent contended that the applicants had not shown that they will suffer any substantial loss. It is clear from the foregoing that, while the advocate who deposed the supporting affidavit may have authority to swear to procedural matters touching on the case, obviously she has no authority to swear on matters that are in controversy.

10. In her entire affidavit, **Brenda Wambui advocate** never stated that she had been authorised by the applicants to swear the said affidavit on their behalf. Further, she did not state the basis on which she averred that the applicants would suffer substantial loss. It was never stated whether this was a fact within her own knowledge and if so on what basis or if it was on information.

11. To this Court’s mind, an issue of suffering substantial loss under **Order 42 Rule 6** is not one of conjecture or speculation. It is a fact to be demonstrated positively by an applicant. It is not an issue or fact that can be deposed to by an advocate without disclosing the basis. In this regard, I hold that the applicants have not demonstrated that substantial loss will be suffered if the stay sought is not granted.

12. This would have disposed of the application. However, in any application under **Order 42 Rule 6**, there are always two competing interests which the Court has to balance. These are, the applicant’s undoubted right to appeal and the successful party’s right to secure the fruits of his judgment.

13. In the present case, the deponent of the supporting affidavit stated that there was apprehension that if the decretal sum is paid over, the respondent would not be able to refund the same if the appeal is successful. In response, the respondent did not deny that fact. He affirmed it when he swore that he needed that money for treatment. By implication, the respondent admitted that he may not be able to refund the decretal sum, which is quite substantial, if the appeal is successful.

14. In **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**, the Court of Appeal held:-

“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 — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

14. From the foregoing, it is clear that the Court has to look both ways. Although the applicants failed to prove that they will suffer substantial loss if the stay is not granted, the respondent admitted to be a man of straw. In this regard, this Court’s view is that both parties need to be protected. The applicants are said to be willing to comply with any terms that may be imposed for the grant of the stay.

16. I have looked at the applicants’ submissions before the trial Court. They did not seriously challenge liability. Indeed they have not appealed against liability in this appeal. They have only challenged quantum. Before the trial court, they submitted for a total sum of Kshs.1,382,000/ as damages without the element of special damages. The decretal sum executed against is Kshs.10,497,064/60.

17. Taking into consideration the foregoing and the circumstances of this case, I allow the application on the following terms:-

a) a stay of execution of the judgment delivered on 2/9/19 in Githongo PMCC No. 94 of 2017 hereby issues pending the hearing and determination of this appeal on condition that:-

i) the applicants do pay to the respondent within 30 days of the date hereof, a sum of Kshs.1,500,000/=;

ii) the applicants do deposit a sum of Kshs.4,000,000/- in an interest earning account in the joint names of the advocates on record for the parties herein within 30 days of this order;

iii) in default of any of the conditions set out in i) and ii) above, execution for the decretal sum to issue.

b) The costs be in the suit

DATED and **DELIVERED** at Meru this 17th day of October, 2019.

A. MABEYA

JUDGE