



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 18 OF 2019**

**MICHAEL MWANGI GUCHURA.....APPELLANT**

**VERSUS**

**MARTIN WAMBUA KITAVI.....RESPONDENT**

**RULING**

1. The appellant prays for *stay of execution* of the decree in the lower court pending the hearing and determination of this appeal.
2. The respondent is the legal representative of *Kambua Kitavi* (deceased) who perished in a road traffic accident on 24<sup>th</sup> September 2003.
3. The respondent filed *Civil Case 366 of 2004* at the Murang'a Chief Magistrates Court in which he blamed the appellant's driver for the accident. Judgment was delivered on 27<sup>th</sup> May 2005. The lower court found that the appellant was 100% liable in negligence. The respondent was awarded Kshs 536,025 as damages together with costs and interest. The decretal sum currently stands at Kshs 1,015, 624.
4. The appellant is aggrieved by the latest order of 13<sup>th</sup> May 2019 in which the lower court extended the time to deposit the decretal sum by 45 days; in default of which the stay of execution would abate and the appellant would be committed to civil jail.
5. The appellant has lodged a *memorandum of appeal* dated 14<sup>th</sup> June 2019 contemporaneously with a *notice of motion* of even date. The memorandum of appeal has since been *amended* and presented to court on 26<sup>th</sup> June 2019. The appellant then lodged a fresh notice of motion filed on the same day.
6. The grounds appear on the face of the motion and the fresh affidavit sworn on 25<sup>th</sup> June 2019. The appellant contends that he is a pensioner and unable to meet the decree. In his view, the respondent should first exhaust other means of execution before committing him to civil jail. He states that committal to jail is harsh and draconian. He blames the respondent for indolence. His learned counsel also submitted that the decree has been caught up by the **Limitations of Actions Act**.
7. The application is contested by the respondent. There is the replying affidavit sworn on 6<sup>th</sup> July 2019. The gravamen of the reply is this: that there is no proof of substantial loss; that the order to deposit the decretal sum cannot amount to such loss; that no security has been offered; and, that the respondent was entitled to enforce payment by committal proceedings.
8. Both parties filed written submissions on 19<sup>th</sup> July 2019 and 22<sup>nd</sup> July 2019 respectively.
9. The present motion is predicated upon Order 42 rule 6 (1) of the **Civil Procedure Rules** which provides-

“6 (1) 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.

(2) No order for stay of execution shall be made under subrule (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.”

10. I find that the original motion was presented *without* undue delay.

11. In *Wilson v Church* (No 2) 12 Ch D [1879] 454 at 459-

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”*

12. See also *Butt v Rent Restriction Tribunal* [1982] KLR 417, *Madhupaper International Limited v Kerr* [1985] KLR 840.

13. The main appeal is pending. I will thus desist from commenting on its merits. But I can safely state that it is *arguable* on two aspects: whether the decree has expired; and, whether the decree holder should exhaust other means of execution first.

14. The decree here is substantial: It currently stands at Kshs 1,015,624. I am alive that as a general proposition, the execution of a *money decree* does *not* constitute substantial loss. *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR.

15. Although the applicant claims he is a pensioner, he has not provided any details of income. He simply states that he is impecunious. How would the court then establish that he has completely no means to pay? I am alive that section 38 of the **Civil Procedure Act** allows the *arrest* of a judgment debtor *provided* that the judgment debtor is granted an opportunity to *show cause* why he should not be committed to prison. The court before committing the debtor is mandated to consider all the matters in the proviso and record its *reasons*.

16. The proceedings to *show cause* were the ones before the lower court on 13<sup>th</sup> May 2019. I find that the applicant was not forthright. On that date, the appellant *agreed* to deposit the decretal sum in court. Like I stated earlier, the appellant now claims he has *no* means to meet the debt. He embraced wholeheartedly the order to make the deposit within 45 days. It is only after the expiry of the stay, that he made a complete about-turn: he now challenges the *validity* of the decree and the proposed *means* of execution.

17. Although the appellant takes up cudgels on the amount of interest, he has not paid the principal sum for all these years. True, he may have had indemnity from an insurer; but he remained the principal debtor. It is also not lost on me that no security has been furnished to secure the due performance of the decree that may ultimately be binding on him.

18. In the end I find that the conditions for grant of a stay of execution pending appeal have *not* been established.

19. The upshot is that the appellant’s notice of motion dated 25<sup>th</sup> June 2019 is devoid of merit. It is hereby *dismissed*. Costs shall abide with the outcome of the main appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG’A this 8<sup>th</sup> day of October 2019.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Mbugua holding brief for Mr. Kimwere for the appellant/applicant instructed by Kimwere Josphat & Company Advocates.

No appearance by counsel for the respondent.

Ms. Elizabeth, Court Clerk.