



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL CASE NO. 65 OF 2019

MAKUENI COUNTY GOVERNMENT.....APPELLANT

-VERSUS-

GRACE MWELU DAVID.....RESPONDENT

RULING

1. The application for determination is dated 09/09/2019. It was filed under certificate of urgency and is brought under, Order 3(1) and 2 of the High court (Practice & Procedure) Rules of the Judicature Act and Order 50 Rules 1, 2 and 3 of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders;

a) That there be a stay of execution of the judgment delivered on 08/08/2019 in CMCC No. 39 /2018 Makueni Law Court pending hearing and determination of this application.

b) That costs of this application be provided for.

2. It is supported by the grounds on the face of it, the supporting affidavit of counsel Edith Nzisa Mutuku sworn on the same day and an undated supplementary affidavit sworn by I.F.M Masika. Counsel Nzisa deposes that judgment of kshs 2,156,071/= plus costs and interests was entered in favour of the Respondent who has already given notice to commence execution after expiry of the 30 days' stay given by the trial court.

3. She has further deposed that the Applicant being a County Government will suffer irreparable loss and damage if its motor vehicles are attached. She has further deposed that the Applicant is ready to deposit security in the form of an insurance bond equivalent to the value of the award.

4. The Respondent opposed the application through a replying affidavit sworn on 16/09/2019. The gist of opposition is that the application does not satisfy the conditions of stay as set out in the Civil procedure rules. She agrees that the execution process had commenced when she was served with the stay orders from this court.

5. She deposes that the money decree cannot be rendered nugatory as she has the means to refund the decretal sum if the appeal succeeds. It's also her deposition that an insurance bond is not acceptable as she is entitled to enjoy the fruits of her judgment.

6. The application was canvassed by way of written submissions.

Applicant's submissions

7. The Applicant submits that it has met all the conditions of stay as provided in Order 42 of the Civil Procedure Rules (CPR).

8. With regard to security, it submits that it's insurer, the Heritage Insurance Company, is ready to deposit security as shall be ordered by the court but proposes to deposit an insurance bond equivalent to the value of the award. It relies on **Nduhiu Gitahi & Anor -vs- Anna Wambui Warugongo (1988) KAR** where the Court of Appeal held;

“The form of security over the decretal amount is immaterial so long as it is adequate. The aim is to preserve the rights of both parties pending appeal and to ensure that the decretal amount is available when required....the aim is to ensure an even handed manner, that the appeal will not be prejudiced and that the decretal sum is available if required. The Respondent is not entitled for instance to make life difficult for the Appellant so as to temp him into settling the appeal”

9. The Applicant submits that it is for the Respondent to prove that she is not a woman of straw and can afford the decretal sum if the appeal succeeds. It contends that the Respondent should have at least exhibited bank statements to show that she has enough savings and

investments. It relies on **National Industrial Credit Bank Ltd –vs- Aquinas Francis Wasike & Anor** as quoted by Lady Justice Mutende in **Swapan Sadhan Bose –vs- Ketan Surenda Samaia & Others (2006) eKLR** as follows;

“This court has said before and would bear repeating that while the legal duty is on the 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 the 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.”

10. The Applicant also submits that after the lapse of the initial stay orders, it made a formal application for stay before the trial court but it was dismissed on the ground that there was no urgency. It therefore contends that if stay is not granted herein, execution will proceed and the appeal will be rendered nugatory.

11. The Applicant submits that the appeal has high chances of success in that; the special damages awarded were not specifically pleaded and strictly proved. It also contends that the award on general damages is manifestly excessive to warrant an appeal. It also submits that the application was filed without inordinate delay.

The Respondent’s submissions

12. The Respondent submits that the Kshs.800,000/=, which the Applicant had cited in the trial court as appropriate general damages, should be lessened by 15% and be released to her. The balance should then be deposited in an interest earning account pending the determination of the appeal.

13. She submits that failure to subject the special damages to 15% contribution was an arithmetic error which is curable under section 99 of the Civil Procedure Act. She also submits that such an error can be corrected by the court on its own motion or on application of either party but should not be a basis for appeal.

14. It is her further submission that refusal to grant stay will not render the appeal nugatory because she is capable of refunding the money decree if the appeal succeeds. She relies on **Nrb HCCC 575 of 2003 (UR) Kariuki Ng’ang’a t/a Ndarugu Merchants –vs- Joseph Ngae & Anor** where Justice Mutungi relied on the decision in **Kenya Shell Ltd –vs Kibiru & Anor (1988) KLR** to state as follows;

“It is not normal in the money decrees for the appeal to be rendered nugatory if payment is made. That is precisely the issue here. The decree sought to be stayed from execution is a money decree. There is no evidence that the plaintiff has no means to pay back the decretal amount in the suit and judgment herein should the appeal succeed.”

15. She submits that the Applicant’s argument about her financial position is baseless as counsel cannot swear an affidavit on contentious matters and the source of that information is not disclosed. She contends that it’s the Applicant’s burden to prove that she is a person of straw incapable of refunding the decretal sum. She cites **Nrb HCCC No. 31 of 2001 (UR) O.M Costa –Luis –vs Nova Chemicals Ltd** where **Justice L. Njagi** relied on the **Kenya Shell case (supra)** to state as follows;

“It is usually a good rule to see if Order 4 rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

16. Having considered the application, the supporting affidavit, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether grant of stay of execution is merited, in this case.

17. As rightly submitted by the parties, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree. (Order 42 Rule 6 Civil Procedure Rules).

18. Judgment in the case appealed from was delivered on 08/08/2019 and a 30 days stay granted by the trial Court. This application was filed on 09/09/2019 which is exactly one month after lapse of initial stay. It is therefore evident that the application was filed without unreasonable delay.

19. As for substantial loss, the applicant’s position is that attachment and sale of its motor vehicles will result in failure to deliver to their clientele and cause loss of business worth millions which will not be easy to recover from the Respondent. The proclamation notice marked as ‘GMD3’ shows that 13 vehicles with an approximated value of ksh 10 million were proclaimed.

20. I do not understand why so many vehicles were proclaimed yet the decretal sum is less than 3 million and I am inclined to agree with the Applicant that loss of so many vehicles would occasion substantial loss and affect its operations which are by and large for the public benefit.

21. On whether or not the Respondent will be able to refund any money paid in the event of a successful appeal, it is the Applicant’s word against that of the Respondent. No single piece of evidence was laid before this court to prove their position. The court will therefore strike a balance by taking some precautions.

22. On security, the Applicant proposed an insurance bond but expressed willingness to abide by orders which this court would deem fit.

The Respondent submitted that the Applicant had made a proposal of Kshs.800,000/= as general damages before the trial court. I do not have the benefit of the Applicant's submissions before the trial court but it has not been expressly denied. I however take note that the same is mentioned in the trial court's judgment. This is however subject to this court's reassessment of the same in this appeal.

23. It is not in dispute that parties consented on liability in the ratio of 85:15 in favour of the Respondent. It is therefore clear that the Applicant bears a bigger portion of the liability. The pain suffered must accordingly be compensated for, to enable the Respondent enjoy fruits of the judgment. The special damages are highly contested and it is best that the right amount be determined on appeal.

24. I find that the Applicant has satisfied the conditions for grant of stay of execution pending appeal, which I hereby grant on the following conditions:

i. The Applicant to pay the Respondent Kshs.400,000/= through her advocates within 30 days.

ii. The balance to be secured through an insurance bond by the Heritage Insurance Company on behalf of the Applicant. The same to be executed within 30 days and filed in court.

iii. Costs of the application to be in cause.

iv. Failure to comply with any of the conditions will automatically lead to vacation of the order of stay of execution.

Orders accordingly.

Delivered, signed & dated this 20th day of November 2019, in open court at Makueni.

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Hon. H. I. Ong'udi

Judge