



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 27 OF 2019

MATIVO KOVI.....APPELLANT

VERSUS

JAMES TOM MULI MULEKYE.....RESPONDENT

R U L I N G

1. By way of Notice of Motion dated **10th June, 2019**, the Applicant seeks stay of execution of the Judgment entered pending hearing and determination of the Appeal.

2. The application is premised on grounds that: The application has been made without delay; the Applicant has appealed against the decision of the Lower Court; the Appeal raises serious triable issues with high chances of success; unless stay is granted, the Appeal will be rendered nugatory and the Applicant will suffer substantial loss and that the Applicant is willing and ready to provide security for the Judgment awarded in terms set out by the Court.

3. The Applicant swore an affidavit in support of the application where he deposed *inter alia* that unless stay of execution is granted the Respondent will commence execution proceedings against him, an act that will prejudice his rights. That the Respondent is incapable of making a refund should execution proceed.

4. The Respondent filed a Replying Affidavit urging that the application is intended to delay the matter and derail him from enjoying fruits of Judgment. That he relies on handouts from friends and relatives to pay hospital bills and feed his family, amounts of money that he has not refunded having promised to repay upon finalization of the case. He cannot do manual work and that in event that the application is allowed, the Court may order the Applicant to pay half the decretal sum and the balance be deposited in a joint account.

5. The application was canvassed by way of written submissions that I have taken into consideration.

6. Conditions to be met for granting stay of execution are provided for by **Order 42 Rule 6** which can be summed up as:

- i) That substantial loss may result to the Applicant unless the order sought is not granted;
- ii) That the application was made without unreasonable delay; and
- iii) That such security as the Court orders for the due performance of such a decree or order may ultimately be binding on the Applicant has been given.

7. It is argued that the award is a substantial sum of **Kshs. 1,100,000/=** which the Respondent cannot refund if the Appeal is successful as he has confirmed that he is not a man of means.

8. In the case of **silverstein vs. Chesoni [2002] I KLR 867** it was stated that:

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

9. In his affidavit evidence the Respondent has volunteered information of lack of capacity to repay any sum in case the Appeal is successful. Looking at the Memorandum of Appeal, the Appellant faults the trial Court for awarding general damages that were excessive and holding the Appellant wholly liable for the accident. What the allegation amounts to is that the Respondent contributed to the accident, therefore, if conditions are set stay of execution order may be granted.

10. The impugned Judgment was entered on the **15th May, 2019**. Twelve (12) days thereafter, the Applicant demonstrated dissatisfaction by filing an Appeal. The instant application was subsequently filed on **10th June, 2019**. It was done timeously without delay.

11. The Respondent is willing to furnish security if ordered by the Court. This being the case I grant the relief sought as follows:

i) There be stay of execution of the Judgment and Decree on condition that the Applicant pays the Respondent **Kshs. 400,000/=** and the balance be deposited in Court within **thirty (30) days** hereof.

ii) In default, the order of stay shall lapse.

iii) Costs of the application shall abide the Appeal.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 5th day of December, 2019.

L. N. MUTENDE

JUDGE