



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 52 OF 2019

SIBOTA JOHN.....APPELLANT

=VRS=

JOSEPH OGEKA ONGERI {Suing as Personal Representative of the

Estate of JOHN MOMANYI ONGERI (DECEASED)}.....-RESPONDENT

{Being an appeal against the Ruling of Hon. A. C. Towett – SRM – Nyamira dated and delivered on the 25th day of September 2019 in the original Nyamira Chief Magistrate’s Court Civil Case No. 17 of 2014}

RULING

By the Amended Notice of Motion filed herein on 28th October 2019 the appellant/applicant seeks a stay of execution of the decree in Nyamira CMCC 17 of 2014 pending the hearing and determination of this appeal.

The application is premised on grounds that execution of the said decree is eminent; that the appellant stands to suffer double jeopardy his motor vehicle having been attached and sold and proceeds of the sale not tendered; that he was not the owner of the motor vehicle when the accident occurred; that service of summons to enter appearance is shrouded in mystery as there are two summonses served on two different people and further that the appellant had questioned the credibility of the trial Magistrate and asked her to recuse herself. There are further grounds that the motor vehicle belonging to the appellant was attached before the respondents paid further court fees of Kshs. 66,000/=; that the appeal has high chances of success and that this is a fit case for the prayers sought.

The application was canvassed by way of written submissions. In order to succeed, a party seeking stay of execution pending appeal must fulfil the conditions set out in **Order 42 Rule 6 (2) of the Civil Procedure Rules** which states: -

“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;

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

In **Butt v Rent Restriction Tribunal [1982] eKLR** the Court of Appeal stated: -

“1. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.

.....

5. The court in exercising its power under O. XLI Rule 4 (2) (b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

Guided by the above principles and having considered Counsel’s submissions and perused the lower court record, I am satisfied that the application herein is merited. Firstly, the application has been brought timeously the ruling appealed from having been rendered on 25th September 2019. Secondly, the appellant/applicant has demonstrated that his appeal has a likelihood of success and that it stands to be rendered nugatory should this application be refused and it succeeds. Accordingly, in order not to cast him from the seat of justice, I shall grant the order sought conditioned upon him demonstrating his bonafides by depositing half the decretal sum either in this court or in an interest earning account in the joint names of the Advocates for the parties within 21 days of this ruling failing which the order for stay shall lapse. For the avoidance of doubt the ruling of the trial Magistrate that no execution in the matter shall proceed unless and until the respondent/decreed holder pays the further court fees adjudged at Kshs. 66,000/= still stands and shall be a bar to execution even should the condition imposed by this court not be fulfilled. The costs of this application shall abide the appeal. It is so ordered.

Signed, dated and delivered in open court this 5th day of December 2019.

E. N. MAINA

JUDGE