



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 25 OF 2017

JAMES KARANJA.....APPELLANT

VERSUS

JOYCE K. MAINA.....1ST RESPONDENT

KELVIN KIMNI KARIUKI.....2ND 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. The appellant is aggrieved by the judgment delivered on 13th June 2017 in Civil Case 410 of 2014 at the Murang'a Chief Magistrates Court.
2. The lower court found that the appellant was 100% liable in negligence. The respondent was awarded Kshs 5,339,206 as damages together with costs and interest. The appellant has lodged a memorandum of appeal dated 30th June 2017.
3. The grounds of the motion are set out at length in the notice of motion dated 12th July 2017. The appellant contends that unless the stay is granted, it will suffer substantial loss. Its appeal would in the circumstances be rendered nugatory. At paragraph 6 of the supporting affidavit, it is deposed that the appellant is willing to provide a *bank guarantee* in the sum of Kshs 2,600,000; approximately *half* of the decree.
4. In the alternative, the appellant has offered to deposit half of the decretal sum in a *joint interest earning account* as security for due performance of the decree. All those matters are buttressed in the deposition of Grace Mugo, counsel on record for the appellant.
5. At the hearing of this appeal, learned counsel for the appellant submitted that the respondent has not provided an *affidavit of means*; and, that the replying affidavit sworn by Lucy Waweru, *counsel* for the respondents, delved into facts beyond her personal knowledge. Learned counsel went as far as praying for the deposition to be struck out.
6. But I do not find the deposition offensive. The deponent was acting for the respondents and conversant with the impugned judgment and decree. The only objectionable paragraph is paragraph 7. But it is also a case of the kettle calling the pot black: the appellant's deposition is also sworn by his *counsel* of record, Grace Mugo.
7. If the entire deposition by the respondents' counsel is struck out, the respondents will be left holding the short end of the stick. It will defeat the *overriding objective* of the court. See *Harit Sheth T/a Harit Sheth Advocate v Shamas Charania, Court of Appeal at Nairobi*, Civil Application No 68 of 2008 [2010] eKLR.
8. The main point taken by learned counsel for the appellant is that the respondents are *men of straw*: They would be unable to refund the amount in the event the appeal succeeds.
9. As stated, the motion is contested. There is the replying affidavit sworn by the respondents' counsel on 31st July 2017. The gravamen of the reply is this: that the respondents lost their father in the suit accident; and, the present motion will delay the fruits of the judgment. Learned counsel beseeched the court to balance the *interests* of both parties.
10. I have considered the application, depositions, and the rival submissions.
11. 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.”

12. The motion has been presented *without* undue delay. In *Butt v Rent Restriction Tribunal* [1982] KLR 417 the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. 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”

13. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General v Emerson and others* 24 QBD [1889] 56 at page 59. In the *Butt* case (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. Those general principles were restated in *Madhupaper International Limited v Kerr* [1985] KLR 840 at page 846.

14. The decree here is substantial: It currently stands at Kshs 5,339,206. I am alive that as a general proposition, the execution of a money decree does not constitute substantial loss. See *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. However, the respondents have *not* filed an *affidavit of means*. The *capacity* of the respondents to refund the sums in the decree is thus cast into doubt. See *MDC Holdings limited and others v J.P. Machira* Nairobi, Civil Appeal Nai 7 of 2002 (unreported).

16. I thus find that the appellant is entitled to a stay of the decree. But I will *balance* the interests of the parties by ordering that a portion of the decretal sum be paid to the respondents; and, that a part be held in an interest earning account of both counsel in a reputable bank. I am persuaded by the reasoning of Okwengu J (as she then was) in *Jubilee Insurance Company Ltd v Samuel Thumbe*, High Court, Nairobi, Civil Appeal 432 of 2009 [2010] eKLR.

17. The upshot is that the appellant’s notice of motion dated 12th July 2017 is *allowed* in the following terms-

a) That there shall be a stay of execution of the judgment and decree dated 13th June 2017 pending the hearing and determination of this appeal.

b) The stay is granted upon the *condition* that the appellant deposits the sum of Kshs 2,600,000 in a joint interest earning account of both counsel in a reputable bank as earlier ordered by the court on 19th July 2017. For the avoidance of doubt, the appellant has already fulfilled this condition.

c) The stay is granted upon the *further condition* that a sum of Kshs 500,000 is paid to the respondents within 30 days of today’s date.

d) In default, execution shall issue.

e) Costs shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 5th day of June 2018

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant/applicant.

Mrs. L. Waweru for the respondents instructed by L. K. Waweru & Company Advocates.

Ms. Dorcas, Court Clerk.