



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 24 OF 2017

BERNARD KINYUA KIRIMARIA.....APPELLANT

-VS-

STEPHEN KAMAMIA MAINA (Suing as the Legal

Representative of the Estate of MOURINE NJOKI KAMAMIA).....RESPONDENT

R U L I N G

1. Before me is a Notice of Motion dated 12th June, 2018, It s brought under **Section 1A, 1B, 3A and 95 of the Civil Procedure Act, CAP 21 of the Laws of Kenya; Rule 4 of the Court of Appeal Rules, 2010, Order 50 Rule 6 of the Civil Procedure Rules, 2010**. The applicant, seeks an order of stay of execution of the judgment of Majanja J delivered on 7th June, 2018, and that for, the sum of Kshs 1,500,000/= deposited at NIC Bank in a Joint Account in the names of both counsel for both parties to continue to be held as security pending the hearing and determination of the applicant intended Appeal in the Court of Appeal at Nyeri.
2. The grounds upon which the Motion was grounded were set out in the body of the Motion and in the affidavit of Allan Odongo, Advocate sworn on 12th June, 2018. The said deponent is the advocate who has the conduct of this matter on behalf of the applicant.
3. He deponed that, on 7th June 2018, Majanja J. delivered a judgment upholding the lower court’s finding on quantum and that the applicant being dissatisfied with the entire judgment, and particularly on the findings on quantum, had lodged a Notice of Appeal dated 8th June 2018.
4. That on 7th July, 2017, part payment was paid to the respondent in the sum of Kshs.1,500,000/= and the applicant deposited a similar amount in a joint account at NIC Bank in the joint names of both counsels in this matter as security pending the determination of this Appeal.
5. He further deposed that the instant application was necessary since the security deposited at NIC Bank may be released to the respondent and the respondent may proceed to execute against the balance yet there is an intended appeal to the Court of Appeal.
6. The application was opposed through a Replying Affidavit of Stephen Jamamia Maina sworn on 4th July, 2018. He deposed that, the dismissal order of the appeal was a negative order incapable of execution and could not be stayed. That the only limb of judgment that was amenable to execution was the decree on costs. He contended that there was no money held in any joint account at NIC Bank in the joint names of the Advocates for the parties and that the consent order alluded to by the applicant was never adopted as an order of Court.
7. He further deposed that he was not a person of straw incapable of repaying the amounts in the unlikely event that the intended appeal succeeded. According to him, he was a civil servant and owner of several properties in Nairobi and its environs and other assets whose net value was more than 100 times the sum of Kshs 3,100,909/= due under the judgment appealed against.
8. The parties filed their respective submissions which I have carefully considered. It was submitted for the Appellant that he had a viable arguable appeal which he was interested in prosecuting; that the application had been filed without any delay and that unless stay of execution sought was granted, he stood to suffer irreparable loss as the decretal sum involved was in excess of Kshs 3,000,000/=, which was the statutory limit payable by an insurer per claim in accordance **with section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405**. That the applicant had an arguable appeal with high chances of success and if the application was not allowed, the appeal would be rendered nugatory.
9. It was further submitted that the security of the decretal balance having been deposited in a joint account, the same should continue to be held in the said account pending the determination of the intended appeal.

10. On behalf of the respondent, it was submitted that the judgment in this appeal was a negative order incapable of execution save for the award of costs; that the contention by the applicant that there was a sum of Kshs 1,500,000/= being held at NIC Bank in a joint account in the names of the parties' Advocates was untrue as no such account existed and details of the said account had not been given. Further that, the applicant had not made any attempt to demonstrate what loss would be suffered if the stay was not granted.

11. Consequently, the Respondent urged the court that in the event the court was persuaded to grant the stay, the Appellant should be ordered to deposit the entire balance sum due to him in the sum of Kshs.3,100,909/=.

12. I have carefully considered the affidavits on record, the rival submissions by the parties and the authorities relied upon. This is an application for stay of execution of the judgment of Majanja J made on 7th June 2018.

13. The appellant did not invoke the correct provisions of law under which this court can exercise its jurisdiction to grant an order of stay of execution pending appeal. That jurisdiction is clearly set out in **Order 42 Rule 6 of the Civil Procedure Rules**. The principles applicable are that; the application should be made timeously; the applicant must demonstrate that he would suffer substantial loss if the stay is not granted and the applicant must give security for the due performance of the decree that may ultimately be found to be binding upon him.

14. In **Butt v Rent Restriction Tribunal [1982] KLR 417**, the Court of Appeal gave guidance on how a court should exercise its discretion and held that:-

“1. The power of the court to grant or refuse an application for a 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order 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.”

15. On the first limb, the application was made timeously. The judgment that the applicant seeks to appeal against was delivered on 7th June, 2018, whereas the instant application was filed on 20th June, 2018. This was a period of 13 days which in my opinion is reasonable in the circumstances.

16. As regards the second limb, it was submitted that the applicant would stand to suffer irreparable loss as the decretal sum is in excess of Kshs.3,000,000/= and that he has an arguable appeal with high chances of success. That if the stay is not granted, the appeal would be rendered nugatory. On the other hand, it was contended by the respondent that no attempt had been made to demonstrate what loss would be suffered by the applicant.

17. In **CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997**, the Court of Appeal held:-

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. ...the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

18. As regards the merits of the intended appeal, my opinion is that that is not an issue for consideration by this court. On substantial loss, an applicant must specifically state what or the nature of the loss he will suffer that can be termed as substantial. In a money decree, such as the present one, the applicant should state or demonstrate that if the money is paid over to the respondent, the respondent will not be in a position to repay the same if the appeal is ultimately successful. A positive statement to that effect is required so as to shift the evidentiary burden of proof to a respondent to show that he is not a man of straw. The fact that the amount of decree is colossal is not by itself proof that the appeal will be rendered nugatory if the stay sought is not granted. It must be alleged or demonstrated that if paid over, it may be irrecoverable.

19. I note that even though the applicant did not demonstrate or state that the respondent would not be able to repay the money if paid over and the appeal succeeds, the latter still did swear that he is not a man of straw. Although he likewise did not provide evidence of his net worth, his said positive statement as to his being a man of means was neither doubted nor challenged. The evidentiary burden of proof remained with the applicant. To my mind therefore, the applicant has not demonstrated that he would suffer substantial loss if the stay sought is not granted.

20. With regard to the 3rd limb namely; provision of security, the applicant stated that he was ready and willing to abide by any conditions that this Honourable court may order; that in the interests of justice, the amount of Kshs.1,500,000/= deposited in the joint names of the advocates on record for the parties do continue to be held at NIC Bank as security of the intended appeal. On the other hand, the respondent

contended that there was no such sum as Kshs.1,500,000/= being held at NIC Bank in any joint account in the names of the parties Advocates.

21. Although the respondent had denied that there was any sum of KShs.1,500,000/- held in the joint names of the advocates for the parties, the applicant did not respond to that assertion. This court has carefully perused the record and has found that there was no evidence that was proffered to show that there was any such sum deposited. If there was an such joint account nothing was difficult than to produce evidence of its existence. In effect, the applicant was misleading the court while appealing to the exercise of its discretion. That is a fact to be frowned upon by the court.

22. The other issue is the sufficiency of security, the applicant holds the view that the amount due is a maximum of KShs.3 million only as spelt out under **section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405**. With due respect, that is not the case. The said Act did not hamstring the court on the amount awardable. The amount of limit is as between him and his insurer and does not concern the court nor the respondent. If this court were to order security, it would have been as suggested by the respondent. However, for what the court has found out, that will not be necessary for now.

23. Accordingly, I find the application to be without merit and the same is hereby dismissed with costs to the respondent.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 11th day of October, 2018.

A. ONG'INJO

JUDGE

In the presence of: -

M/S Kairu MC Court Adv for applicant N/A

M/S Musyoka Mugai for respondent N/A

Court: Notice to issue to counsel and parties by Deputy Registrar

A. ONG'INJO

JUDGE