



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 48 OF 2018

SILVESTER MUEMA MUSYOKA alias

SILVESTER MUEMAAPPELLANT

VERSUS

ANNAH KAMAN THE NYAMAI1STRESPONDENT

ALEX MUTUA NYAMAI (Suing as the Legal Representatives

and on behalf of the estate of

JOSHUA MUEMA NYAMAI (DECEASED)2ND RESPONDENT

[Being an appeal from the judgement delivered by Hon. A. Lorot (Senior Principal Magistrate) in Machakos CMCC No. 832 of 2015 delivered on 18th day of April 2018]

RULING

1. The Appellant/Applicant filed a Notice of Motion dated 17/5/2018 seeking the following reliefs:

(i) *(Spent)*

(ii) *(Spent)*

(iii) *That there be a stay of execution of judgment and decree in Machakos CMCC No. 832 of 2015 delivered on the 18th day of April 2018 pending the hearing and determination of the Appeal.*

(iv) *That the costs of the application be in the cause.*

2. The application is supported by the grounds on the face thereof and further by the affidavit of George Mahugu learned counsel for the Appellant who deposed inter alia; that the Appellant has already filed an Appeal against the judgement of the lower court both on liability and quantum; that the Appeal is arguable and has high chances of success; that should the Respondent execute the decree then the Appeal will be rendered nugatory as chances of recovery of the sums from the Respondent shall be slim since the Respondent's financial means is unknown and that the Appellant will suffer substantial loss; that the Appellant is ready and willing to provide such reasonable security as may be ordered by the court for the due performance of the decree; that the application has been brought without unreasonable delay.

3. The application was opposed by the Respondent. A replying affidavit was filed by Carolyn M. Bosco who deposed inter alia; that the application for stay is made in bad faith only meant to delay and deny the Respondent from enjoying the fruits of the judgment; that the appeal filed herein is an afterthought meant to delay the matter; that if the court is inclined to grant the orders then the Appellant should deposit all the decretal sums in an interest earning account as security.

4. The application was canvassed by way of written submissions which I have duly considered. The issue for determination herein is whether the Applicant has satisfied the requisite conditions set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.

5. Order 42 Rule 6 (1) (2) of the Civil Procedure Rules provides the conditions to be satisfied by an applicant seeking an order of stay of execution of decree or order pending Appeal. they are as follows:

(i) An applicant must show that substantial loss may result unless the order is made.

(ii) The application for stay must be made without unreasonable delay.

(iii) The applicant must be ready to furnish security for the due performance of the decree which may ultimately be binding upon him or her.

6. On whether the Applicant stands to suffer substantial loss, it is noted that the Applicants have averred that if the order of stay is not granted, then their appeal already lodged might be rendered nugatory should it succeed in the end as the Respondent would not be in a position to refund the decretal sums. The Appellants in their affidavit have claimed that the Respondent is a person of straw having disclosed before the trial court that she was unemployed and does not earn a living, it was thus imperative for the Respondent herein to disclose her means. She has not done so yet the issue of her means is a matter within her knowledge. The moment the Appellants raised the issue of lack of means then the burden shifted to the Respondent to disclose that she has the wherewithal and able to reimburse the Appellants should the appeal not succeed in the end. The decretal sums is in the region of Kshs. 2 million plus costs and the same is a tidy sum by any standards. If the same is paid to the Respondent and the appeal succeeds then the appellants shall only be holding a paper judgement. Even though the Respondent is entitled to enjoy the fruits of the judgement, the Appellants who have lodged an appeal are also entitled to be given a chance to ventilate their appeal. Each of them have a right to be protected and thus the issue of deposit of security for costs will take care of the rival concerns.

7. On the issue of whether the application for stay has been filed timeously, it is noted that the judgment of the trial court was delivered on the 18th April 2018 whereas this application was filed on the 18/5/2018 exactly one month thereafter which is within the period for lodging the appeal. I find the application has been lodged without unreasonable delay.

8. As regards the issue of security, it is noted that the Appellants have indicated that they are ready and willing to deposit the decretal sum. Indeed the Respondent vide paragraph 14 of the replying affidavit is agreeable to the deposit being made into an interest earning account. Once the security is deposited then the parties can proceed to canvass the appeal without any worries since the Appellants duty to satisfy the due performance of the decree will not be a problem.

9. In the result, the Appellants application dated 17/5/2018 is allowed in the following terms:

(a) An order of stay of execution of the judgement and decree in Machakos CMCC No. 832 of 2015 is granted upon the Appellants depositing the entire decretal sums plus assessed costs into a joint interest earning account in the names of the Advocates for the parties within 45 days from the date hereof failing which the stay shall lapse.

(b) The costs of the application shall abide in the appeal.

Orders accordingly.

Dated and delivered at Machakos this 8th day of November, 2018.

D.K. KEMEI

JUDGE