



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 29 of 2018**

**MEDULA ACADEMY.....APPELLANT/APPLICANT**

**VERSUS**

**JACKLYNE ATIENO OTIENO**

**DANIEL OMONDI OKELLO**

**(Suing as legal representatives**

**of the estate of DOMINIC**

**JUMA OKELLO) Deceased.....RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 29<sup>th</sup> November, 2018, the appellant herein Medulla Academy brought an application seeking from this court orders:

***a. that this application be and is hereby certified as urgent and heard exparte in the first instance and interpartes on a date to be allocated by this Honourable court;***

***b. that pending the hearing and determination of this application, interpartes there be and is hereby granted a temporary stay of execution of the judgment or decree in Bondo PMCC No. 61 of 2016;***

***c. that execution of decree and judgment in Bondo PMCC No. 61 of 2016 be and is hereby stayed pending the hearing and determination of appeal filed herein;***

***d. that the costs of this application be provided for.***

2. The application is brought under the provisions of section 63E of the Civil Procedure Act, Order 40 Rule 1(a) and Order 51 of the Civil Procedure Rules, 2010.

3. The said application is predicated on the grounds on the face of the application and an affidavit supporting the Notice of Motion sworn by **Carolyne Kimetto**.

4. In the grounds thereof, the applicant claims that the awarded sum in the lower court is 2,067,760 which is beyond the reach of the Respondents and that if paid at this stage then they will not be in a position to refund the same should the appeal herein succeed as they have no known source of means hence the appeal which has chances of success will be rendered nugatory.

5. The grounds above are replicated in the supporting affidavit with a deposition that the appellant is willing to abide by any conditions that the court may place on the order for stay of execution pending appeal.

6. The Respondents opposed the application and filed a replying affidavit sworn by both Respondents contending that the application is fatally defective, bad in law, incompetent and an abuse of court process. Further, that the application is an afterthought and that it is intended to deny the respondents their fruits of a lawfully obtained judgment hence the application is meant to delay the enforcement of the judgment.

7. It was further contended that the applicant has not satisfied the court on the conditions stipulated in Order 42 Rule 6 of the Civil Procedure Rules and that there has been no demonstration that it will suffer any loss if the stay sought is not granted.

8. That no security has been furnished for the due performance of decree and that the application offends Article 27 of the Constitution or the right to equality before the law.

9. That the court can order for payment of half of the decretal sum and half to be deposited in an interest earning account of both advocates for the parties.

10. The respondents maintained that the appeal has no chances of success.

11. The parties' advocates Miss Nyangola and Mr Otara argued the application this morning reiterating the contents of their client's pleadings and affidavits.

12. I have carefully considered the application and in my view the issue for determination is whether the application has merit.

13. First and foremost is that the application is brought under the wrong provisions of the law that provides for injunctions but that in itself is a mere procedural lapse on the part of the appellant's advocate which does not go to the root of the application. I shall therefore ignore the error and proceed to determine the application on the substance therein.

14. Applications for stay of execution pending appeal are brought under Order 42 Rule 6 of the Civil Procedure Rules.

15. The conditions for the granting of a stay of execution pending appeal are now settled. An order of stay of execution is a discretionary one. However that discretion is fettered by the conditions or pre-requisites encapsulated in Order 42 Rule 6(2) of the Civil Procedure Rules. These conditions are that:

***i. The application must be made without undue delay;***

***ii. The applicant must demonstrate that they will suffer substantial loss unless the order sought staying execution is granted; and***

***iii. That the applicant should provide such security as may be ordered by the court.***

16. On the first condition and whether the appellant/applicant herein has filed this application without undue delay, The appellant had lodged an appeal against the judgment of the Honourable court delivered on 17<sup>th</sup> October, 2018 on 16<sup>th</sup> November 2018 . This was within 30 days stipulated in Section 79G of the Civil Procedure Act.

17. In my view, the application was filed within reasonable time within 30 days of the date of judgment, which is also statutory period under Section 79G of the Civil Procedure Act, within which an appeal from the subordinate court should be filed to the High court as a matter of right. I am therefore satisfied that the application was filed timeously.

18. Regarding the second condition of substantial loss that is likely to be suffered by the applicant if stay is not granted, the applicant has submitted that the respondents have no known means and therefore it is unlikely that they will be in a position to refund the decretal sum of over Kshs 2,067,760 should the appeal succeed, which will in effect render the appeal nugatory.

19. The respondents rubbish that submission as a mere allegation and that it has not been proved that they not in a position to refund the money if paid and the appeal succeeds. Further, that the submission offends Article 27 of the Constitution.

20. The applicant has maintained in their application and supporting affidavit that they will suffer substantial loss if the money as decreed by the lower court is paid out to the respondent and the appeal succeeds. They did not indicate or specify what kind of loss they will suffer if the amount of shs 2,067,760 is paid before the appeal is heard and determined.

21. Indeed, demonstrating what substantial loss is likely to be suffered is the core to granting a Stay of execution of decree pending appeal. In this case, the applicant has complained that the amount of shs 2.067million is so substantial that if paid out, the respondents shall not be in a position to refund and that the deceased was a motorcycle rider without a licence and no eye witness was called to testify on how the accident occurred hence the appeal has overwhelming chances of success.

22. However, it is not to say that its operations will be crippled and or completely grounded. Neither has it been proved that the respondents are so impecunious that if paid the said money, they would not be in a position to reimburse it if the appeal succeeds or that such reimbursement would be with difficulty.

23. In **Daniel Cheptulu Rotich & 2 others vs Emirates Airline Civil Case No. 368/2001**, Musinga J (as he then was) held, and I agree that:

***“ It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur.....” substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum”.***

24. In **James Wangalwa & another vs Agnes Naliaka Cheseto (2012) e KLR** the court held that:

***“ the applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or***

*negate the very essential core of the applicant as the successful party in the appeal”*

25. In **Jeny Luesby vs Standard Group Ltd (2014 ) e KLR** it was held that:

*“Granting of stay pending appeal is at the discretion of the court on sufficient cause being established by the applicant . The incidence of the legal burden of proof on matters which the applicant must prove lies with the applicant.”*

*.....sufficient cause being a technical as well as a legal requirement will depend entirely on the applicant satisfying the court that the substantial loss may result to the applicant unless the order is made, and therefore the court may direct for the deposit of such security for the due performance of the decree or order as may ultimately be binding on the applicant where an applicant has been able to satisfy the court that the application has been made without unreasonable delay. ....The fact that execution process is in motion or the attached properties have been sold does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil procedure Rules”.*

26. I reiterate that the applicant has failed to demonstrate that it will be totally ruined in relation to the appeal if it pays over the decretal sum to the respondent, and that it will be reduced into a mere explorer in the justice process if it does what the decree commands it to do without any prospects of recovering the money should the appeal succeed. In a money decree, substantial loss lies in the inability of the respondent to refund the decretal sum should the appeal succeed.

27. It is trite law that he who alleges must prove (see Sections 107,108, 109 of the Evidence Act). Real and cogent evidence must be tendered by way of affidavit.

28. The appellant also alleges that it has an appeal which has high chances of success especially on ground 1 and 3 of the Memorandum of Appeal.

29. On this point, this court has pronounced itself in several decisions that under Order 42 Rule 6 (2) of the Civil Procedure Rules, the applicant in seeking orders of stay pending appeal from the subordinate court to the High Court, the applicant is not required to prove that they have an arguable appeal, unlike if it was an application before the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. This is exemplified in several decisions including **Nakuru HCC 211/98- Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others** and the appellant’s own authorities cited in support of this application namely, **Equity Bank Ltd vs West Link Mbo Ltd** (supra).

30. Nonetheless, what was stated in the case of **Absalom Dora vs Tarbo Transporters (2013) e KLR** is relevant that:

*“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”*

31. Thus, stay pending appeal being a discretionary remedy, this court has many options of balancing out the parties rights. Where it decides to grant stay it can do so on terms.

32. Noting that the applicant has offered to abide by any conditions that this court may issue, albeit it never specifically offered security for the due performance of decree, this court can make any order that would insulate the respondents/decreed holders from any loss should the appeal be rendered in their favour, I order that the decretal sum of shs 2,067,700 plus all party and party costs of the suit in the court below if taxed or agreed upon shall be deposited in this court within 30 days from the date hereof, as a condition precedent to stay of execution of decree in Bondo PMCC No. 61 of 2016 pending hearing and determination of the appeal, herein, upon which the said monies shall be held as security for the due performance of decree which may ultimately be binding upon the appellant. In default, the orders of stay herein granted lapses and the respondent shall be at liberty to execute decree.

33. I further order that upon depositing of such decretal sum in court, the appellant shall take all the necessary steps to complete the process of readying this appeal for hearing and disposal within the next 60 days from the date of this ruling and in default, the orders of stay shall automatically lapse after 60 days from the date hereof and the respondents may apply for release of the funds deposited in court.

**Dated, Signed and Delivered in open court at Nairobi this 10<sup>th</sup> Day of December, 2018.**

**R.E. ABURILI**

**JUDGE**