



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 143 OF 2016

IMMACULATE KANINI MULWA.....APPELLANT

VERSUS

DANIEL MUGURU IRUNGU.....RESPONDENT

(Being an appeal from the judgment of Principal Magistrate's Court at Kangundo law Courts delivered by Honourable Mrs Chesang, (Principal Magistrate) on 18th November, 2016 in KANGUNDO C.M.C.C. NO.106 OF 2015)

RULING OF THE COURT

1. The Appellant/Applicant has filed an Application dated 8/12/2016 seeking for the following prayers:-
 - (a) THAT an order of stay of execution of the Judgement and decree in Kangundo CMCC NO. 106 of 2015 do issue pending hearing and determination of this Appeal.***
 - (b) THAT costs be in the cause.***

2. The Application is supported by an annexed affidavit of the Appellant sworn on 8/11/12/2016 and further on the following grounds:-
 - (a) Judgment was delivered on 18/11/2016 for Kshs. 1,200,00/=.***
 - (b) Being aggrieved the Appellant preferred this appeal.***
 - (c) The Appellant seeks stay of execution of the judgement and decree hearing and determination of the Appeal.***
 - (d) The lower court granted thirty (30) days stay which will lapse on 18/12/2016.***
 - (e) Unless stay sought is granted the Appeal will be rendered nugatory.***
 - (f) The judgement sought to be appealed from is bad in law and contrary to principles of awarding General damages.***
 - (g) The award of Kshs.1,200,000/= for a simple fracture is excessive and a total miscarriage of justice.***
 - (h) If execution proceeds irreparable harm and damage will be occasioned to the Appellant as***

recovery from the Respondent will not be possible.

(i) The appeal has high chances of success.

(j) The Applicant is ready to furnish security to the tune of Kshs.200,000/=.

(k) The judgement subject of the Appeal herein is wrong and if left to stand will occasion a serious miscarriage of justice.

3. The Application is opposed by the Respondent who filed a replying affidavit sworn on 15/12/2016 and raised the following grounds of opposition.

(a) The Applicant has not demonstrated the substantial loss she will suffer if stay is not granted.

(b) The Applicant's Application is meant to frustrate the Respondent from realizing the fruits of the judgment.

(c) The applicants appeal has no chances of success.

4. Parties filed submissions which I have carefully considered. The only issue for determination is whether this court should stay execution of decree in **Kangundo CMCC No.106 of 2015** pursuant to the Provisions of Order 42 Rule 6 of the civil Procedure Rules.

5. Order 42 Rule 6 of the Civil Procedure Rules grants this court power to order stay of execution if sufficient cause is shown. Rule (2) therefore lays down the conditions to be fulfilled for the stay orders to be given. These conditions were outlined in the case of **AGGREY MAULA MALUNGU =VS= SANYA MWAKAVI [2015] eKLR** where the court noted as follows:

“For a stay of execution to be granted an Applicant must satisfy three (3) conditions stated in Rule 6(2) to the effect that:-

(a) The Application for stay must be made without unreasonable delay from the date of the decree or order to be stayed.

(b) The Applicant must show that he will suffer substantial loss if the orders of stay are not granted.

(c) The Applicant offers security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.”

The court went further to state that:-

“The essence of an Application for stay pending appeal is to preserve the matter of litigation to avoid a situation where a successful appellant only gets a paper judgement.”

The Applicant has submitted that she has met the above threshold.

6. As regards the first condition above, I note the judgement by the lower court was delivered on the 18/11/2016 and that the Appellant filed the Memorandum of Appeal on 9/12/2016. She also applied for certified copy of proceedings and judgement on 29/11/2016. The present Applications was filed on the 9/12/2016 which is about three (3) weeks from the date of delivery of the judgement and which I find was within the time provided for lodging an appeal. Hence it is quite clear that the Application for stay has been made without unreasonable delay.

7. With regard to the second condition for grant of stay namely that the Applicant must show that she will suffer substantial loss if an order of stay is not granted, the Applicant has stated that the Respondent

intends to execute the decree which will be detrimental to her. According to the Applicant, the awards by the lower court were manifestly excessive and out rightly illegal in view of the fact that the Respondent had sustained minor injuries. According to the Applicant, the sums awarded were exaggerated and not commensurate with the injuries sustained and therefore an indication that the lower court applied wrong principles in arriving at the award. The Applicant maintains she has an arguable appeal with high chances of success. I must point out that the merits or otherwise of the appeal is yet to be determined. Again the Applicant maintains that the Respondent might not be able to refund the sums in the event the appeal succeeds. The Respondent in his replying affidavit has thrown the burden of establishing his penury status on the Applicant. Indeed both the Applicant and Respondent have not presented evidence to the effect that there will be difficulty in refunding the monies in the event the appeal succeeds. The entire decretal amount stands at about Kshs.1.3 million which by no means is a tidy sum by any standards and if paid out can cause a dent on the Applicant's finances without a clear assurance that the same would be refunded back upon successful appeal. The anxiety of the likely loss is to be taken care of under the third condition of grant of stay of execution.

8. On the third condition, I note the Applicant has indicated that she is ready and willing to offer or furnish security to the tune of Kshs.200, 000/=. On the other hand the Respondent proposes that half of the decretal sums be paid to the Respondent while the balance be deposited in court. Indeed for one to get an order of stay pending appeal, security for costs must be furnished. I am unable to understand as to why the Applicant has offered security in the sum of Kshs.200, 000/=. It would seem that the Applicant who intends to appeal against the lower court's award of damages appears to believe that the same shall be scaled downwards on appeal to the sum of about Kshs.200,000/= yet the appeal is still to be determined. The outcome of the appeal could go either way and it might turn out that the lower court had applied proper principles in arriving at the award. In the circumstances I find it would be appropriate if the decretal sums herein are deposited into an interest earning account in the joint names of both advocates as they canvass the Appeal.

9. In the result, I find the Applicant's Application dated 8th December, 2016 has merit. The Applicant is granted stay of execution on condition that the entire decretal sums is deposited in an interest earning account in the joint names of both Advocates for the parties herein within thirty (30) from the date hereof. The costs of the Application shall abide in the appeal.

It is so ordered.

Dated, signed and delivered at Machakos this 9TH day of MAY 2017.

D. K. KEMEI

JUDGE

In the presence of:-

C/A: Kituva