



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL CASE NO. 12 OF 2015

ISAAC MUTETI KISUA.....APPELLANT/APPLICANT

AND

FELIX MWANGI NDEGWA.....RESPONDENT

RULING

1. By a Notice of Motion dated 23rd September, 2015, **ISAAC MUTETI KISUA** the appellant/applicant herein has sought the following orders under **Order 42 (b)** and **Order 51 Rule 1 Civil Procedure Rules**.
 - i. ***That this application be certified urgent and heard exparte in the first instance.***
 - ii. ***That there be a stay of execution in Baricho PMCC No. 66 of 2013 pending the hearing and determination of this application.***
 - iii. ***That there be a stay of execution in Baricho PMCC No. 66 of 2013 pending the hearing and final determination of the appeal filed herein.***
 - iv. ***That costs to abide by the outcome of the appeal.***
2. The application is based on the grounds on the face of the said motion. These are:
 - a. ***That the applicant has challenged the judgment by the trial court and execution may issue.***
 - b. ***That the applicant is apprehensive that the appeal may be rendered nugatory as the money paid may not be recovered in the event of a successful appeal.***
 - c. ***That the appeal has merit and is likely to succeed.***
 - d. ***That the application for stay has been presented without delay.***
 - e. ***That the respondent will not be prejudiced if stay is granted.***
3. In his supporting affidavit the applicant has deposed that his application for stay of execution in the subordinate court was allowed with conditions that the decree holder be paid 50% of the decretal amount and the other 50% be deposited in a joint interest earning account. He has further added that the total amount at the trial court was Kshs.1,061,205 and that the respondent had not disclosed his means to show that he was in a position to refund the amount if the appeal succeeds.
4. In his written submissions, the appellant has contended that he is entitled to be heard on his appeal which should be determined on merit. He has contended that he stands to suffer unless stay is granted as the appeal would be rendered nugatory if execution issues. He has relied on the

following authorities:

1. **Betheul Muiruri Benjamin Vs Development Bank of Kenya (2006) eKLR.**
 2. **Channan Agricultural Contractors (k) Ltd. –Vs- Nicodemus Mugara (2006) eKLR.**
 3. **Lesiolo Ltd –Vs- Samuel Nganga (1991) eKLR**
 4. **Feisal Amin Janmohammed T/A Dunyia Forwarders –Vs- Shami Trading Co. Ltd (2013) eKLR and**
 5. **Johnson Mwiruti Mburu –Vs- Samuel Macharia Ngure (2004) eKLR.**
5. **Felix Mwangi Ndegwa**, the respondent herein has opposed the application through a replying affidavit sworn on 28th September, 2015, written submissions and legal authorities cited which I will consider shortly.
 6. The respondent views the appellant’s application as an unfair delay to his fruits of judgment. He has accused the appellant of bad faith stating that the appellant should have at least paid half the decretal amount as ruled in the trial court as a condition for stay of execution. The Respondent has further deposed that the applicant has not demonstrated what substantial loss he would suffer if he was to comply with the said set condition for stay of execution.
 7. The Respondent has in addition contended in his affidavit that an assumption should not be made that he is financially unable to refund the decretal amount if the appellant was to succeed on appeal. He has deposed that he is a businessman and that he is able to repay the decretal amount if he was to be ordered to do so after the appeal is determined.
 8. On the question of chances of the appeal succeeding, the respondent has contended that the appeal is purely on quantum. A related case quoted as **Baricho PMCC No. 65 of 2013** arising from the same accident was determined against the same appellant herein and never appealed to challenge the finding on liability. In his opinion the ruling in the trial court was fair as the same balanced the interests of both parties without unfairly denying him the fruits of his judgment.
 9. The Respondent has also deposed that granting the prayers sought would greatly prejudice him on account of delay and utility of the judgment amount.
 10. The Respondent in his written submissions faulted the Appellant for not demonstrating the substantial loss he would suffer if he pays the Respondent 50% of the decretal amount as ruled. He relied on the following authorities to buttress his point.

1. **Socfinac Co. Ltd –Vs- Nelphat Kimotho Muturi [2013] eKLR.**
2. **Lucy Nyamanu Kimani –Vs – Lawrence Mburu Muthiga [2006] eKLR.**
3. **Caneland Ltd Malkit Singpandhal & Anor. –Vs- Delphis Bank Ltd [2000] eKLR.**
4. **Van Den Berg (k) Ltd –Vs- Charles Osewe Osodo [2015] eKLR.**

He added that the Appellant has the burden to proof that the Respondent is unable to pay and that showing that the Respondent’s financial means is unknown is not sufficient to warrant a stay of execution.

11. It was further submitted that there was no reason to unreasonably delay the fruits of judgment where an appeal is only on quantum. Quoting the authorities in the cases of **Stephen M. Kimani & Anor –Vs- Stephen Rurigi Njoroge [2013] eKLR**, **Beatrice Munene –Vs- Molly Wangui Gitahi [2015] eKLR** and **Francis Kirwa Magut & Anor –Vs- Grace Agiso [2015] eKLR**, the Appellant submitted that there was no basis or justification for the Respondent to be kept from enjoying the fruits of his judgment and urged me to affirm the ruling in the trial court that ordered stay of execution on condition that half decretal amount be paid to the Respondent while half be deposited in an interest earning account.
12. I have considered the application, the response made and both written submissions plus all the quoted authorities which were filed by both parties. The provisions of **Order 42 rule 6 (2)** of the **Civil Procedure Rules 2010** provides as follows:

“No order of stay of execution shall be made under subrule (1) unless (a) The court is satisfied that a substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;.....”

The provisions of subrule 1 provide that an appeal shall not operate as a stay unless there is sufficient cause shown for such stay. The Appellant/applicant has deposed that the Respondent has not disclosed his means of income and therefore he will not be in a position to refund the money if the appeal succeeds.

13. I have looked at the Memorandum of Appeal and I must say from the onset that the parties herein did not do any favours to this court or to the cause of justice by failing to enclose copies of pleadings and judgment from the lower court to enable this Court determine the issues raised by both parties with full knowledge of all the facts. However, from the Memorandum of Appeal filed and the copy of the ruling dated 17th September, 2015 made by the trial court upon an application for stay of execution made before that court in the first instance, it can be discerned that the appeal is largely about quantum. This Court finds that the Applicant from the reading of the above quoted provisions, has the burden to demonstrate that he would suffer “substantial loss” and not just loss unless stay of execution is granted. I am not convinced that the burden of demonstrating financial means is the other way round as submitted by the Applicant. Looking at the authorities quoted, especially by the Respondent and the provisions of the quoted rules it is clear that an applicant has a duty to demonstrate that a substantial loss may result to him/her unless an order of stay is made. The Applicant has failed in that respect.

14. I have also looked at the replying affidavit of the Respondent and he has deposed that he is a businessman and though he has not demonstrated the kind of business he does or his income, the law does not assume that one is a pauper unless contrary is proved. It is also important to note the importance of the provisions of **Section 1A** and **1B** of the **Civil Procedure Act** and note that the overriding objective of the statute is to deliver timely justice to litigants. The law provides that the overriding objective of **Civil Procedure Act** is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes and efficient disposal of cases. A party to litigation should not be made to feel that another party in the proceedings is causing unnecessary delay in his quest for justice.

15. This Court finds that the contention by the Respondent that he should not be denied fruits of his judgment well founded. A party to litigation should not be denied the fruits of litigation through delay or any other unjustified reason. I am persuaded by the authorities cited by the Respondent that the interests of both litigants should be balanced on the scales of justice in order not to cause any party prejudice. The decision in the Court Appeal case of **Kenya Shell Ltd. –Vs Kibiru & Anor (1986) KLR** is guiding in that respect. In that case the Court of Appeal made the following observations:

“In applications for stay the court should balance the parallel prepositions, first that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.”

16. In the light of the above and the fact that the issue of liability is not really contested, this Court finds that the ruling by the trial court in ordering half decretal amount to be paid to the decree holder pending the determination of the appeal to be well founded and fair in the circumstances. The Appellant/Applicant really has no plausible reason to feel prejudiced by the said ruling.

In view of the above I find no merit in the application dated 23rd September, 2015. The same is disallowed but I shall make no order as to costs. For the interest of justice this Court directs the Appellant to comply with the conditions set by the trial court’s ruling dated 17th September, 2015. The Appellant is given 15 days from today to comply. The Appellant is further directed to expedite the preparation of record for purposes of timely prosecution of his appeal. It is so ordered.

Dated and delivered at Kerugoya this 11th day of February, 2016.

R. K. LIMO

JUDGE

11.2.2016

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Nganga holding brief for Wahome for defendant/applicant present

Wangechi holding brief for Ngare for respondent present

COURT: Ruling dated, signed and delivered in open court in the presence of Nganga holding brief for Wahome for defendant/applicant and Wangechi holding brief for Ngare for respondent.