



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 88 OF 2014

PETER KOLEE AMODHE.....APPELLANT/APPLICANT

VERSUS

FLORENCE KAINDA.....RESPONDENT

RULING

By a Notice of Motion dated 26th November, 2014 the appellant has sought from this court an order of stay of execution of the decree arising from the **Chief Magistrates' Court** at Nanyuki in **Civil Case No. 59 of 2009** pending the hearing and determination of his appeal. The motion is stated to be brought under **Order 42 Rule 6(1) 2(a) and (b)** of the **Civil Procedure Rules** and it is supported by the applicant's own affidavit sworn on 25th November, 2014.

The applicant has deposed that he was initially granted an order for stay of execution of the decree by the court which issued it but in his view, the terms upon which it was granted were unfavourable. His application for review of those terms was dismissed and therefore he is now praying that this court considers his application for stay of execution afresh.

He has also sworn that the applicant is in the process of executing the decree and there is danger that if the decree is executed, he will suffer substantial loss. According to him, his appeal has high chances of success.

The applicant has offered to deposit in court the original titles of his two parcels of land both of which have been valued at **Kshs. 2,300,000/=** as security for the performance of the decree in the event his appeal fails.

The respondent opposed the application and in the replying affidavit sworn in that behalf, he has disputed the applicant's contention that his appeal is likely to succeed mainly because the appellant did not call any evidence to controvert the respondent's evidence at the trial and secondly, the appellant himself offered to pay **Kshs. 700,000/=** as general damages.

The respondent has also deposed that the appellant is a man of means who owns more than 1000 head of cattle and commercial premises in **Jua Kali Trading Centre** and Rumuruti within Laikipia County and that he is also a prominent businessman trading in hides and skins. I understand the respondent to be saying that the applicant could easily have complied with conditions upon which the order for stay of execution was granted by the magistrates' court and deposit the whole decretal sum as security for performance of the decree.

Order 42 (6) of the Civil Procedure Rules under which the applicant made his application provides as

follows:-

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule

(1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

Order 42(1) generally gives this court the discretion to grant an order for stay of execution or make such order that it deems just in the circumstances. **Rule 2(1)** of the **Order** lays out the boundaries within which that discretion can be exercised and more specifically prescribes the circumstances when the order for stay cannot be issued regardless of the discretion with which the court has been clothed.

To the extent that the applicant has urged that his appeal has high chances of success and therefore he is likely to suffer substantial loss if a stay order is not granted, it is necessary to consider his grounds of appeal and evaluate, for purposes of determination of his application, the viability of this argument.

In the memorandum of appeal filed in court on 17th December 2013, the applicant raised five grounds of appeal; these are:-

1. The learned magistrate erred in both law and in fact by holding the appellant 100 % liable considering the circumstances of the case.
2. The learned trial magistrate erred in law and in fact by failing to allow the appellant a chance to give his part of the story.
3. The learned magistrate erred both in law and in fact by awarding the respondent a hefty award without any justifiable cause whatsoever.
4. The learned magistrate erred both in law and in fact by making an award which was excessive in the circumstances and does not match the nature of the injuries suffered by the respondent.
5. The learned magistrate erred both in law and in fact by failing to evaluate the evidence relating to the special damages and the source thereof.

The record from the trial court shows that only the plaintiff and his doctor testified; the plaintiff's case was closed at that stage. The defence did not call any evidence; however, on 25th October, 2013, counsel for the defendant filed written submissions on behalf of the defendant following the court's directions on 4th September, 2013 that parties file written submissions.

In his submissions, counsel for the appellant only submitted on quantum of damages payable to the respondent; he did not say anything on liability perhaps because no evidence had been called from the defendant's side to counter the plaintiff's evidence on this aspect of his claim. The appellant proposed that the respondent be paid "*Kshs. 700,000/= as general damages for pain and suffering and loss of amenities*".

The trial court inevitably held that the appellant was solely responsible for the accident and the appellant was 100% liable. The court awarded the sum of Kshs. 450,000/= as general damages of and special damages of Kshs. 3,420/=.

Contesting liability at this stage when it is clear that it was not challenged at the trial court does not appeal to me to be a ground sufficient enough to persuade this court that the appellant's appeal has high chances of success particularly on the trial court's finding on liability.

As for the award on general damages, this court cannot determine at this stage whether the award was excessive in the circumstances, and therefore issue an order for a stay of execution on that ground; however, what is clear from the appellant's pleadings at the trial is that the appellant was willing to pay Kshs. 700,000/= as damages, which is far more than what the court awarded.

If the appellant has no qualms in settling what he thinks is the adequate compensation for the loss and damage, which as noted is almost twice as much as what the magistrates' court awarded, there is no basis for grant of stay of execution; I would in the circumstances reject with costs the applicant's application dated 26th November, 2014. It is so ordered.

Meanwhile, I have noted that the judgment against which the appeal is filed was delivered in a suit from the magistrates' court at Nanyuki; now that a high court has been established at Nanyuki law courts, I hereby direct that this appeal be transferred to that court for disposal.

Dated, signed and delivered this 1st July, 2016

Ngaah Jairus

JUDGE