



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 123 OF 2012**

**MIGOTIO PLANTATIONS LIMITED.....APPELLANT**

**VERSUS**

**PAUL WANYAMA WAFULA.....RESPONDENT**

**RULING**

1. By the Notice of Motion dated and filed on 9<sup>th</sup> October 2012 by which the Appellant SEEKS stay of execution of the judgment of the lower court made on 15<sup>th</sup> June 2012 in Nakuru CMCC No. 396 of 2004.
2. The application was supported by the affidavit of Benjamin Amdany and was opposed by the Respondent vide the Replying Affidavit of Joseph Karanja Mbugua sworn on 13<sup>th</sup> June 2013.
3. The Respondent was an employee of the Appellant. His suit in the lower court was for general and special damages for the injuries he sustained after he was assaulted by unknown persons while he was on duty. On 15<sup>th</sup> June 2012 judgment was entered in his favour and against the Defendant for Kshs. 407,350/= together with costs of the suit and interest from the date the suit was filed.
4. The Appellant has appealed to this court against the said judgment by its Memorandum of Appeal filed on 13<sup>th</sup> July 2012. It seeks orders to set aside the judgment on the grounds that the lower court did not analyse the evidence properly, the award of damages was excessive and that the lower court erred in ordering that the interest be computed from the date of filing the suit when this had not been pleaded in the Pleint.
5. The present application is for an order to stay the execution of the judgment pending the hearing and determination of this appeal.
6. The Appellant believes that the appeal has a high chance of success. It argued that the Respondent will not be in a position to refund the decretal sum should the appeal be successful and therefore, there is a likelihood that the appeal will be rendered nugatory. The Appellant is willing to offer such security as the court may direct.
7. The Respondent accused the Appellant of laches both in the lower court and in this court. It was his contention that the Appellant has not shown that substantial loss will result if the order of stay is not granted. The fear that the Respondent will not be able to pay the decretal sum should the Appellant be successful can be mitigated by depositing the decretal sum in court.

**ANALYSIS**

8. The conditions on which on which a stay of execution can be granted by the appellate court are provided for under **Order 42 Rule 6(2)** of the **Civil Procedure Code**; that the Appellant stands to suffer substantial loss, the application has been brought without unreasonable delay and the

- applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on it.
9. The Respondent did not challenge the Appellant's contention and main ground for seeking stay of execution that it would suffer substantial loss if the decretal sum is paid to the Respondent who is unemployed and has no source of income. It was apprehensive that should the appeal succeed, it would not be able to recover the decretal sum of Kshs. 407,350/=. He also did not contest that this application had been filed promptly.
  10. The Respondent's objection to the application and was that the Appellant has been guilty of laches and is therefore undeserving of the orders sought. The Appellant was accused of delaying the conclusion of the main trial by evading service of summons for 19 months after the suit was filed and thereafter seeking adjournment of the hearing five times. Further after filing this application for stay of execution and being granted temporary relief pending its hearing on 19<sup>th</sup> October 2012, the Appellant showed reluctance in prosecuting it. It was the Respondent who moved the court for directions and thereafter took the hearing date. His position was that the Appellant should be granted a conditional stay of execution.
  11. The powers of the court to grant stay of execution of the decree are discretionary. The ultimate goal of the court is to preserve the appeal and ensure that the rights of the Appellant are not defeated pending its determination. (**Butt v Rent Restriction Tribunal [1962] KLR 417**)
  12. Therefore, whether the Appellant stands to suffer substantial loss is the cornerstone of the application of stay. However the court must also consider special circumstances and unique requirements of the case. (See **Butt V Rent Restriction Tribunal supra** at pages 419-420). At this point, there is a valid judgment in force and the court must weigh the Appellant's right to appeal against the equally weighty right of the successful party to enjoy the fruits of his judgment. **Redland Enterprises Limited v Premier Savings & Finance Limited [2002] 2 KLR 139**
  13. In case I find that the Appellant's right to appeal would be served if the execution of the judgment of the lower court is stayed pending the determination of this appeal. However, I do note that the Appellant appears not to have been keen in prosecuting the appeal. In deed since it was filed and the temporary stay granted, the Appellant has not taken steps towards the hearing of the appeal and no reasons have been given for this failure. Therefore, if granted an unconditional stay of execution, the Respondent whose case has been pending since 2004 will be greatly prejudiced.

### **DETERMINATION**

14. In the circumstances, I allow the application dated 9<sup>th</sup> October 2012 in the following terms;
  - (a) There shall be a stay of execution of the decree issued on 15<sup>th</sup> June 2012 in Nakuru CMCC No. 396 of 2004 on condition that the Appellant deposits the entire decretal sum in court;
  - (b) The Appellant shall file and serve the Record of Appeal within 14 days from the date of this ruling;
  - (c) The Appellant shall list the appeal for directions within 14 days from the date of filing the record of appeal;
  - (d) If the Appellant does not comply with orders (b) and (c) above, the appeal shall stand dismissed with costs;
  - (e) The Respondent shall have the costs of this application, in any event.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 10th day of July, 2015.**

**A. MSHILA**

**JUDGE**