



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. E084 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

MR & MRS. SURESH RANIGA.....APPELLANTS

VERSUS

HELLEN EDEL MBENGE MUNYAO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. O. Mbeja (Mr.) Principal Magistrate in NAIROBI CMEL No. 1377 of 2019, Hellen Edel Mbenge Munyao v Mr. & Mrs. Suresh Raniga delivered on 23rd July 2021)

RULING

1. The application before me for determination seeks stay of execution pending determination of appeal. The Appellants were aggrieved by the decision of Hon. D. O. Mbeja (Mr.) Principal Magistrate in Nairobi CMEL No. 1377 of 2019 and filed the instant appeal.
2. The Respondent has filed a replying affidavit sworn by herself, which the Appellants state was never served upon them.
3. Order 42 Rule 6(2) provides for stay of execution pending appeal as follows –

(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.

4. The principles for grant of stay of execution pending appeal are well stated in the case of **Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa [2016] eKLR** where the Court observed –

The conditions for granting a stay of execution pending Appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules which are that: -

i The application must be made without undue delay.

ii That the Applicants must demonstrate that they will suffer substantial loss unless the order sought is granted.

iii 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.

5. The Court of Appeal in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR)** stated: -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to

expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

6. The Respondent submits that the Applicant has not proved that it will suffer substantial loss should the decree be executed. She relies on the decision in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** where the Court held that substantial loss is the cornerstone for grant of stay.
7. The Respondent further relies on the decision in **George Oraro v Kenya Television Network Nairobi High Court Civil Case Number 151 of 1992**, where the Court held that before depriving a successful litigant the fruits of the judgment pending appeal the Court must establish that the proposed appeal would be rendered nugatory.
8. The Respondent further relied on the cases of **Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCCC No. 6726 of 1991** where the Court stated that it is not fair to deny a litigant the benefit of her judgment because she/he is poor.
9. It is further the submission of the Respondent that the Applicant has not remitted security for costs for the due performance of the decree relying on the decision in **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited & Another [2001] eKLR**.
10. The Respondent further submitted that the Applicant failed to satisfy the Court that the Applicant is impecunious and it will not be able to recover any money paid to her if the appeal is successful, relying on the decision in **Stephen Wanjohi v Central Glass Industries Ltd (supra)**.
11. The Respondent further relied on the cases of **George Omondi Odek v Jagdish Kotecha & another [2000] eKLR, Union Insurance Company of Kenya Ltd v Ramzan Abdul Dhanji, Civil Application Number 179 of 1998, Council of Legal Education and another v Rita Biwott, Civil Application Number 238 of 1994; [1994] LLR 4859 and FK Kiongo v VP Mukubwa and another, Civil Application Number Nairobi 63 of 1988**.
12. Most of the cases cited by the Respondent are for stay of execution on appeals to the Court of Appeal where the provisions of the Court of Appeal Rules are applicable.
13. The rules applicable for appeals from Magistrates Courts are those in Order 42 Rule 6(2) of the Civil Procedure Rules which I have already cited above being substantial loss and security for due performance of the decree.
14. In the replying affidavit, the Respondent has not given any indication of her ability to refund the money she prays to be released to her.
15. From a perusal of the judgment and grounds of appeal, I am satisfied that the appeal is not frivolous, and that there are triable issues. I am further satisfied that the Respondent has not demonstrated ability to refund any decretal sum should any portion thereof be released to her.
16. It is for these reasons that I allow the application for stay of execution on condition that the Appellant deposits 50% of the decretal sum in a joint interest earning fixed deposit account in the joint names of Counsel for the Appellant and Counsel for the Respondent within 30 days pending hearing and determination of the appeal herein.
17. The costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE