



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL 251 OF 2015

AMREF KENYA.....APPELLANT

V E R S U S

MARY AWINO OBONYO.....RESPONDENT

RULING

This is an application by the Appellant by Notice of Motion dated 28th May 2015 for the main order that there be stay of execution of decree pending hearing and determination of the appeal herein. It is brought under Sections 1A, 1B, 3A and 65(1)(b) of the Civil Procedure Act and Order 42, rule 6 of the Civil Procedure Rules. Sub-rule (1) of that rule donates to the court the jurisdiction to make the order sought subject to the conditions set out in sub-rule (2) of the rule. These conditions are:

- i. that the court must be satisfied the substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- ii. that such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

There is a supporting affidavit sworn by one JOHN MWANGI who describes himself as the Acting Human Resource Manager of the Appellant.

The Respondent has opposed the application upon the grounds set out in her replying affidavit sworn on the 9th July 2015. Those grounds are, that the Appellant shall suffer no substantial loss or damage or prejudice; that the appeal is vexatious with the intention of delaying payment of the decretal sum thus denying her the fruits of her judgment; that she lost her leg due to the negligence of the appellant and it is in the interest of justice that she is compensated so that she can purchase an artificial one; that the appeal has no chances of success; that it is unfair for the Appellant to assume that she is a woman of straw yet it is out of its negligence that she has been subjected to untold suffering; that it is in the interests of justice that the appellant is compelled to pay half of the decretal sum and deposit the remainder in court pending hearing and determination of the appeal.

I have duly considered the submissions of the learned counsels appearing and the authorities cited. I will state at the outset that the prospect of success or otherwise of the appeal is not one of the matters that I

must consider in this application. It suffices that the Appellant has an undoubted right of appeal which it has duly exercised, and that there is a proper appeal before the court. Whether or not the appeal is meritorious is a matter to be decided when the appeal is heard.

I have already set out above the matters that I am required by the law to consider. May substantial loss result to the Appellant unless the order of stay of execution sought is made" The decretal sum now stands at about KShs. 3,536,740/=. The Appellant's case is that should it pay this sum over to the Respondent it will have great difficulties recovering the same should its appeal succeed. The Appellant makes reference to the fact that the Respondent was unable to give her permanent address of residence during the hearing of the suit.

A court will normally not grant a stay of execution of a money decree. That, however, is not to say that the court will never grant a stay of execution of a money decree. It will depend on the circumstances of the case at hand. Should the Appellant succeed in demonstrating that it will have extreme difficulty in recovering the decretal sum from the Respondent in the event that it succeeds in its appeal, it will have succeeded in showing that it stands to suffer substantial loss. In that event the court would be entitled to order stay of execution of the decree in the interests of justice.

In the present case, the Respondent has not denied the assertions by the Appellant but has only stated that 'it is unfair for the Appellant to assume that I am a woman of straw and yet it is out of its negligence that I have been subjected to untold suffering'. She has not made any effort to show that she has any assets that the Appellant can have resort to, to recover the decretal sum.

I am, however, not shifting the burden of proof from the Appellant to the Respondent; it is the Appellant's burden to prove the Respondent's inability to refund the decretal sum in the event of the appeal succeeding. But, equally, it is within the Respondent's peculiar knowledge as to her physical address and what assets she may own, and she has not stated that she owns any assets. I am satisfied on a balance that the Appellant would have great difficulty recovering from the Respondent the decretal sum in the event of it succeeding in its appeal. An order of stay of execution of decree is therefore in the interests of justice.

The application has been brought without unreasonable delay. The Appellant is also prepared to give such security as the court may order for the due performance by it of the decree that may ultimately be binding upon it should its appeal fail.

In the event, therefore, I will allow the application. There shall be an order of stay of execution of decree pending hearing and disposal of the appeal. This shall be subject to the condition that the Appellant does, within thirty (30) days of delivery of this ruling, deposit in an interest-earning account the decretal sum, which for the purposes of this order is hereby placed at KShs. 3,536,740/=. The said account shall be opened in the joint names of the advocates on record for the parties who shall agree on the bank or financial institution in which to open the account.

Costs of this application shall be in the appeal. There shall be orders accordingly.

Dated and delivered at Nairobi this 9th Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE



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