



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.E029 OF 2021

2NK SACCO DRIVERS SELF HELP GROUP.....1ST APPELLANT

MAINA CHARLES.....2ND APPELLANT

JAMES RITHO MWANGLI.....3RD APPELLANT

VERSUS

STEPHEN MURUNGI KABIRO.....1ST RESPONDENT

JOSEPH MAIYO2ND RESPONDENT

RULING

1. In their **Notice of Motion dated 26th August 2021** the applicants pray for orders that there be stay of execution of the judgement and decree of the lower court namely Molo cmcc no. 122 of 2015 pending the hearing and determination of this application and thereafter the main appeal.
2. The application is based on the grounds thereof and the affidavit of the 2nd appellant/applicant sworn on the same date. The said affidavit deposes that they are dissatisfied with the judgement of the trial court which awarded the 1st respondent general damages of kshs.1million and special damages of Kshs 2000 after finding that the appellants were 100% liable for the accident.
3. Their attempt to seek stay at the trial court was dismissed hence this application. He states that they have a strong and arguable appeal and that the court should therefore stay the judgement to allow them prosecute the appeal. He further deponed that they were willing to offer bank guarantee for the full amount so as to secure the respondent in the unlikely event that the appeal does not succeed.
4. The 1st respondent through his replying affidavit sworn on 17th September 2021 has vehemently opposed the application. He deponed that the trial court found for a fact that the appellants were totally liable for the accident and that he should be allowed to enjoy the fruits of the judgement as he suffered greatly as a result of the said accident.
5. He went on to state that he was a civil servant and thus he was capable of refunding the decretal sum in the event that the appeal succeeds. He demonstrated this by providing a copy of his payslip as well as the details and pictures of motor vehicles registration numbers KBV 451V and KCL 021Z all belonging to him.
6. The court thereafter directed the parties to file their submissions which they did and I have gladly perused. The common thread in all of them revolves around the provisions of Orders 42 rule 6(2) of the Civil Procedure Rules which states that;

***“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 sub rule (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.”

7. Based on the above provisions, can it be said that the application has been brought without much delay? I think the answer is on the affirmative. Looking at all the circumstances from the date the decree was issued up to this application I find the period very reasonable in the circumstances contrary to the respondent’s perspective.

8. Secondly is whether substantial loss will be suffered by the applicant should the order not be granted. I do not think so. The respondent at least from the uncontroverted evidence he has offered to this court is a person of means. He is a career civil servant working with Kenya Defence Forces. He has also exhibited his two motor vehicles which goes to indicate that their value is over one million shillings.

9. On the third limb of security, the applicant has offered a bank guarantee. There is an agreement exhibited between Diamond Trust Bank and the directors of Directline Assurance Company Limited who are the insurers of the applicants. The same is for a sum of Kshs30 million. It is for a period of 12 months and it is expiring on 30th November 2021.

10. The applicant of course is not a party to the said agreement. Secondly and fundamentally there is no evidence that the said guarantee is for the benefit of this matter specifically. Thirdly there is no evidence that as at the time of this ruling the same had been renewed.

11. Consequently, this court does not find the said bank guarantee viable for this matter. It could be available where specifically it is stated by the parties whatever it is to benefit. It is a general bank guarantee.

12. Having stated so I find that there is need to strike a balance so that while the appeal is ongoing the respondent ought to be enjoying the fruits of the judgement and at the same time secure the interest of the applicants.

13. The application is thus allowed as hereunder;

a) Pending the hearing and determination of the appeal the applicants shall pay to the 1st respondent the sum of Kshs. 500,000 within 30 days from the date herein and in default execution shall issue for the entire decretal amount.

b) The balance of the decretal sum together with costs and interest shall await the outcome of the appeal.

c) The respondents shall have the costs of this application.

Dated signed and delivered at Nakuru via video link this 27th day of January 2022.

H K CHEMITEI.

JUDGE