



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 20 OF 2021**

**KENSILVER EXPRESS LIMITED.....1<sup>ST</sup> APPELLANT**

**DOUGLAS NTAMBURA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ESTHER MUKAMI (Suing as Legal Representative of**

**BEDAN NYAGAKA THURAKU (Deceased)).....RESPONDENT**

**CONSOLIDATED WITH**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 19 OF 2021**

**KENSILVER EXPRESS LIMITED.....1<sup>ST</sup> APPELLANT**

**DOUGLAS NTAMBURA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JUDY NJOKI GATUMO (Suing as Legal Representative of**

**SAMUEL KARIUKI NJIRU (Deceased)).....RESPONDENT**

**AND**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 18 OF 2021**

**KENSILVER EXPRESS LIMITED.....1<sup>ST</sup> APPELLANT**

**DOUGLAS NTAMBURA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JUDY NJOKI GATUMO (Suing as Legal Representative of**

**FAITH KARIMI NJIRU (Deceased)).....RESPONDENT**

## RULING

1. The Respondents in all the three consolidated matters, Civil Appeal No. 20 of 2021, Civil Appeal No. 19 of 2021 and Civil Appeal No. 18 of 2021 sued the Applicants in Maua Civil Suit No. 182 of 2013, Maua Civil Suit No. 187 of 2013 and Maua Civil Suit No. 188 of 2013 respectively for damages under the Fatal Accidents Act, under the Law Reform Act as well as special damages following a road traffic accident involving Motor Vehicle Registration Number KAW 097K Isuzu Bus in which the three deceased persons, who were passengers therein succumbed.

2. The deceased in Civil Appeal No. 20 of 2021 is the late husband to the Respondent therein whilst the deceased persons in Civil Appeal No. 19 of 2021 and Civil Appeal No. 18 of 2021 are the son and daughter respectively of the Respondent therein.

3. By Judgment delivered on 25<sup>th</sup> January 2021 by Hon. C. K. Obara SPM, the 1<sup>st</sup> Applicant was found 100% liable in all the 3 matters and was ordered to pay the Respondents in the said matter i.e a total of Ksh.1,910,000/=, Ksh 1,500,000/= and Ksh 1,500,000/= respectively as damages. Being dissatisfied with the said Judgment, the Appellants herein intend to appeal to this Court and vide the application by Notice of Motion dated 9<sup>th</sup> February 2021 they seek for stay of execution of the Judgment. The said application seeks the following orders: -

**i) Spent**

**ii) Spent**

**iii) THAT this Honourable Court do order a stay of execution of the Judgment and Order made by the Senior Principal Magistrates' Court at Maua on the 25<sup>th</sup> January 2021 pending the hearing and final determination of the Applicants' Appeal.**

**iv) THAT the costs of this application be provided for.**

### ***Applicants' Case***

4. The arguments raised in all the three applications are similar and further, the issue for determination cuts across all the three. The Applications are premised on the grounds on the face of it and each is also supported by the supporting affidavit of David Lucas Onyengo sworn on the very 9<sup>th</sup> February 2021. Mr. Onyengo is a supervisor in the 1<sup>st</sup> Applicant company. He avers that the 1<sup>st</sup> Applicant has filed a Memorandum of Appeal against the Judgements. He avers that in the lower Court, the 1<sup>st</sup> Applicant's Advocates successfully informally applied for a thirty (30) days stay of execution of the Judgment pending a formal application for the same. He avers that the 1<sup>st</sup> Applicant's Advocates thereafter applied for certified copies of proceedings and judgment with a view of lodging an appeal. He further avers that the 1<sup>st</sup> Applicant's motor vehicles are used PSVs and they are charged with different respective financial institutions and if attached by the Respondent, it will be a serious blow to both the banks and the Applicants. He avers that the 1<sup>st</sup> Applicant has a serious and arguable appeal and if stay of execution is not granted, the Appeal will be rendered nugatory and the Applicants will suffer irreparable loss and damage.

5. The Applicants filed a further supporting affidavit sworn on 5<sup>th</sup> March 2021 similarly sworn by Mr. Onyengo. He avers that the 1<sup>st</sup> Applicant's appeal is indeed merited and going by the fact that the Respondents only responded to certain grounds on the Memorandum of Appeal, being those set out at paragraphs 8, 9, 10, 11, 12 and 13, this indicates that there are 13 other unchallenged grounds which confirms that the Appeal has high chances of success. He avers that paying the Respondent half of the decretal amount and depositing the other half in a joint account, as suggested by the Respondent at paragraph 9 of his replying affidavit would be very prejudicial in the event the Appeal succeeds.

### ***Respondents' Case***

6. The application is opposed vide the Respondents' replying affidavits sworn on 18<sup>th</sup> February 2021. The Respondents respectively aver that the Applicants' appeal is unmerited and their only intention is to delay justice and that further, the 1<sup>st</sup> Applicant owns more buses and property including cash in bank which are all sufficient to satisfy the Judgment. They avers that the Applicants' application does not disclose the grounds for issuance of the orders sought. The Respondent in Civil Appeal No. 20 of 2021 avers that she lost her husband in the accident in issue and the Respondent in Civil Appeal No. 19 of 2021 and 18 of 2021 avers that she lost her son and daughter respectively in the accident that occurred on 6<sup>th</sup> November 2010 as a result of negligence on the part of the 2<sup>nd</sup> Appellant who was the driver and/or employee of the 1<sup>st</sup> Applicant and that they have suffered for over 10 years since the demise of their late husband and children. The Respondent in Civil Appeal No. 20 of 2019 avers that her late husband was the bread winner of the family. They aver that now that justice has been rendered, it should not be delayed further since justice delayed is justice denied. They aver that it is their expectation that the awards variously made in the lower Court would go a long way in helping their children with basic needs including their school fees. They pray that the Applicants' applications be dismissed and in the alternative, should the Court be inclined to allow the applications, the same should be on condition that the Applicants pay them half the decretal amount and then deposit the other half in a joint interest earning account in the name of Advocates for both parties. They avers that the Court should order for the said conditions to be complied with within 21 days from the date of issuance of the order, failure to which the orders of stay should lapse.

### ***Applicant's Submissions***

7. The Application was to be canvassed by way of written submissions. The Respondents did not file any submissions. The Applicants filed submissions dated 5<sup>th</sup> March 2021. They rely on the case of *Peter Odande T/A Spreawett Chemist v Josephine Wangari Karanja* (2006) eKLR, and the other case of *Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others* Civil Appeal No. 291 of 1997 where the conditions for grant of stay were enunciated being that the applicant must satisfy that substantial loss may result should stay not be granted, that the applicant must have filed the application for stay without unreasonable delay and that the applicant must provide security as may

ultimately be binding upon him.

8. They contend that they have demonstrated the likelihood of suffering substantial loss should stay not be granted since the motor vehicles, as evinced in the search, are charged with different respective financial institutions such that if attached, it will be a huge blow to both the Applicants and the financial institutions who are not parties to this suit and/or appeal. In defining what substantial loss is, they rely on the cases of **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331** and **Sewankambo Dickson v. Ziwa Abby** HCT -00- CC MA 0178 of 2005 where it was held that substantial loss is a qualitative concept and it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal. They also rely on the case of Bungoma High Court Misc Application No. 42 of 2011 **James Wangalwa & Another v Agnes Naliaka Cheseto** to define substantial loss.

9. They submit that the incidence of legal burden with respect to an allegation lies upon the party for whom the substantiation of a particular allegation is an essential of his case as espoused in Halsbury's Laws of England Vol. 17 Paragraph 14.

10. On the issue of security, they submit that they are willing to comply with any such conditions as may be determined by the Court but they are only fearful and apprehensive that the Plaintiff will not make good the repayment of such security and they therefore urge that no orders for payment of security should be made. They submit that the evidential burden of proof that the Respondent is capable of refunding the decretal sum if the appeal succeeds shifts to the Respondent the moment the Applicants state that they are apprehensive of repayment and unaware of the Respondent's resources in Civil Application No. Nai 15 of 2002 **ABN Amro Bank N. V. v Le Monde Foods Limited** and Nrb Civil Appeal No. 238 of 2005 (UIR44/2005) **National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another**.

11. They also rely on the case of **Reliance Bank Limited (In Liquidation) v Norlake Investments Limited** Civil Application No. Nai 93/02 (UR) wherein the other principles of stay of execution are espoused and accordingly, they submit that their appeal is indeed arguable and is not in any way frivolous as can be evinced from the face of their application, from the affidavits in support and from the draft Memorandum of Appeal. They submit that one of their grounds in the Appeal is the erroneous finding by the Learned Magistrate that the deceased person's name was erroneously omitted from the occurrence book and that it was the Applicants' who were to prove that the deceased persons were not in the vehicle. They submit that this was a blatant deviation from the well established legal principle that 'he who alleges must always prove.' They submit that the said accident did occur but the deceased persons were never in the motor vehicle for the reasons that their names never reflected in the occurrence book where initial complaints are always recorded. They argue that as espoused in the case of **Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union** Civil Application Nai. No. 72 of 2001, it is not necessary to show that an appeal is likely to succeed but it is enough to show that there is at least one issue upon which the Court should pronounce its decision. They also rely on the case of **Kenya Railways Corporation v Edermann Properties Limited**, Civil Appeal No. Nai 176 of 2012 and **Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others**, Civil Appeal No. Nai 256 of 2013.

12. On whether the appeal could be rendered nugatory if stay orders are not granted, they submit that this will happen since the matter involves a money decree and the Respondents suggested that the respective halves of the decretal sum be paid to them and the other halves be deposited into joint interest earning accounts. They submit that if this is done, their appeals will be rendered nugatory.

13. They submit that the appeal has an overwhelming chance of success and unless stay is granted, they appeal is likely to be rendered nugatory. They rely on the case of **Kenya Hotel Properties Limited v Willesden Properties Limited** Civil Application Nai. No. 322 of 2006 (UR 178/06). They also submit that the purpose of granting an order of stay of execution is to preserve the subject matter of the appeal and they rely on the case of **Butt v Rent Restriction Tribunal** (1982) KLR 417.

#### **Issues for Determination**

14. There is only one issue which the instant Applications present for determination: -

**i) Whether or not this Court should grant stay of execution pending Appeal.**

#### **Stay of Execution Pending Appeal**

15. The law concerning applications for stay of execution of a Judgment and/or Ruling are well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, as follows: -

**'No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.**

**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.**

**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.'**

## ***Arguable Appeal***

16. To begin with, and although the rules do not expressly provide for it, in such applications for stay, the Court has developed a practice that it must be satisfied that there is an arguable appeal. The instant appeals seek to challenge the Judgment and/or Decree of the lower Court on both liability and quantum. This nature of appeal is indeed allowed in law. The gravamen of the Applicants' claim is that the lower court erred in concluding that the deceased persons were passengers in the motor vehicle whilst their names were not in the occurrence book, a public record and/or official book of facts concerning the accident. They argue that there was an error in that the lower Court shifted the burden to the Applicants to prove that the deceased persons were not in the motor vehicle a deviation from the principle on law of evidence that 'he who alleges must prove.' On quantum, it is argued that the lower Court applied the wrong multiplier and dependency ratio and failed to consider the correct factors and/or applied or considered erroneous, irrelevant and/or extraneous factors. There is clearly an arguable case in the intended appeal being the question fact, on whether or not the deceased persons were indeed aboard the motor vehicle at the time of occurrence of the accident and further, the legal question of the principles applied in arriving at quantum. An arguable case does not mean one that must eventually succeed and it is not for this Court to go into the merits of the claim at this stage. See the case of **Omar Shurie v. Marian Rashe Yafar** (Civil Application No. 107 of 2020).

## ***Substantial loss and whether the Appeal will be rendered nugatory***

17. One of the leading authorities in the issue of substantial loss is the case of **Kenya Shell Limited v Kibiru** Another Civil Application No. NAI 97 of 1986 (1986) KLR 416 where Platt, AG JA held as follows: -

***“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.***

18. On whether substantial loss may result to the Applicant unless the order is made, this Court observes that subject matter of the matter is money decrees being the award of damages of Ksh.1,910,000/=, Ksh 1,500,000/= and Ksh 1,500,000/= respectively. The Applicant has argued that its motor vehicles are PSVs which are 'charged' to various banks and if the said vehicles are attached by the Respondents, this will be a great blow to both the banks and the Applicants. One thing is clear, that no such attachment has been done just yet. The Applicants have therefore made their application in anticipation of any attachment that may follow.

19. The Respondents on the other hand have argued that the buses exhibited vide the annexures to the Applicants' affidavits are not the only buses owned by the Applicants and further, that the Applicants have other assets including cash in bank which can well be used to settle the decretal amount. From the information availed to this Court, it is not clear whether or not the buses exhibited in the Applicant's application are the only assets belonging to the Applicants which are capable of being attached. Indeed, since no execution process had commenced at the time of filing the application, it is not possible to tell which assets belonging to the Applicants would have been the subject of the execution. Nonetheless, concerning those motor vehicles exhibited, this Court agrees that it would not be the most efficacious option for the Respondents, in execution of the Judgment, to attach the said motor vehicles which are partially owned by third parties, being banks and/or financial institutions not parties to the instant matter and/or intended appeal. To do so would invite unnecessary litigation in the form of objection proceedings and would delay the process of execution further as well as waste judicial resources. Nonetheless, it being that the Court is not certain whether the buses mentioned are the only assets belonging to the Applicants, this Court finds that this is not a ground good enough to sustain the application for stay. It is possible that the Applicants have other assets which if successfully traced would be lawfully attached in execution of the Judgment.

20. Although they haven't pleaded it in their affidavits, the Applicants have stated in their submissions that in the event the appeal is successful, they are apprehensive that the Respondents may not be in a position to make good the repayment of such security and they therefore urge that no orders as to payment of security should be made. This argument in itself does not hold any water for the reason that security deposited is not to be expended for the benefit of any party but is deposited in a fixed account until the appeal has been determined and thus, there would be no question of inability by the Respondent to repay security. Upon conclusion of the appeal, the security so deposited would merely be transmitted to the account of the successful party.

21. This Court agrees with the submission made by the Applicants that once an applicant states that they are apprehensive of the inability of the Respondent to pay the decretal sum should the appeal succeed, the burden of proof shifts to the Respondent to prove that they can pay. See the case of **National Industrial Credit Bank Limited -v- Aquinas Francis Wasike and Another (UR) C.A (2006) eKLR and Bonface Kariuki Wahome v. Peter Nziki Nyamai & Another Kajiado** Civil Appeal No. 43 of 2018 (2019) eKLR. It is however not quite clear whether in making this submission, the Applicants are referring to payment of security and/or payment of the decretal sum. If the Applicants are referring to inability to pay the security, as the Court has found hereinabove, this is not a sound argument. However if the Respondents are referring to inability to settle the decretal amount, then the Respondents are expected to indicate whether or not they are capable of making the said payments. It does not help that the Applicants did not make any averments in their supporting affidavit on this matter of inability to pay. Further, the Respondents notably did not make any submissions on this issue of their ability to pay the decretal sum should the appeal be successful.

22. In the end, this Court is not convinced that the Applicant has clearly demonstrated the nature of substantial loss they are likely to suffer should stay not be granted. On the other hand, the Respondents have a judgment for which fruits they should be able to enjoy.

## ***Application without undue delay***

23. As to whether this application for stay was made without unreasonable delay, this Court finds that the same has indeed been made without unreasonable delay. The Judgment was delivered on **25<sup>th</sup> January 2021** and the instant application was filed on **11<sup>th</sup> February 2021** just but fifteen (15) days later. This does not constitute unreasonable or undue delay in any circumstances.

## **Security**

24. On security, the Applicants have confirmed that they are ready, willing and able to offer security as may be directed by the Court. Despite stating so, they however urge that the Court should not to grant any orders for the deposit of security because they are apprehensive that the Respondents will not be able to pay for the same. As already indicated above in this Ruling, this argument by the Applicants is not a sound one for the reason that any such security deposited is not to be expended for the benefit of any party but is merely deposited in a fixed account until the appeal has been determined and thus, there would be no question of inability by the Respondent to repay security. Upon conclusion of the appeal, the security so deposited would merely be transmitted to the account of the successful party.

25. The Respondents have urged that the Applicants should pay them half of the decretal amount and the other half should be deposited in a joint interest earning account. This Court finds that in the interests of justice, an order for payment of security should issue to secure the interests of the successful party. However, owing to the fact that there was some level of dependency as evinced in the Judgment of the lower Court, an order for payment of not more than a third of the total sums awarded should issue in order to cater for the maintenance needs of the various Respondents who were dependent on the deceased persons.

## **Conclusion**

26. In the end, this Court finds that the Applicants have failed to demonstrate what substantial loss they are likely to suffer should stay not be granted. However, noting that they have an arguable appeal and that they have come to Court without unreasonable delay, this Court will grant conditional stay on the condition that the Applicants pay **each** of the Respondents in the 3 consolidated appeals a sum of Ksh.500,000/= and thereafter the Applicants do deposit the balance of the respective decretal amounts in interest earning accounts in the joint names of the respective Advocates for parties.

## **Orders**

27. Accordingly, for the reasons set out above, this Court makes the following orders: -

*i) An order for stay of execution of the Judgment and Decree in Maua Civil Suit No. 182 of 2013, Maua Civil Suit No. 187 of 2013 and Maua Civil Suit No. 188 of 2013 pending the filing, hearing and determination of the intended Appeals is hereby issued.*

*ii) The Applicants shall within fourteen (14) days from the date of this order pay the Plaintiffs in Maua Civil Suit No. 182 of 2013, Maua Civil Suit No. 187 of 2013 and Maua Civil Suit No. 188 of 2013 a total of Ksh.500,000/= for each matter. For the avoidance of doubt, the total sum payable by the Applicants to the respective plaintiffs is Ksh.1,500,000/=.*

*iii) Within the said fourteen (14) days in ii) above, the Applicants shall deposit the balance of the decretal sum being Ksh.1,410,000/=, Ksh.1,000,000/= and Ksh.1,000,000/= for the three respective matters in joint interest earning accounts in names of the respective Advocates for the parties.*

*iv) In default of the payment and deposit as per order ii) and iii) above, the orders for stay shall lapse and be of no effect.*

*v) The costs of the applications shall abide the outcome of the Appeals.*

Order accordingly

**DATED AND DELIVERED ON THIS 18<sup>TH</sup> DAY OF MARCH, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

## **Appearances:**

M/S Ngunjiri Michael & Co. Advocates for the Applicants.

M/S Vivian Aketch & Co. Advocates for the Respondents.