



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. E010 OF 2021

SULTAN OMAR HUDHEFAAPPELLANT

VERSUS

BRIAN MUTHII WARUI ALIAS BRIAN MUTHIE....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Kimondo Gachoka Advocates for the appellant

Wambua Kilonzo Advocates for the respondent

RULING

This application brought by way of notice of motion by **Sultan Omar Hudhefa** dated 21.7.2021 is expressed under Order 22 Rule 22, Order 42 Rule 6 (1), Order 51, Rule 3 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act. The applicant is seeking orders for stay of execution of the orders in **SPMCC NO. 16 OF 2019** at Lamu Law Courts pending the hearing and determination of the appeal against that decree arising out the Judgment dated 25.6.2020.

The grounds for the notice of motion are set out on the face of it and the affidavit in support thereof of **Kelvin Ngure**, the Deputy Manager of Directline Assurance Company. Briefly stated the deponent avers that the applicant will suffer substantial loss and the appeal could be render nugatory if the remedy sought is not granted. The applicant is willing to furnish security for due performance of the decree as may ultimately be binding upon it, in the form of a bank guarantee. The applicant has made this application without unreasonable delay, the applicant appeal has high chances of success. It is fair that the discretion be extended in his favour.

The respondent also deponed by way of a replying affidavit of legal counsel **Mr. Wambua Kilonzo**. In his affidavit in reply, the motion is opposed as it's bad in Law, and only a targeted at obstructing the execution process. That the impugned Judgment was obtained after issues were canvassed on the merits. That there is no contestation on liability and the issue on assessment of damages lacks any prospects of succeeding on appeal.

That in the event, the Court is inclined to grant the order to stay execution part of the decretal sum ought to be released to the respondent.

The applicant who is being represented by Learned counsel **Mr. Nyabero** in support of the application filed written submissions and placed reliance on the following authorities: On the legal proposition that substantial loss may result to the applicant unless the order is made see **James Wangalwa & Another v Agnes Naliaka Cheseto [2021] eKLR**, second, that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given see **Absalom Dova v Tarbo Transporters [2013] eKLR**, **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR**, **Gianfranco Manenthi & Another v African Merchant Assurance Company Ltd [2019] eKLR**, **Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR**, **Focin Motorcycle Co. Limited v Ann Wambui Wangi & Another [2018] eKLR**

The case

The gist of the application stems from the Judgment of the trial Court in **SPMCC NO. 16 of 2019**. The particulars of the claim as suited between the parties was on an accident which occurred on 24.4.2019 involving a motor cycle registration number **KMDS 614L** in which the plaintiff was a rider and the defendants motor vehicle registration No. **KCH 723P**. The 1st defendant as the registered owner was held to be

100% viciously liable for the accident. The Learned trial Magistrate having settled the issue on liability went ahead to assess general damages at Kshs.700,000/=. The 1st defendant now an appellant before this Court is aggrieved fundamentally with the assessment of general damages for pain and suffering. That is how he finds himself before the High Court. As a prelude to the appeal, he filed this application to preserve the subject matter of the appeal.

Determination

The Law is crystal clear under Order 42 Rule 6 of the Civil Procedure Rules and the principles espoused in the cases of consolidated **Marine v Nam Pijja & Another CA NO. 93 OF 1989, F. K. Kiongo v VPN Mukubwa CA NO. 63 OF 1988, Behns Emporium v Moses Mosiga {1990} LWR 10, Stephen Wanjohi v Central Glass Industries Ltd CA NO. 6726 OF 1991**. On conditions to be met for an applicant to be considered successful for grant of the relief on stay of execution they include:

- (a). **Sufficient cause.**
- (b). **The application being filed without unreasonable delay.**
- (c). **Substantial loss.**
- (d). **The likelihood of the appeal being mandated nugatory.**
- (e). **The existence of an arguable appeal with high chances of success.**
- (f). **The existence of my special circumstances to warrant the Court to exercise discretion in favor of stay of execution.**

The factors named above are matters among others which the Court may be guided in the determination of the application. To my mind, there are matters of a crucial importance like substantial loss, the appeal being rendered nugatory, which might deprive applicant any benefit of the reliefs in the event the appeal succeeds.

In the first instance what is deemed substantial loss is a matter of evidence and not a presumption and a mere assertion in the affidavit. In a related meaning the Court in **Tropical Commodities Supplies Ltd v International Credit Bank Ltd {2004} 2 EA 331, Ogola J** held:

“That the phrase substantial loss does not represent any particular amount or size, it cannot be qualified by any particular mathematical formula. It refers to any loss, great or small, or real worth or volume as distinguished from a loss that is merely in nominal.”

In the applicant’s submissions in contends that he will suffer substantial loss for the sole reason that the assessment is wrong. Thus the applicant has failed the extent of the overreach in the assessment of damages. I think at this stage, some evidence to put up some elements of a prima facie case may be necessary to persuade the Court to exercise the discretion appropriately. The applicant in this matter participated at the trial of the claim where those issues were heard and determined. In respect of that trial, the applicant is not even conceding ground on the admitted facts before that Court on the proposals made as a contribution to the assessment to be made by the Learned trial Magistrate. It has been stated that in stay of execution, only within the proceedings to execute the valid Judgment would cause irreparable injury to the appellant can stay be considered. The mere inconvenient and annoyance with the Judgment is not enough to induce the Court to take away from the successful party, the benefit of a meritorious decree. That being the case, a closer look of the affidavit averred by the applicant has not demonstrated substantial loss. One of the reasons I deduce from the record being the satisfaction rendered by the applicant that the respondent is entitled to a measure of damages for pain and suffering and loss of amenities.

As a consequence, the test on the substantial loss remains unmet by the applicant. In the case of the applicant contention on some prospects of success in his appeal, the Court has considered the record, evidence adduced and ultimate measure of assessment undertaken by the Learned trial Magistrate. From the record and affidavit evidence, it’s crystal clear that any outcome of the appeal would be underpinned on the question of any misdirections if any on that limb of the Judgment. That emphasis finds emphasis in case Law in **George Oraro v KTN CA NO. 151 OF 1992** which the Court held that:

“the Court does not make a practice of depriving the successful litigation of the fruits of his litigation, and locking up the fruits to which prima facie he is entitled to pending appeal.”

Indeed, in this case the respondent is entitled to some measure of the decretal sum, pending the outcome of the appeal. This has been acknowledged by the applicant during the pendency and determination of the claim on the merits before the trial Court. Such also the appellant in his affidavit has not shown the respondent to be a man of strand, it’s plausible to grant partial compensation of the decretal sum of Kshs.250,000/= pending the appeal.

The other condition to be met is on deposit of security for due performance of the decree. The appellant’s contention is for this Court to admit the Bank Guarantee to satisfy the ground on deposit. For the purposes of this application, the circumstances do dictate that the appellant does deposit the remainder of the decretal sum in the joint earning interest of both counsels in a reputable financial institution pending the determination of the appeal. That request for a bank guarantee is denied as the amount in question is not Colossal to attract financial logistical nightmare to move the money from one account to another. That position is not the one tenable in this application.

For the reasons showed above, the Court accepts partially submissions of counsel for the appellant to grant the following orders:

(1). That there be interim stay of execution pending the hearing and determination of the pending appeal.

(2). That a declaration is hereby issued that part of the decretal sum of Kshs.250,000/= be released to the respondent as a partial measure of compensation to await the hearing and determination of the appeal.

(3). That the balance of Kshs.350,000/= be deposited in a joint earning interest account of both counsels in a reputable financial institution within thirty (30) days from today's date. Under clause (2) above the part decretal sum to the respondent be complied with in the same period of timelines.

Ultimately, the appellant has a stay of execution as a discretionary remedy to pursue the issues in the Memorandum of Appeal. Notwithstanding, the grant of part of the fruits of the Judgment to the respondent, the costs of the application to abide the outcome of the appeal.

In the circumstances, the application is allowed with the costs to the extent stated hereinabove.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 6TH DAY OF AUGUST, 2021

.....

R. NYAKUNDI

JUDGE

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