



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CIVIL APPEAL NO. E09 OF 2021

SULTAN OMAR HUDHEFA APPELLANT

VERSUS

ANN MUTHONI NGUGI RESPONDENT

Coram: Hon. Justice R. Nyakundi

Kimondo Gachoka Advocates for the appellant

Wambua Kilonzo Advocates for the respondent

RULING

This is an application dated 21.7.2021 seeking to invoke the discretion of the Court by way of a notice of motion to stay the execution of the Judgment/Decree obtained in **PMCC NO. 26 OF 2019 at Lamu**. The appellant has lodged an appeal to this Court vide Memorandum of Appeal dated 15.7.2021. The notice of motion is supported by the affidavit of the appellant. The affidavit alleges inter alia that the appellant is aggrieved with the said Judgment and if stay is not granted it would render the intended appeal nugatory.

That the appellant is apprehensive of the execution of the decree without first the appeal being heard on the merits. The applicant further avers that if the decretal sum is paid out there is high risk of substantial loss as the amount may never be recovered from the respondent.

The respondent filed an affidavit premised on the averments of her legal counsel **Mr. Wambua**. In that affidavit on oath, Learned counsel stated that the notice of motion is bad in Law, meant to frustrate the execution process. That the appellant has not met the threshold on the conditions necessary for grant of stay of execution pending an appeal. That the appellant at the Lower Court submitted on issues to do with quantum and made a proposal of Kshs.200,000/= as general damages. That on the prospects of the appeal succeeding appear to be too remote, hence the need to decline exercise of discretion in favor of the appellant.

In view of the evidence both counsels relied on their written submissions to canvass the application. It is therefore possible to deal with the application without the necessity of the recitals of the submissions. Obviously, they form part of the mirror to ventilate the issues for determination.

Determination

The application rests on Order 42 Rule 6 of the Civil Procedure Rules. Arising out of those provisions are features like an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the appeal Court so orders subject to such terms as it may impose. The rule also provides that the appellant must satisfy that the application has been filed without undue delay, there is proof of substantial loss that may otherwise result.

There is substantial questions of fact and Law to be adjudicated upon at the appeals Court. That from the evidence if stay is not granted the appeal if successful would be rendered nugatory.

Finally, there is sufficient cause for granting the order on stay of execution. See the principles in Stephen Wanjohi v Central Glass Industries Ltd CA NO. 6726 OF 1991, Vishram Ravji Halal v Thornton & Turpin {1991} KLR 365, Dr. Willis Badia v Lake Steel Supplies CA NO. 224 OF 1995, Kenya Shell Ltd v Benjamin Karenga Kibiru {1986} KLR 40. It has also been stated in Madhupaper v Crescent Construction CA NO. 60 OF 1990 that:

“It is not normal for a Court to grant stay of execution in monetary decrees but where there special features such as the issue of the regularity of the Judgment. The fact that the amount payable under the decree being substantial and the fact that the

plaintiff has no known assets within the jurisdiction from which the applicant can recoup in event that its appeal succeeds.”

In all these, the ultimate question to be answered by the Court is whether the appellant has met the criteria for stay of execution pending an appeal. In the present application when one considers the evidence before Court in its entirety, it is clear that the application has been filed without unreasonable delay.

The next issue raised by Learned counsel for the appellant is on substantial loss. The contention is found in an averment but the submissions on it remain bare statements. The contention on substantial loss must give reasons that if this Court proceeds to reject the application, the respondent has no means to refund the decretal sum in the event of an execution.

On consideration of the motion and affidavit evidence, this Court has to be satisfied that the appellant has proved all the elements and particulars of the conditions in terms of Order 42 Rule 6 of the Civil Procedure Rules. It is trite that under Section 107 (1) of the Evidence Act ***“whoever desires any Court to give Judgment as to any legal right or liability on the existence of facts, which he asserts, must prove that those facts exist.”*** Where he fails to prove the existence of such facts, his or her case cannot succeed and must fail. Hence the maxim that who alleges must prove? What this means is for the appellant to lay before Court aspects of substantial loss in the form of irremediable, harm if no stay is granted. There is always a presumption in accident claim suits, that the victims are men and women of straw. This Court finds no merit for that contention as an attempt to prove substantial loss.

As Courts we should always strive to treat litigants to a suit equally despite their financial capability or muscle. I am of the humble view that the appellant has not fully satisfied the hurdle on substantial loss. To continue with the analysis, an applicant must demonstrate that if the stay order is denied, the intended appeal would be rendered nugatory.

In the context of this application and the impugned Judgment one can safely say that the applicant is entitled to exercise his constitutional right of appeal before that correct forum. Therefore, at this interim stage, the million dollar question to be answered is whether refusal of the reliefs on stay would render the appeal nugatory. To answer it based on the affidavit evidence, the case at hand involves a challenge to the assessment of general damages at Kshs.450,000/=. The replying affidavit of the respondent has shown that the subject matter on quantum was an outcome of a Judgment delivered on the merits. In dealing with this issue on the subject matter of the appeal, Learned counsel for the respondent invited the Court to appreciate the proposals made by the applicant at the lower Court. Given that position, Learned counsel argued and submitted that part payment should be made to the respondent and the rest of the decretal sum be deposited in Court or interest earning account of both counsels. Whereas the right to be heard on appeal is a basic natural justice concept underpinned under Article 50 of the Constitution, it ought not be the sole reason to deny a successful litigant the fruits of the valid Judgment. There is no cogent evidence that if part of the decretal sum is released to the respondent it would render the entire appeal nugatory.

In forming this opinion on this point, I bear in mind that liability is not contested as deductible from the Memorandum of Appeal. It is a sad feature of litigation in traffic accident claims that the victims are kept away of their compensation for reasons of the appeal process. Thus a paradigm shift is required on the part of the Insurance Companies to consider what weight to attach to the appeal, in light of the issues in contention and non-contentious as drawn from the Judgment in question. Permitting, the appeal process, as a whole on assessment of damages while the alleged negligence on the part of the appellant is not impugned occasions some form of prejudice to the respondent.

It is not sufficient for the applicant to merely state that the appeal would be rendered nugatory or that he will suffer substantial loss if the money is paid out. In applications of this nature, the applicant has a duty to demonstrate the irremediable loss and damage he will suffer if part of the sum as ventilated in the lower Court should not be released to the successful litigant. Tied to the ground on the appeal being rendered nugatory, is the aspect on the existence of serious and arguable appeal with high chances of success.

In the instant application, it's for a specific decree on award of general damages. The point that would be arguable is whether on the facts and admitted evidence the appeal is likely to sustain a complete interference with the decision of the Learned trial Magistrate. The test here is connected with the materiality of the evidence and the characteristics of Law on past precedents with similar injuries. In respect of this case, I take the view that the appeal if successful would not as of necessity throw out the entire claim. The appellant has not denied that the respondent is entitled to compensation arising out of the accident. His grievance is on the measure of the award which he thinks is on the higher scale. The arguable appeal therefore might not be on the entire money decree as envisaged from the record and affidavit evidence to this motion.

I found that there is need to balance the competing rights of the parties herein to the intended appeal under the broad concept of the interest of justice to order for a release of Kshs.200,000/= to the respondent pending the hearing and determination of the appeal. To my mind, it would be unjust in these circumstances to delay part of the compensation to the respondent in absence of support of the appeal being rendered nugatory as such.

Therefore, the orders of stay pending appeal would apply to the effect of the balance of the decretal sum. Similarly, it's a condition precedent that stay of execution is predicted on deposit of security for the due performance of the decree. As pointed out by the appellant, he is comfortable to offer the bank guarantee in favour of cash deposit. For this reason, he refuses to accede to the traditional policy of depositing the decretal sum either in the joint earning interest account of both counsels or with the Deputy Registrar of the High Court – Malindi.

Whereas, there is some plausible argument in support of the bank guarantee as an alternative to cash deposit security, I am reminded of the process to secure such an amount in the hands of a third party. The bank is not a party to the present proceedings. Therefore, at an opportune time, the Court can do more than just to commence proceedings to realize the guarantee. The Court is not being told that the insurance company liquidity base held with the bank is capable of settling the decretal sum when and at the time it falls due. It is safe to say that the guarantee is in so far as the Bank itself is concerned such interpretation of the guarantee paves way for a radical change in the Law compared to the settled traditional policy of depositing the decretal sum in an account held by the parties or in the judiciary deposit account.

On the other hand, a different approach in cases of this nature is for the insurance to issue a covenant in conjunction with the Bank that the

amount specifically under the jurisdiction of the Court has been set aside in an escrow account. Unfortunately, that is not the case here. Equipped with the Law, I am of the view that the appellant has no escape route to be allowed an alternative remedy of a bank guarantee to satisfy the condition on a deposit of security for due performance of the intended decree.

For the reasons canvassed, the application partially succeeds with the following declarations:

(1). That the applicant has been favoured with a stay of execution against the Judgment of the trial Court conditioned in terms of

(i). The pay out of Kshs.200,000/= as part of the general damages assessed by the trial Court to the respondent within thirty (30) days from today's date.

(ii). The balance of the decretal sum of Kshs.200,000/= be deposited in a joint earning interest account of both counsels in a reputable financial institution, or in the alternative with the deposit account of the judiciary at the High Court of Malindi capped within the same timeline of thirty (30) days as in clause (i) above.

(iii). The Record of Appeal be processed and served upon the respondent. The costs of this application to be pegged on the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED via email AT MALINDI THIS 6TH DAY OF AUGUST 2021

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R. NYAKUNDI

JUDGE

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