



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 196 OF 2018

TRAKANA MOMBASA LTD.....1ST APPELLANT/APPLICANT

DEDA JAJI NZUYA.....2ND APPELLANT/ APPLICANT

VERSUS

GEORGE AMWAYI ISAYA.....RESPONDENT

RULING

1. This is a ruling on application dated 22nd June 2020 seeking the following orders:-

a. Spent

b. Spent

c. There be a stay of execution of the judgment /decree issued herein on 7th May 2020 pending the hearing and determination of the further appeal lodged on 20th May 2020 in terms and or conditions set out in the honourable court's ruling on 27th June 2019.

d. That the costs of the application be costs in the intended appeal.

2. This is part of a series of three matters being HCCC Appeal No. 197, 198 and this matter both of 2018 arising from the same accident. The instant appeal was lodged by the appellants who were aggrieved by the decision of the lower court delivered on 11th December 2018 in Molo CMCC No. 127 of 2018; and following an application dated 15th April 2019, the appellant/applicant was granted stay of execution on condition they pay half the decretal being a sum of Kshs 6,694,180/= within 14 days. They complied with the orders and the appeal was heard on merit.

3. Being aggrieved by the decision of this court, the appellant wishes to file a further appeal and they are now seeking an order of stay of execution as they are apprehensive the respondent will proceed with execution unless the orders are granted rendering the further appeal nugatory.

4. This application is supported by the affidavit of Caren Jaguga who reiterates the grounds of the application.

5. In response, the respondent filed a replying affidavit on 14th July 2020 and averred that the applicant failed to comply with the conditional orders issued for stay of execution requiring them to deposit half the decretal sum and as a result, he has incurred more expenses in execution; and he is apprehensive that the appeal may take long before it's concluded; and being bedridden as a result of the injuries, he relies on well-wishers for help.

6. The applicant further averred that the appellant is in the process of winding up and may leave the jurisdiction of the court in an attempt to defeat justice as the contract of transporting petroleum product from Lowdar was terminated.

7. He averred that the application has not met the threshold for granting stay orders and prayed that if the orders are granted, 2/3 of the judgment amount be released to him and the balance be deposited in court.

8. In a rejoinder, the applicant filed a supplementary affidavit where he averred that by the court granting stay orders, it became *functus*

officio and that he intends to seek further medical operations. He averred that the appellant's advocates sought to settle the matter as per the statutory limit of the insurance policy held by the applicants as follows:

- a) HCCA NO. 196 OF 2019- KSHS 3,000,000/=
- b) HCCA NO. 198 OF 2019 – KSHS 2,554,230/=
- c) HCCA NO. 197 OF 2019- KSHS 3,000,000/=

9. He averred that the above offer was to be accepted on condition the balance of the decretal sum be paid by the appellant.

APPLICANT'S SUBMISSION

10. The applicant submitted that the conditions for granting stay of execution are provided under Order 42 rule 6 sub-rule 2 of the civil procedure rules and the applicant has satisfied the provisions set out in the order; and further granting of a stay order is a discretion of the court; and cited the case of *Alhyder Trading Company Limited vs. Lucy Jepngetich Mibei (2016) eKLR*.

11. The applicant submitted that the respondent has not demonstrated that he can refund the decretal sum if the further appeal succeeds and further the applicant has settled the statutory limit of Kshs. 3,000,000/= out of the decretal sum as per the scope of the insurance policy and if a stay is not granted, he will be compelled to pay beyond the policy limits. If the orders are not granted the further appeal will be rendered nugatory.

12. The applicant further submitted that the application has been brought without unreasonable delay as judgment was delivered on 7th May 2020 and the current application was filed on 22nd June 2020.

13. On the issue of security, the applicant proposes that the money deposited as security in the first appeal continue operating as security in the further appeal. The amount is deposited with the respondent's advocate and no prejudice will be suffered if the orders are not granted. The applicant urged this court to exercise its discretion and allow the orders of stay since all conditions for granting stay have been met; and urged this court to strike a balance between the interests of both parties; that the respondent is enjoying a substantial amount of the decretal amount being HCCA No. 196 of 2019- KSHS 3,000,000/=, HCCA No. 198 OF 2019 – KSHS 2,554,230/=, and HCCA No. 197 OF 2019- KSHS 3,000,000/= which has been released to the advocate.

14. The applicant submitted that there is no conspiracy between the applicant and their insurance to frustrate the respondent from enjoying the fruits of the judgment and reiterated the submissions dated 17th September 2020

RESPONDENT'S SUBMISSIONS

15. The respondent submitted that the conditions for granting stay of execution are set out under **Order 42 Rule 6 (2) (a)** as follows:-

“No order for stay of execution shall be made under sub-rule 1 unless 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.”

16. The respondent restated his averments that he suffered severe injuries, is bedridden and in need of medical care; that he relies on well-wishers for survival. He submitted that unlike the High Court, the Court of Appeal controls its diary and the intended appeal will take a very long time and the respondent will continue to suffer and will suffer irreparable loss if the orders are granted.

17. The respondent further submitted that no security has been furnished by the applicant to warrant a grant of the stay orders and notwithstanding the intention to appeal, there were negotiations with the applicant's advocate in settling the decretal sum; that the Advocate for the applicant had deposited a sum of Kshs 11,475, 446.35 in the joint interest-earning account and only forwarded the sum of Kshs.8,554,230.00 to the respondent's advocate and the rest forwarded back to the insurance company.

18. The respondent submitted that the application for stay order is made to frustrate the respondent from enjoying the fruits of his judgment; that the respondent has a valid judgment and there should be no further delay in enjoying the fruits of the judgment.

19. The respondent submitted that where the insurance is liable to pay the statutory limit, the respondent is entitled to proceed with execution from the judgment debtor and cited the case of **Patricia Mona Antony & another Vs Africa Merchant Assurance Company Limited (2019) eKLR** where the court held as follows:-

“I therefore wholly concur with the defendant's argument that it is only obligated to satisfy the decree by paying the plaintiffs the amount limited by the law in the sum of Kshs. 3,000,000. This doesn't however mean that the plaintiffs cannot recover the full decretal amount. They have the option of pursuing the defendant's insured for recovery of the amount in excess of the Kshs. 3,000,000 they are entitled to receive from the defendant”

20. He urged this court to disallow the application with costs to the respondent.

ANALYSIS AND DETERMINATION

21. I have considered averments and submissions herein and what I consider to be in issue is whether the applicant has met the threshold for grant of orders for stay of execution pending appeal. **Order 42 rule 6(1) and (2) of the Civil Procedure Rules** provides principles for grant of stay orders pending appeal as hereunder:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 an application being made, to consider such application and to make such order thereon as may to it seems 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.”

22. From the above provision, the court has to be satisfied that the applicant has satisfied the above set conditions before granting stay of execution order pending appeal. I note that the amount being disputed is the amount over and above the statutory limit set by the insurance. The applicant argues that it is only entitled to pay Kshs. 3,000,000 being the amount as per statutory limit.

23. The applicant argues that the respondent is a man of straw means and if paid will not be able to refund the money if the appeal succeeds. In granting an order of stay of execution, the court should not be seen to interfere with a party's enjoyment of the fruit of the judgment. In the case of **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991** the court stated as follows:-

“The financial ability of a decree-holder solely is not a reason for allowing stay; it is enough that the decree-holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.”

24. The respondent averred that he suffered serious bodily injuries and he relies on well-wishers for support. There is no doubt that he is in need of further medical treatment and his medical condition stand to deteriorate if he is denied access to decretal amount to facilitate his treatment. The fruits of successful litigation should be applied to alleviate the suffering of the respondent.

25. In view of the above I find that it would be fair and just to grant stay orders but with condition that half the decretal amount be paid to the respondent and the balance be deposited in joint interest earning account in the names of both Advocates herein.

26. FINAL ORDERS

1) Stay of execution do issue on condition that half the decretal amount is paid to the respondent and the balance be deposited in joint interest earning account in the names of both Advocates herein.

2) The applicant to comply with order 1 above within 45 days from the date of this ruling.

3) Costs in the cause.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 21ST DAY OF OCTOBER, 2021

.....
RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Kisila for Defendant/applicant

Mr. Gekonga for plaintiff/respondent