



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL CASE NO. E154 OF 2021

BETWEEN

PAUL KOECH.....1ST APPELLANT/APPLICANT

LOLOMARIK LIMITED.....2ND APPELLANT/APPLICANT

AND

JOSEPH KINYUA MURAYA.....RESPONDENT

RULING

Background

1) On 13th October, 2021, the court in **MERU CMCC 77 OF 2020** entered judgment in favour of the Respondent as against the Applicants for Kshs. 4,500,000/-.

2) By a notice of motion dated 10.11. 2021 and filed on 11.11.2021, Applicant seeks orders for:

1) Stay of execution of judgment in MERU CMCC 77 OF 2020 pending the hearing and determination of the appeal

2) Costs be provided for

3) The notice of motion is premised on grounds among others that the Applicants are aggrieved by the judgment of the trial court and that their appeal has high chances of success.

4) The application is also supported by an affidavit sworn on 10.11.2021 by Lucy Kariuki, Assistant Claims Manager at Allianz Insurance Co. Ltd, the insurers of the accident motor vehicle in which she reiterates the grounds on the face of the application. Additionally, the deponent avers that the appeal Applicant is willing and ready to abide by any terms and conditions that the court may impose including depositing the decretal sum in a joint interest earning account.

5) Respondent opposed the application by way of an affidavit sworn on 16.11.2021 but avers that in the vent the stay is granted, he should be paid half of the decretal sum to cater for his medical bills.

Analysis and Determination

6) I have considered the application in light of affidavit on record and I have deduced the following issues for determination.

1. Whether there ought to be Stay of execution of judgment in MERU CMCC 77 OF 2020 pending the hearing and determination of the appeal

2. Who should bear the costs of this application

7) Concerning stay of execution, Order 42 (6) of the Civil Procedure Rules provides:

(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

b. That the application has been made without unreasonable delay; and

c. 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.

8) There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9) Similarly, in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“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 suits.”

10) Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

11) The Respondent was awarded general damages in the sum of Kshs. 4,500,000/-. The Respondent avers that he has been unable to work since the accident occurred and by implication is therefore not in a position to refund the said judgment sum in the event that the appeal succeeds. (See Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997).

12) From the affidavit evidence, I am convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

13) Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has offered to furnish deposit the decretal sum for due performance of the decree herein pending the hearing and determination of the appeal.

14) Whereas it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of *the Act* to afford the Appellants an opportunity to prosecute their appeal.

15) In the end, the notice of motion dated notice of motion dated 10.11. 2021 and filed on 11.11.2021 is allowed in the following terms:

1) There shall be a Stay of execution of judgment in MERU CMCC 77 OF 2020 pending the hearing and determination of the intended appeal upon payment to the Respondent of Kshs. five hundred thousand (Kshs. 500,000/-) within 14 days from today’s date and the balance of the decretal sum be deposited into an interest earning account of both advocates within 30 days

2) Costs shall abide the outcome of the intended appeal

DATED IN MERU THIS 25TH DAY OF NOVEMBER 2021

T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicants - Ms. Njoki for Getrude Matata, Waithaka & Associates, Advocates

For Respondent - Mr. Mwanzia for Muia Mwanzia & Co Advocates