



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E057 OF 2021**

**ROBERT JOHN TRUNDELL.....APPELLANT**

**-VERSUS-**

**EWK(minor suing through mother**

**and next friend WK).....RESPONDENT**

***(Being an appeal against the Judgement and Decree of the Chief Magistrate's***

***Court at Naivasha in CMCC No. 60 of 2014 delivered by Hon. K. Bidali (CM) on 8<sup>th</sup> September, 2021)***

**RULING**

1. The application before the court is the Appellant's Notice of Motion dated 7<sup>th</sup> October 2021 brought under **Sections IA, 1B, 3, 3A, 63 (e)** of the **Civil Procedure Act, Order 9 Rules 9 & 10, Order 22 Rule 22(1), Order 42 Rule 6** and **Order 51** of the **Civil Procedures Rules** and all enabling provisions of the Law.
2. The application seeks two substantive orders namely: leave for the firm of Tindi Munyasi & Company Advocates to come on record for the Appellant in place of the firm of Waigwa Ngunjiri & Company Advocates; and stay of execution of the lower court's judgement and decree delivered on 8<sup>th</sup> September, 2021 pending the hearing and determination of the appeal.
3. However, the first substantive order is basically spent in view of the Consent that was lodged in court on 29<sup>th</sup> October, 2021 between Waigwa Ngunjiri & Company Advocates, the outgoing advocate, and Tindi Munyasi & Company Advocates, the proposed incoming advocate.
4. The Application is supported by the Affidavits of **JACQUELINE TINDI MUMOKI**, advocate coming in on record for the Appellant, and **TIBERIUS NYANG'U**, the legal officer of Corporate Insurance Company Limited who is the Insurer of the Appellant's subject motor vehicle registration number KAN 853Y – Toyota Land Cruiser. It is averred that the lower court delivered a judgment in ***Naivasha CMCC No. 60 of 2014: EWK (minor suing through mother and next friend WK v Robert John Trundell*** on 8<sup>th</sup> September, 2021 in favour of the Respondent herein in the sum of Kshs. 11,995,270.00 plus costs together with interests and found the Appellant 100% liable. That the Appellant was granted thirty (30) days interim stay of execution which expired on 8<sup>th</sup> October, 2021.
5. It is averred that the Appellant is aggrieved by the quantum of damages as assessed by the trial court and the incoming Advocates already have lodged a Memorandum of Appeal in this court against the same. The Insurer believes that Appellant's Appeal has overwhelming chances of success. However, they are apprehensive that the Respondent's Advocates will proceed to institute execution proceedings against the Appellant at any time if the stay sought is not granted. The Insurer further avers that without the stay, they stand to suffer substantial loss and untold public embarrassments since the Respondent will not be in a position to refund the colossal decretal sum of Kshs. 11,995,270.00 in the event that the Appellant's intended Appeal is successful given her status and the Appeal will be rendered nugatory. In addition, it is stated that the Appellant's Insurers are ready and willing to issue an Insurance Bond as security for any eventual decree that may be favourably binding and/or abide by any terms as to security as may be ordered by this Court. Lastly, it is deposed that the Application has been made without delay.
6. In opposition, the Respondent filed a Replying Affidavit sworn on 21<sup>st</sup> October, 2021 deposing that the application lacks merit and is an abuse of the court process. She contended that the supporting affidavits are incompetent and fatally defective as the deponents have not illustrated the requisite authority to swear the same on behalf of the Appellant herein. She deposed that no execution proceedings have been commenced to warrant the present application and neither has the Appellant attached any proclamation notices in proof of an impending execution as alleged. Further, she averred that the Appellant has not adequately demonstrated the likelihood of success of the intended appeal and that merely attaching a Memorandum of Appeal is not proof of its high chances of success.

7. It was also her contention that the Appellant's Insurers has not demonstrated the substantial loss and prejudice that they stand to suffer should they be compelled to pay the decretal sum. She argued that the Appellant has not presented any evidence to corroborate their assertion that the Respondent is not in a position to refund the decretal sum in the event that the Appeal succeeds. She maintained that the Respondent is the successful litigant at this moment and should not be barred from benefitting from the fruits of her lawfully obtained judgment. She stated that Respondent is now a paraplegic due to the injuries sustained from the accident and at the moment, she remains bed ridden and permanently disabled forcing her to live with her parents who continue to incur expenses on medication, home care nurse, physiotherapy, indwelling catheter and pampers all of which are costly.

8. She averred that as such, if this court is minded to grant the order sought, it is only fair and in the interest of justice that the Appellant be ordered to pay half the decretal sum to the Respondent to enable her foot her medical needs and procure a wheel chair for mobility and deposit the remaining balance in court as security since the Appellant does not dispute liability.

9. The Application was canvassed by way of written submissions. To demonstrate his assertion that his appeal has high chances of success, the Appellant submitted that the awards of future medical care/nurse aid, loss of earning capacity, medical supplies and cost of wheel chair were not pleaded as required by the law, no particulars were given, no evidence on the same was led and the same were even excessive. It was submitted that the Applicant has already set the Appeal process in motion and has applied for typed and certified copies of proceedings and judgment to enable the preparation of the Record of Appeal.

10. On substantial loss, the Appellant reiterated his earlier averments that the Respondent will not afford or be able to refund the colossal sum of money due to her financial status in the event the appeal succeeds particularly in view of her testimony before the trial court, she stated that she is a farmer and house wife. The Appellant took issue with the fact that the Respondent has not provided any proof of her income in her Replying Affidavit or deponed that she is capable of refunding the Judgement sum if paid to her. He argued that in that case, there is no way of ascertaining her income or at all, hence, it would be prudent for the Court to grant the stay orders so that the appeal is not rendered nugatory.

11. On Security, the Appellant maintained that his insurers have undertaken to issue an Insurance Bond to secure the decretal sum. He argued that in the alternative, he is ready and willing to pay the Respondent the sum of **Kshs. 1,000,000/=** which in his view is a reasonable award for pain and suffering which the lower court assessed at Kshs. 400,000/= as well as costs and interest thereon. Further, it was his submission that this Application was brought timeously.

12. On the other hand, the Respondent maintained that since she was the successful litigant, the Appellant cannot be heard to be saying that he stands to suffer substantial loss if he pays the decretal sum. She submitted that appeals on money decrees are never rendered nugatory for money being a commodity of trade, can always be refunded and one can also sue for recovery.

13. The Respondent further argued that the Appellant has not tendered any valid or reasonable explanation for the delay in filing the instant application and as such, he failed to unlock the court's flow of discretion in his favour. On security, the Respondent maintained that an insurance bond would not suffice in this case in view of her earlier averments on the current status of the victim of the accident. She contended that even the sum Kshs 1,000,000/= which the Appellant has offered to pay in the alternative, is a negligent amount that cannot foot the medical needs of the victim pending the hearing and determination of the appeal. She reiterated that a conditional stay of execution granted in the terms suggested earlier would balance the interest of both parties.

### **Analysis and Determination**

14. I have carefully considered the application, the Supporting Affidavits thereto, the Respondent's response and the parties' respective submissions. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.

15. Stay of execution pending appeal is governed by **Order 42 Rule 6** of the Civil Procedure Rules which provides that:

*“(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.*

*(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.*

16. From the foregoing, it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the court on sufficient cause being shown by an Applicant that **substantial loss** may result to the Applicant if the order is denied; **the application is made without unreasonable delay** and **on provision of such security as the court may impose** for the due performance of any decree or order as may ultimately be binding on the Applicant. (See James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR). It is also noteworthy that the three (3) conditions must be met simultaneously as they are conjunctive and not disjunctive.

17. On the likelihood of suffering substantial loss, it is evident that the decretal sum of Kshs. 11,995,270.00 is a colossal amount of money.

The Appellant's insurer has raised reasonable grounds that the Respondent will not be able to refund the said sum without hardship if paid to her in view of her testimony in the trial court that she is a farmer and house wife. I note that the Respondent has neither rebutted these claims nor filed an Affidavit of Means to demonstrate that she would be in a position to refund the Appellant the said sum in the event that the appeal succeeds.

18. In the case of **G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR**, the Court stated as follows:-

***“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”***

19. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**, the Court of Appeal held thus:

***“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”***

20. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that his Insurer would suffer substantial loss if the entire decretal sum is paid to Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled the first condition. In any event, I note that the Appellant is contesting the trial court's award of damages for future medical care/nurse aid, loss of earning capacity, medical supplies and cost of wheel chair which were not pleaded. There is therefore no doubt that the appeal arguable.

21. On whether the application was brought without undue delay, I note that the impugned judgment was delivered on 8<sup>th</sup> September, 2021 whilst the instant application was filed on 8<sup>th</sup> October, 2021. In the circumstance, I am satisfied that there was no delay in bringing the application.

22. On security, the Appellant's insurer has indicated that they are ready and willing to provide security in the form of an insurance bond which to this court, is a demonstration that the third condition has been met. However, the court has taken note of the Respondent's plea that the Appellant should be ordered to pay half the decretal sum to enable her foot ongoing medical needs. This therefore calls for the court to balance the interests of the Respondent who is entitled to the fruits of her judgment and the Appellant who has a constitutional right to appeal against the trial court's assessment of damages.

23. I note that the Appellant is not contesting liability in his appeal. He has not also controverted the Respondent's assertion regarding the ongoing medical need. I am alive to the fact that in cases involving road traffic accidents where a victim suffered serious injuries that require daily medical attention, courts find it ideal to order for release of part of the decretal sum. Such orders are normally informed by the long delays that appeal take before being processed and determined by the court. (See **Joseph Mutuku Ndavi v Zipporah Syombua Mwangangi [2021] eKLR**) I am convinced that this is one such case.

### **Disposition**

24. The upshot is that the Appellants' Notice of Motion application dated 7<sup>th</sup> October 2021 is merited. There shall be a stay of execution of the judgment and decree of Hon. Bidali delivered on 8<sup>th</sup> September, 2021 in **Naivasha CMCC No. 60 of 2014** pending the hearing and determination of the Appellant's appeal on the following conditions:-

***i The Appellant shall pay the Respondent a sum of Kshs. 4,500,000/= within thirty (30) days from the date of this ruling.***

***ii The remaining part of the decretal sum being Kshs. 7,495,270/= shall be deposited into an interest earning account with a reputable bank in the joint names of counsel for the Appellant and counsel for the Respondent within thirty (30) days from the date of this ruling.***

***iii In the event of failure to comply with Orders (i) and (ii) above, the stay of execution orders shall automatically be vacated and the Respondent shall be at liberty to proceed with execution of the decree.***

***iv The costs of this application are awarded to the Respondent.***

**DATED AND DELIVERED AT NAIVASHA THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

**1. Miss Tindi for the Appellant/Applicant.**

**2. No appearance for the Respondent's counsel.**