



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. E010 OF 2021

BUSCAR (E.A) LIMITED.....APPELLANT

-VERSUS-

OMARI KUKERA RUWA.....1ST RESPONDENT

ABDALLA MWAMBAWA.....2ND RESPONDENT

(Suing as legal administrators of the estate of the late JUDY TATU RUNA)

RULING

1. Before me is an application by way of Notice of Motion brought under section 3A, 79G and 95 of the Civil Procedure Act (cap.21), Order 21 Rule 22, Order 42, Rule 4, 6 and 7 and Order 50 Rule 6, as well as Order 51 Rule 1 and 2 of the Civil Procedure Rules 2010, seeking five (5) orders, some of which have been spent as follows –

1) (spent)

2) (spent)

3) *That this court be pleased to order a stay of execution of the judgment delivered by the trial court on 19th February 2021 in Civil Suit No. 118 of 2019 -Kilungu between the parties herein pending hearing and determination of the appeal herein.*

4) (spent)

5) *That costs of this application abide the outcome of the appeal.*

2. The application has grounds on the face of the Notice of Motion that a judgment had been entered by the trial court in favour of the respondent on 100% liability basis with an award of damages consisting of Kshs.50,000/= for pain and suffering; Kshs.100,000/= for loss of expectation of life; and Kshs.2,200,000/= loss of dependency; and Kshs.550/= as special damages, and that the appellants' appeal has high chances of success, and that the respondent will not be able to refund the money paid if stay of execution is not granted herein and ultimately the appeal is determined in favour of the appellant.

3. The application is supported by the affidavit sworn on 22nd April 2021 by Kelvin Nguire a Legal Officer of Directline Insurance Company Limited, which amplifies the grounds of the application.

4. The application has been opposed through a replying affidavit sworn on 3rd May 2021 by Omari Rukera Ruwa one of the respondents, in which it is deponed that the application has not satisfied the legal requirements for grant of the stay of execution orders sought in the application.

5. The application has been canvassed through written submissions, and I have perused and considered the submissions of both the applicant's counsel Kimondo Gachoka & company and those of the respondents' counsel M/s Waiganjo Wachira & company. Each counsel has relied on decided case authorities.

6. This is an application for stay of execution of judgment or decree pending appeal which is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. In this regard, Rule 6 provides as follows –

6(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.

6(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 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.

7. I note that the judgment herein was delivered on 19/2/2021 and the application herein was filed on 21/4/2021 after appeal was filed on 18/3/2021. In my view, the application herein was filed without unreasonable delay.

8. Will the applicant suffer substantial loss if the stay orders sought herein are not granted?

9. The applicant says so. The respondent says that there is no possibility of such substantial loss being visited upon the applicant.

10. I have perused the judgment of the trial court, and also the grounds of appeal. The main ground of appeal relates to the quantum of damages awarded. In my view, the appeal is arguable, and it follows that it could go either way. I thus find that the appellant might stand to suffer substantial loss if the stay orders sought are granted and the appeal succeeds after payment of the whole of the decretal sum. I will thus grant stay orders, but conditional on payment of part of the decretal sum.

11. With regard to provision of security by the applicants, in my view the part payment of the decretal sum to be ordered by this court will operate as adequate security provided by the applicant.

12. Consequently, and for the above reasons, I order as follows –

1) Stay of execution of judgment or decree herein is hereby granted pending determination of appeal provided the applicant pays the respondent part of the decretal sum of Kshs.900,000/= though counsel of the respondents within 30 days from today.

2) In default of (1) above, the stay orders herein granted will automatically lapse.

3) The costs of this application will abide the results of the appeal.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge