



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO.E031 OF 2021

DREAMLINE EXPRESS LIMITED.....1ST APPLICANT/APPELLANT

DOMINIC SABALI.....2ND APPLICANT/APPELLANT

-VERSUS-

SHIRIN YUSUFALI TAIBALI.....RESPONDENT

RULING

1. Before me is an application dated 17/5/2021 brought by way of Notice of Motion under Order 22, Rule 22, Order 42, Rule 4 and 6, and Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, and section 3 and 3A of the Civil Procedure Act (Cap. 21).
2. The application seeks five (5) orders, some of which have been spent as follows –
 - 1) *(spent)*
 - 2) *(spent)*
 - 3) *That this court be pleased to stay execution of the judgment/decree obtained herein pending the hearing and determination of the appellant/applicant's appeal filed in the High Court of Kenya at Makueni.*
 - 4) *(spent)*
 - 5) *That costs of the application abide the outcome of the appeal.*
3. The application has grounds on the face of the Notice of Motion. The grounds are that on 30/4/2021 judgment was entered in favour of the plaintiff on 100% liability basis with general damages of Kshs.2,000,000/= ; and special damages of Kshs.971,285/= plus costs and interests, and that the applicant who has now filed an appeal is apprehensive that execution will commence any time and that the respondent (*plaintiff*) might not be able to repay the amount if the appeal succeeds.
4. The application was filed with a supporting affidavit sworn by Kelvin Ngure the Deputy Claims Manager of Directline Assurance Co. Ltd, which amplifies the grounds of the application.
5. The application has been opposed through a replying affidavit sworn by Shirin Yusufali Taibali, the respondent on 17/8/2021 in which it is deponed that the applicants have not demonstrated that they will suffer substantial loss if the stay orders sought are not granted, and that in any event, if stay order is granted then the decretal amount should be deposited in a joint interest earning account.
6. The application was canvassed through filing of written submissions. I have perused and considered the written submissions filed by both Kimondo Gachoka & company advocates for the applicant and Lestins & Smith advocates for the respondents.
7. This being an application for stay of execution of decree or judgment, it is governed by the provisions of Order 42, Rule 6 of the Civil Procedure Rules. Rule 6(2) provides as follows –

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 been made without unreasonable delay; and*

b) *Such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

8. Having perused the judgment and the petition of appeal filed in Civil Appeal No. 31 of 2021, I note that the decree appealed from is a money decree. I also note that the appeal is principally on the quantum of damages awarded.

9. The appeal of the applicant being an arguable appeal, and the respondent presently having a money judgment in their favour, in my view stay of execution can be granted conditionally, in this appeal against quantum of damages. I will thus grant stay of execution orders, subject to the applicant paying the respondent part of the decretal sum Kshs.800,000/=.

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

1) *Stay of execution of judgment or decree is hereby granted pending determination of appeal, provided the applicant pays the respondent through their advocates part of the decretal amount of Kshs.800,000/= within 30 days from today.*

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

3) *The costs of the application will abide the decision in the appeal.*

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

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GEORGE DULU

JUDGE