



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E084 OF 2021**

**DENNIS NJIRU.....1<sup>ST</sup> APPELLANT**

**HOSEA MAINA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**LYNN AKOTH ATENG.....RESPONDENT**

**RULING**

1. The appellants/applicants in this instance have brought the Notice of Motion dated 9<sup>th</sup> March, 2021 supported by the grounds set out in its body and the facts stated in the affidavit of Pauline Waruhiu the Head of Claims and Legal at Directline Assurance Company Limited. The applicant sought for the substantive orders for a stay of execution of the Ruling delivered by the Honourable E. Wanjala, Principal Magistrate on the 19<sup>th</sup> February 2021 pending the hearing and determination of the Appellant's Appeal.
2. To oppose the Motion, the respondent put in the replying affidavit sworn by Lynn Akoth Ateng dated 3<sup>rd</sup> May 2021.
3. When the Motion came up for interparties hearing before this court, the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments. The main order sought is for an order for stay of execution of the decision of the ruling delivered on 19<sup>th</sup> February 2021 pending appeal.
5. A brief background of the matter is that the Respondent instituted against the Appellants vide the amended plaint dated 15<sup>th</sup> August 2018 and sought general and special damages as a result of injuries sustained from a road traffic accident.
6. That the matter proceeded undefended and an ex parte judgment was delivered on 24<sup>th</sup> of July 2019 where the Respondent was awarded Kshs.1,722,506/= plus costs of the suit and interest thereon. Being aggrieved by the aforementioned decision, the appellant/applicants filed an application to set aside the interlocutory judgment, which was dismissed on 19<sup>th</sup> February 2021.
7. The Appellants/applicants being dissatisfied and aggrieved with the said ruling have preferred an Appeal challenging the Trial Magistrate's decision.
8. In her affidavit, Ms. Pauline Waruhiu states that trial magistrate denied the Appellants an opportunity to be heard and defend themselves in the lower court which is against their constitutional rights.
9. It is the Appellant's assertion that if the Respondent levies execution against them, it will render the Appellants/Applicant's appeal nugatory and the same will cause them to suffer irreparable loss and damage.
10. The Appellant/Applicants are reasonably apprehensive that if the decretal amount is paid over to the Respondent who is not in a position to refund the same if the Appeal is successful as the Respondent has not disclosed nor furnished the Court with any evidence to prove his financial standing.
11. The appellants/applicants contend that they are ready, willing and able to such reasonable security in the form of a bank guarantee or any other form of security as this Honourable Court may deem fit.
12. In response, Ms. Lynn Akoth Ateng stated that the said judgment was entered following the hearing of the formal proof case against the

Appellant's both who failed to enter an appearance and defend the suit despite proper and regular service of summons.

13. The respondent states that Appellant's insurers were at all material times aware of the suit against the Appellants as they were not only duly served with the Statutory Notice dated 14<sup>th</sup> August 2018 but also reached out the respondent and her advocates on record seeking various documents as well as seeking attendance to their medical department for medical re-examination which the respondent did.

14. The respondent avers that the apprehension by the appellants that she will proceed to levy execution against them is misconstrued and pre-mature, owing to the fact that execution entails proceedings with a declaratory suit against the Appellant's insurer.

15. The principles guiding the grant of an application for stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

*No order for stay of execution shall be made under subrule (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. On the issue of substantial loss, which is the cornerstone in an application for stay. The appellant avers that if the respondent levies execution against it will render the Appellants/Applicant's appeal nugatory and at the same will cause them to suffer irreparable loss and damage.

17. On the other hand, the respondents avers that the apprehension by the appellants that she will proceed to levy execution against them is misconstrued and pre-mature, owing to the fact that execution entails proceedings with a declaratory suit against the Appellant's insurer.

18. Having considered the rival submissions, it is clear to me that this court issued a negative order which is not capable of execution hence there is nothing to stay save for recovery of costs which is yet to be assessed vide taxation proceedings. The applicant has specifically sought to stay the order of Ruling delivered by the Honourable E. Wanjala, Principal Magistrate to set aside interlocutory judgment. The applicant failed to seek for an order for stay of execution of the decree and or judgment of the trial court.

19. In the case of **National Cereals & Produce Board versus Errad Suppliers & General Contractors Limited, Nairobi civil Application No. Nai 48 of 2012 (UR) 33 of 2012** was cited for the proposition that no stay order is capable of being issued by a Court of law against a negative order (such as a dismissal or a striking out order).

20. In the end, I find no merit in the appellant's application. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants

..... for the Respondent