



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

MISC. CIVIL APPLICATION NO. 10 OF 2020

PETER KARORA.....1ST APPLICANT

JOSPHAT MWANGI NGUTHIL.....2ND APPLICANT

VERSUS

DAVID OGALLE.....RESPONDENT

R U L I N G

1. The Application coming for consideration in this ruling is dated 30/4/2021 seeking the following orders.

(i) SPENT

(ii) THAT this Court be pleased to order stay of execution of the Judgment/Decree issued on 25/11/2020 in Milimani Civil Suit No. 600 of 2020 DAVID OGALLE -vs- DIRECTLINE INSURANCE LTD pending the hearing and determination of this Application.

(iii) THAT this Court be pleased to order stay of execution of the Judgment/Decree issued on 25/11/2020 in Milimani Civil Suit No. 600 of 2020 DAVID OGALLE -vs- DIRECTLINE ASSURANCE LTD pending the full hearing and determination of the Application dated 10/3/2020.

(iv) THAT the Application be heard inter partes on such date and time as this Court may direct.

(v) THAT the costs of this Application abide the outcome of the Appeal.

2. The application is based on the grounds on the face of it and supported by the Affidavit of **BILLY MUMO NDOLO** in which it is deposed that the Judgment in Kericho Civil Suit No.353 of 2016 was delivered on 19/9/2019 in the absence of the applicants.

3. Further, that the applicants filed an application to appeal out of time dated 24/2/2020 and the said application was allowed in a ruling dated 28/4/2020 and the Applicants were directed to deposit the entire decretal sum in Court and further to seek leave before the High Court to appeal out of time.

4. The Applicants further stated that they had complied with the conditions of grant of stay of Execution and that they filed Misc. Application No.10 of 2020 seeking leave to appeal out of time which is now pending submissions.

5. The Respondent opposed the application and filed grounds of opposition dated 7/7/2021 in which he stated that the firm of Kimondo Gachoka & Co., Advocates have not complied with Order 9 of the Civil Procedure Rules and the Application should be struck out.

6. Further, that Milimani Civil Suit No.600 of 2020 is within the territorial Jurisdiction of Nairobi High Court and this court does not have the Jurisdiction to grant the orders sought.

7. Further, that no appeal has been preferred against the Judgment and Decree in Milimani Civil Suit No. 600 of 2020 and there is no Execution pending against the Judgment and decree in Kericho CMCC No. 353 of 2016.

8. The parties filed written submissions which I have duly considered.

9. The applicants submitted that the Judgment in Kericho Civil Suit No. 353 of 2016 was delivered on 19/9/2019 in the absence of the applicants, when the applicants obtained a copy of the judgment, they filed an application to appeal out of time. The application was allowed

vide a ruling dated 28/4/2020 on condition that the applicants deposit the decretal amount and lodge an application before the High Court seeking leave to appeal out of time.

10. The applicants further submitted that they complied with the conditions in the ruling dated 28/4/2020 and deposited the entire decretal amount at the Kericho Chief Magistrate's Court and subsequently moved the High Court seeking leave to appeal out of time.

11. The applicants also submitted that they are disputing the quantum of damages awarded by the trial court, citing that the same was excessive, the Respondent sustained a fracture of the clavicle and inor soft tissue injuries and the court awarded Kshs. 1,114,730.

12. The applicants submitted that they have demonstrated willingness to pursue the intended appeal by complying with the conditions issued by the trial court by depositing the decretal amount on 15/6/2021 and promptly filing an application seeking for leave to appeal out of time in the High Court. The applicants cited the case of **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Anor [2018]** where the court stated that in instances whereby an applicant proposes to provide security it is a mark of good faith that application for stay is not just meant to deny the respondent fruits of judgment.

13. The applicants submitted that the Respondent on his part had willingly neglected to file submissions on the application for leave to appeal out of time and rushed to prosecute the declaratory suit in an attempt to defeat the applicant's appeal.

14. The applicants submitted that allowing execution will occasion them irreparable loss and damage, that the intended appeal has arguable grounds with high chances of success and that they will be prejudiced in that they have fully complied with stay conditions and only need leave to prosecute their appeal in the shortest time possible.

15. The applicants further submitted that granting an order for stay of execution of Judgment/Decree issued in Milimani Civil Suit No. 600 of 2020 David Ogalle vs. Directline Assurance Limited pending full hearing and determination of the application dated 10/3/2020 will preserve the substratum of the intended appeal, pave way for resolution of the real issues in dispute on merit and will serve the ends of justice.

16. The respondent submitted that he would rely on his grounds of opposition filed on 7/7/2021 and list of authorities.

17. The respondent submitted that the firm of Kimondo Gachoka & Co Advocates had not complied with Order 9 rule 9 of the Civil Procedure Rules, 2010 as such were not properly on record and the instant application should be struck out.

18. The respondent further submitted that the court was not seized with jurisdiction to grant a stay of execution in Milimani CMCC No. 600 of 2020, furthermore the was no appeal preferred against Judgment/Decree in Milimani CMCC No. 600 of 2020 in the High Court at Nairobi which is within its territorial jurisdiction or any other High Court in the Republic of Kenya. The respondent argued that the court did not have jurisdiction and that the prayer for stay was incompetent, misconceived and an abuse of court process.

19. The respondent submitted that the applicants had not complied with the conditions set out in Order 42, Rule 6 (2) of the Civil Procedure Rules, 2010 in respect with Milimani CMCC No. 600 of 2020.

20. The respondent further submitted that the instant application was not merited and was made in bad faith, to defeat the overriding objectives of the court as per section 1A & B of the Civil Procedure Act and to deny the respondent fruits of the judgment and decree in Milimani CMCC No. 600 of 2020.

21. The law governing stay pending appeal is order 42 Rule 6, which states as follows:-

[Order 42, rule 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.

(2) 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."

22. In the current case, the Applicants state that the entire decretal sum for Kericho CMCC 353 of 2016 has been deposited in Court.

23. The issues for determination in this Application are as follows:-

(i) Whether the Applicant is entitled to stay of Execution in Milimani Civil Suit No. 600 of 2020 pending the hearing of the Application dated 10/3/2020.

(ii) Whether the firm of Kimondo Gachoka is properly on record.

(iii) Who pays the costs of this application

24. On the issue as to whether the applicant is entitled to stay of Execution in Milimani Civil Suit No. 600 of 2020, I find that the applicant has not shown that he has filed an appeal against the said Judgment or Decree.

25. The Application for stay of execution in Milimani Civil Suit No. 600 of 2020 is therefore not merited.

26. On the issue as to whether the firm of Kimondo Gachoka & Company Advocates complied with Order 9 of the Civil Procedure Rules, I find that there is a consent on record dated 19/10/2021 signed by both the former Advocates, KAIRU & McCourt Advocates and Kimondo Gachoka & Company Advocates and therefore Order 9 has been complied with.

27. The prayer for stay of execution in Milimani Civil Suit No. 600 of 2020 lacks in merit and the same is dismissed.

28. The Applicant will pay the costs of the application.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 19TH DAY OF NOVEMBER, 2021.

A.N. ONGERI

JUDGE