



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 98'B' OF 2019**

**(FORMERLY HCC.A 67 OF 2019)**

**PAUL NGILA.....1<sup>ST</sup> APPLICANT**

**WATHE MBENIA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MUSILI MALONZA & MASIKA MUSILI (Suing as the Administrators of the**

**Estate of the late ISIKA MUSILI (Deceased).....RESPONDENTS**

**R U L I N G**

1. By way of Notice of Motion dated **25<sup>th</sup> November, 2019** the Applicants seek orders as follows:

· .....

· That pending the interpartes hearing of this application, this Honourable Court be pleased to grant a temporary stay of execution of this Judgment and orders in **KITUI CMCC 448 of 2017** made by **Honourable Stephen Mbungi** delivered on **31<sup>st</sup> October, 2019**.

· That pending the hearing and determination of the Applicant's intended Appeal, this Honourable Court do grant a stay of execution of the Judgment and orders of the subordinate Court in **KITUI CMCC 448 of 2017** made by **Honourable Stephen Mbungi** delivered on **31<sup>st</sup> October, 2019**.

· That the costs of this application be provided for.

2. The application is premised on grounds that: the intended Appeal is arguable and has overwhelming chances of success; the Judgment against the Applicants where they are required to pay a sum of **Kshs. 2,505,262.40 cts** was scheduled to be delivered on **11<sup>th</sup> October, 2019** was not delivered then, but on **30<sup>th</sup> October, 2019**; and should the execution issue the Applicants will suffer substantial loss as it will be exceedingly difficult to recover the sum paid to the Respondent who have no source of income.

3. The application is supported by an affidavit sworn by **Caroline Kimeto** the head of Legal Department of Britam General Insurance Company the insurer of the Applicant's vehicle.

4. She deposed *inter alia* that the damages awarded are inordinately high given the nature of injuries sustained. That the insurer is aggrieved by the Judgment of the Court hence will be seeking to institute Appeal proceedings in respect of the Court findings and should the Appeal succeed the Respondents who will have executed the decree will be unable to refund the sums paid therefore rendering the Appeal nugatory.

5. The Respondents swore a Replying Affidavit jointly, where they averred that the application was improperly before the Court having been filed by a stranger to the proceedings. That following the accident, they had to borrow money to cater for funeral expenses, money that has not been refunded. And in event that the Court finds the application merited, it could order the Applicants to pay half the decretal sum, **Kshs. 1,349,108/=** and to deposit the balance of **Kshs. 1,349,108/=** in a joint interest earning account within 14 days of the Ruling.

6. The application was canvassed by way of written submissions.

7. It was urged for the Applicants that the Appeal would be rendered nugatory should execution of the decree proceed since the Respondents

would not refund the sum paid. This Court was called upon to consider what was stated in the case of **Superior Homes Kenya LTD vs. Musango Kithome (2018) eKLR** in regard to the principle of granting stay of execution as governed by **Order 42 Rule 6** of the **Civil Procedure Rules**.

8. That the Appeal is based on strong grounds and the Applicants are ready to deposit half the decretal sum (**Kshs. 1,320,000/=**) in an interest earning account with a reputable bank in the joint names of the respective advocates until the Appeal is heard and determined.

9. The Respondent on the other hand argues that as indicated by the Supporting Affidavit, the intended appeal is to be instituted by the insurer and there is no indication that the Appellants themselves have a problem with the award.

10. That the insurer's right under the principle of subrogation has not yet accrued, as the insurer has not paid out any money on behalf of the insured.

11. On the issue of filing the application without undue delay it was appreciated that the Judgment having been delivered on the **31<sup>st</sup> October, 2019** and the application filed on the **27<sup>th</sup> November, 2019**, it was within the 30 days stay of execution that had been granted by the Court.

12. On the question of occurrence of substantial loss, it was argued that it had not been demonstrated that the Respondent is a person of straw and that he may not repay the sum in question in event of the Appeal succeeding.

13. And, that the Applicants had not offered or proposed any security for the due performance of the decree.

14. The principles of granting a stay of execution are provided for under **Order 42 Rule 6** of the **Civil Procedure Rules**. It must be established that:

- i) The application is brought without undue delay.
- ii) The Applicant stands to suffer substantial loss unless the order sought is granted; and
- iii) Such security as the Court would order for due performance of the decree.

15. It is not in dispute that the application herein was made timeously. The Judgment was delivered on the **31<sup>st</sup> October, 2019** and the application was filed on **27<sup>th</sup> November, 2019**, time given within which the Applicant would appeal.

16. On the question whether the Applicant will suffer a substantial loss if the Appeal succeeds; In the case of **Kenya Hotel Properties Limited vs. Willesden Properties Limited; Civil Application No. 322 of 2006 (UR 178/06)** it was held that:

*“the decree is a money decree and normally the court have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”*

17. The contention of the Applicant is that if the appeal succeeds the Respondent shall not refund money, if paid, as he is a man of straw. It is submitted that the applicant failed to demonstrate that particular fact. In the case on **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and Another (UR) CA 238/2005** it was stated that:

*“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by respondent or the lack of them. One 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 – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”*

18. The evidential burden therefore shifted to the Respondents to show that they were not men of straw and had resources that would enable them to refund the sum paid should the Appeal succeed. But this would only happen after the Applicants discharged the duty of proving that the Appeal would be rendered nugatory.

19. The complaint of the Applicants is in respect of the sum awarded. It is argued that it is colossal such that there is a reasonable apprehension as to the ability of the Respondent to refund it in event the Appeal succeeds. The Respondents did express the fact of being persons of straw, looking at paragraph 6 of the Replying Affidavit, where it is averred that money expended on funeral expenses was borrowed and has not been refunded to date.

20. It is the contention of the Respondents that the affidavit in support of the application was sworn by a stranger which renders the application fatally defective. The impugned affidavit was sworn by **Caroline Kimeto**, who described herself as the Head of Legal Department of BRITAM the insurer of the Applicants' vehicle. It is not stated if she was in conduct of the matter. As correctly submitted by the Respondents. At paragraphs 5, 6 & 7 of the affidavit the deponent states thus:

***“5. That given the foregoing, BRITAM General Insurance being the insurance company responsible for satisfaction of the said Judgment are aggrieved by the Judgment of Honourable Stephen Mbungi delivered on 31<sup>st</sup> October, 2019 in Kitui CMCC 448 of 2017 and will therefore be seeking to institute appeal proceedings in respect to the Court findings.***

***6. That Wathe Mbenia through BRITAM General Insurance will be seeking to file the intended appeal. Annexed hereto and marked CK 1 is a copy of the Memorandum of Appeal.***

***7. That the insurance company is apprehensive that should the intended appeal be found to be meritorious, and the Judgment amount has already been satisfied the Respondents will be unable to refund the full or indeed any portion of the sums already paid up for the reason that they allege to have been fully dependent on the Deceased.”***

21. It is apparent that the Insurance Company is the one that was aggrieved as opposed to the Applicants.

22. Looking at sketchy facts that can be discerned from the Memorandum of Appeal filed as no copy of the Judgment was annexed, Judgment on liability was entered by consent of parties at the ratio of **80:20**. The trial Court has been faulted for departing from the principles applied in awarding damages on various heads hence awarding exorbitant sums.

23. It has not been alleged that the Insurer is acting pursuant to the doctrine of subrogation as it has not been insinuated that the Insurer has already paid the insured the damages and now seeks to prosecute the suit so as to recover the sum from the tortfeasor. And, since there is absolutely nothing to suggest by way of affidavit evidence that the Applicants (Appellants) in the matter are aggrieved, it renders the application unmeritorious.

24. In the circumstances, the application is dismissed with costs to the Respondents.

25. It is so ordered.

**Dated, Signed and Delivered** electronically through **Skype** this **26<sup>th</sup>** day of **May, 2020**.

**L. N. MUTENDE**

**JUDGE**