



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 269 OF 2019

DAVID KANGETHE.....1ST APPELLANT

SIMON NJANGIRU KURIA.....2ND APPELLANT

VERSUS

DENSIS NYANGINCHA NYAIRO.....RESPONDENT

RULING

1. In their Notice of Motion application dated 11th June 2019 and filed on 12th June 2019, the Appellants sought an order for stay of execution of the judgment, decree in **Milimani CMCC No 8910 of 2017** pending hearing and determination of the appeal herein. Their said application was supported by the Affidavit of Isabella Nyambura, the Legal Counsel at Directline Assurance Co Ltd, who were the insurers of Motor Vehicle Registration Number KBQ 793J that was said to have caused the Respondent to sustain injuries. The same was sworn on 11th June 2019.

2. They stated that their application to have the Respondent referred for a second medical examination was dismissed by the Learned Trial Magistrate who directed that the matter proceed for hearing which their counsel declined to do. They asserted that they pointed out to the said Learned Trial Magistrate that their previous advocate on record had notified them of a wrong Mention date for the Pre-Trial Conference leading to the Pre-Trial Directions to be taken *ex parte*.

3. They contended that they filed an application for stay of proceedings in the lower court to appeal against the said Ruling but unfortunately, the same was not heard as the courts were not sitting. It was their averment that the Respondent proceeded to file submissions on the main suit and a judgment date was given.

However, the Respondent failed to notify them of the said developments which led to the entry of judgment against them without their knowledge.

4. They asserted that they were dissatisfied with the colossal award that the Learned Trial Magistrate awarded the Respondent herein and thus appealed against the same. They pointed out that the Respondent had not disclosed and/or furnished the court with any documentary evidence of his financial standing and hence they would suffer substantial loss as there was likelihood that they would not recover the decretal sum in the event they succeeded in their Appeal.

5. They added that they filed their present application without unreasonable delay and further that they were ready, able and willing to furnish such reasonable security. They proposed that the whole decretal sum be deposited in court or in a joint interest earning account. They thus urged this court to allow their application as prayed.

6. In opposition to the said application, on 1st July 2019, the Respondent's advocate, Nelson Kaburu Felix, swore a Replying Affidavit on his behalf. The same was filed on 12th July 2019.

7. Through his Advocate, the Respondent stated that the Appellants were invited to fix a date but they did not attend as a result of which an *ex parte* hearing date of 12th March 2019 was taken and a Hearing Notice served upon them. He averred that on the said hearing date, the Appellants sought an adjournment on the ground that they wanted him to undergo a second medical examination. He said that he objected to the said adjournment for the reason that the hearing Notice was served upon them on 17th January 2019 and that the letter seeking to have him re-examined was dated 11th March 2019.

8. He pointed out that the Appellants' advocates refused to participate in the proceedings but that they subsequently called his advocate requesting that he attends a medical re-examination, which he did on 22nd March 2019. He said that he was never furnished with the 2nd medical report. He asserted that he sustained serious injuries and that the Appellants did not file a witness statement and/or seek an

adjournment to call a witness.

9. He asked this court to disregard the averments regarding the appeal seeking to stay the proceedings in the lower court and further dismiss the present application and/or allow it on condition that the Appellants released to him, half of the decretal sum and then deposit the balance of the decretal sum either in court or in a joint account.

10. The court considered the Appellants' submissions and restrained itself from analysing several issues they had raised therein as there was a danger of it delving into the merits or otherwise of the Appeal herein. In addition, it found and held that the question of stay of proceedings was not an issue that had been placed before it for determination and hence, it did not address itself to the issue.

11. Notably, before a court can grant an order for stay of execution, it has to be satisfied that the applicant has demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The said conditions are as follows: -

a. That substantial loss may result unless the order is made.

b. That the application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

12. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"**. It connotes that all three (3) conditions must be met simultaneously.

13. The Appellants placed reliance on the cases of **Hashmukhlal Virchand Shah & 2 Others vs Investments & Mortgages Bank Limited [2014] eKLR** and **Esther Wamaita Njihia & 2 Others vs Safaricom Limited [2014] eKLR** in support of their case. On his part, the Respondent did not rely on any case law.

14. The court considered the parties' respective Written Submissions and noted that they were agreed on the circumstances under which an application seeking an order for stay of execution pending appeal could be granted. The court did not therefore deem it necessary to analyse to the conditions set out in Order 42 Rule 6(2) (b) and (c) of the Civil Procedure Rules, 2010 as the Respondent was ideally not opposed to a stay pending appeal being granted provided that half the decretal was released to him while the other half was deposited into a joint account in the names of his advocates and those of the Appellants herein.

15. It therefore considered the question of whether or not the Appellants would suffer substantial loss envisaged in Order 42 Rule 6 (2)(a) of the Civil Procedure Rules, if they released the decretal sum to him and they were successful on appeal.

16. In the case of **G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR**, this very court held as follows: -

"It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful."

17. The decretal sum herein was Kshs 1,419,550/=. It might not have been a very colossal amount of money. However, the Respondent did not file an Affidavit of Means to demonstrate his ability to refund the Appellants the money in the event they were successful in the intended appeal. This court was thus satisfied that they would suffer substantial loss if the entire decretal sum was released to him.

18. It was evident from the Judgment that was attached to the Replying Affidavit herein that the Respondent sustained a fracture of the left femur and would require a sum of Kshs 120,000/= for the removal of a metal implant. He had submitted that a sum of Kshs 1,400,000/= was sufficient general damages to compensate him for the injuries that he sustained. Unfortunately, there was no knowing how much the Appellants would have proposed to have been sufficient compensation for the injuries that he sustained as they opted not to participate in the proceedings after their application for adjournment was disallowed.

19. Bearing in mind that the Appellants had referred the Respondent for a second medical examination, this implied that he was entitled to some form of compensation. It was therefore the considered opinion of this court that they would not suffer any prejudice if a small part of the decretal sum was released to the Respondent pending the hearing and determination of the Appeal herein.

20. Going further, this court wished to bring to the attention of the Appellants' advocates the improper manner it had filed its Memorandum of Appeals. For the sake of good order, parties in appeals ought to appear as Appellant vs Respondent and not Respondent vs Appellant. The court was happy to note that in his Replying Affidavit, the Respondent indicated the correct order of the parties.

21. As orders and judgments follow the format given in the pleadings, there was need for the Appellants to amend their Memorandum of Appeal to reflect the proper order of the parties herein. The court found it fit to pronounce itself on this issue as this was not the first matter it had seen pleadings from the Appellants' firm of advocates drafted in that manner. It is hoped that they will be dissuaded from drafting their pleadings in such manner in future.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application dated 11th June 2019 and filed on 12th July 2019 was merited and the same is hereby allowed in terms of Prayer No (3) in the following terms: -

1. There shall be a stay of execution of the decree in Nairobi CMCC No 8910 of 2017 Dennis Nyangincha Nyairo vs David Kangethe & Another that was delivered on 3rd May 2019 on condition that the Appellants shall pay to the Respondent a sum of Kshs 300,000/= and deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent, the balance of the sum of Kshs 1,119,550/= within forty five (45) days from the date of this Ruling.

2. For the avoidance of doubt, in the event the Appellants shall default on Paragraph 22(1) hereinabove, the conditional stay of execution shall automatically lapse.

3. The Appellant be and is hereby directed to file and serve an Amended Memorandum of Appeal reflecting the correct order of parties within fourteen (14) days from the date of this Ruling.

4. Either party is at liberty to apply.

5. Costs of the application will be in the cause.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of June 2020

J. KAMAU

JUDGE