



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO. 31 OF 2019

OMAR HUSSEIN..... 1ST APPELLANT

IBRAHIM ADAN.....2ND APPELLANT

HUSSEIN IBRAHIM.3RD APPELLANT

VERSUS

AHMED ALI ABDI.....RESPONDENT

RULING

The Respondent Ahmed Abdi sued the appellants in the magistrate's court seeking general damages arising from Injuries suffered by the Respondent in an accident. After full hearing, judgment was entered in favour of the respondent for the sum of Ksh.1,696,167/- on 12th April, 2019. Dissatisfied with the judgment and decree, the appellants filed a memorandum of appeal on 24th April, 2019. The Appellants also filed a Notice of Motion dated 3rd June, 2019 in the trial court seeking stay of execution pending hearing of the appeal. By ruling dated 2nd August, 2019 the trial magistrate dismissed the application.

The appellants then filed this application dated 2nd December, 2019 seeking the following remaining orders a, b, c having been spent.

d) That consequent to c) above the Honourable Court be pleased to grant an order of stay of execution of the decree arising from the judgment in Bungoma CMCC No. 128 of 2016 delivered on 12th April, 2019 and orders consequential therefrom pending the hearing and determination of the appeal hereto.

The grounds for the application are that the appellant have preferred an appeal against the judgment in Bungoma CMCC 128 of 2016; that the appeal has overwhelming chances of success; that the application has been brought without undue delay, that the applicant will suffer substantial loss if order is not granted and that the appeal if successful will be rendered nugatory, and finally the applicants are ready to abide by any orders or terms that the honourable court will impose. The application is supported by supporting affidavit of Caroline Kimeto, legal Manager of Britam General Insurance Company the insurers of the vehicle who reiterates the grounds of the application. She further depones that they are willing to abide by any orders of the court in settlement of the decree.

By consent the application was canvassed by way of written submissions

Atundo counsel for the applicant submitted that the appellant will suffer substantial loss if the order is not granted and execution proceeds. He submits that though the respondents states that he is employed and has assets of worth Ksh.10 million, no proof of such employment or assets were provided. That being so, if he is paid the decretal sum and the appellant succeeds in the appeal, he may not be able to refund. Counsel submits that appellant have an arguable appeal and that this application has been brought promptly without undue delay. Finally counsel submits that the appellants are ready and willing to furnish security for due performance of the decree.

Mr. Bwonchiri for the Respondent filed submissions. He urged the court to direct that the appellant to pay to the Respondent ½ of the decretal sum and the balance to be deposited in the joint bank account of counsels on record.

This application is brought under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. It provides: -

“(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.”

In order for the applicant to succeed in the application, he must satisfy the court that: -

- a) That substantial loss way result to the supplicant unless the order is made.***
- b) The application has been brought without unreasonable delay.***
- c) The applicant has furnished security for due performance of the decree being appealed from.***

In this application, the applicant filed the application on 3rd December, 2019 for stay of execution after dismissal of his application in the trial court on 2nd April, 2019. This was after 4 months which cannot be said to be unreasonable delay, the applicant has submitted that he may suffer substantial loss as there is no evidence that the Respondent if paid can refund the sum if appeal succeeds. The applicant has given undertaking and shown willingness to satisfy the decree appealed from if he does not succeed in the appeal. He has offered to furnish security for due execution of the decree.

Counsel for the Respondent while not opposing the application urges this court to order appellants to pay ½ of the decretal amount to the Respondent and the balance to be paid after determination of the appeal. This is a personal injury claim. I have perused the memorandum of appeal filed. The appellants are not challenging liability in their appeal. Indeed their only complaint is on quantum of damages awarded.

The court in application for stay should be cognizant of two issues, the right of the appellant to have his appeal heard and not be rendered nugatory by any orders made and the respondent's decree-holders right to the fruit of his judgment not to be unduly delayed by court process. This is particularly so in personal injury claims where the decretal sum may be the only source of funds for treatment or medical care. It will be in my view an injustice to delay the sum until the decree holder continues to suffer due to lack of funds for treatment. In such circumstances the court should exercise its discretion judiciously. In **Absalom Dova Vs Tabro Transporters (2013) eKLR** the court stated:

“the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, and such order does not introduce any disadvantage but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellants this appeal which includes the prospects that the appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

After considering the application and submission, I allow the application for stay of section on the following conditions: -

- 1) That the one half ½ of the decretal sum be paid to the Respondent within 30 days.***
- 2) The other 1/2 of the decretal sum to be deposited in court within 30 days.***
- 3) In default of (1) and (2) above, the stay order to lapse and execution to proceed forthwith.***

Dated, signed and delivered at Bungoma this 18th day of June, 2020.

S N RIECHI

JUDGE