



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 250 OF 2018

BIOMEDICAL LABORATORIES LIMITED.....APPELLANT

VERSUS

MARGARET MERCY ACHIENG ONYANGO

(suing as the administrator of the estate of

FELIX HEALON OMONDI (deceased).....1ST RESPONDENT

GEORGE ONYANGO OKUMU

(suing as the administrator of the estate of

FELIX HEALON OMONDI (deceased).....2ND RESPONDENT

GEORGE ONYANGO RADIDO

(suing as the administrator of the estate of

STEIN ARAFINA ONYANGO (deceased).....3RD RESPONDENT

RULING

1. In its Notice of Motion application dated 22nd October 2019 and filed on 23rd October 2019, the Appellant herein sought an order of stay of execution pending the hearing and determination of the Appeal herein. Its application was supported by the Affidavit of the Legal Manager APA Insurance, the insurer of its Motor Vehicle Registration Number KAU 100L (herein referred to as “the subject Motor Vehicle”). The same was sworn on 22nd October 2019.

2. It pointed out that the matter arose out of an accident involving its subject Motor Vehicle and Motor Vehicle Registration Number KBH 847L wherein the 1st and 2nd Respondents’ son, Felix Healon Omondi, sustained fatal injuries. It pointed out that the 1st and 2nd Respondents withdrew their case against its Co-defendants in the lower court matter without involving it and that the question that arose was whether a court could bind a party to terms of a consent it was not part to.

3. It further averred that its application dated 19th December 2019 was dismissed as it did not contain a substantive prayer for a stay of execution pending the hearing and determination of the Appeal herein. It contended that it would suffer substantial loss if its present application was not allowed as the 1st and 2nd Respondents were unlikely or unable to refund it the substantial decretal sum in the event it succeeded in its Appeal herein. It stated that since its liability was an issue in the Appeal herein, it was willing to provide such reasonable security for the due performance of the judgment and the decree as the court would order. It therefore urged this court to allow its application as prayed.

4. In opposition to the said application, on 22nd November 2019, the 1st Respondent swore a Replying Affidavit on her own behalf and on behalf of the 2nd Respondent herein. The Respondents averred that they withdrew the suit against the 3rd and 4th Defendants in the lower court matter and retained the 3rd Respondent and the Appellant herein as the actual owners of the subject Motor Vehicle. They denied that they withdrew the suit against the Appellant herein.

5. They stated that they were entitled to enjoy the fruits of their judgment and that they were able to fully restate the Appellant herein in the event it was successful in its Appeal. It was their contention that the Appellant had not reached the threshold of being granted the orders it had sought but added that in the event the court was inclined to grant it the said order, then it ought to be ordered to pay them half of the decretal sum of Kshs 6,676,230.86 as per the Warrant of Attachment and deposit the balance in the joint interest earning account in the names of their advocates and its advocates and also pay the auctioneers fees. They also filed a Notice of Preliminary Objection dated 22nd November 2019 stating that the present application was *res judicata*.

6. This court directed that the present application and the Preliminary Objection be heard together to expedite the matter herein. It found it prudent to deal with the question as to whether the present application was *res judicata* as had been contended by the 1st and 2nd Respondents herein. In this regard, the Respondents relied on the cases of **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR** and **Accredo AG & 3 Others vs Steffano Ucceli & Another [2019] eKLR** which emphasised the finality of litigation where fresh issues were brought to court after a dismissal of similar issues.

7. On its part, the Appellant relied on the cases of **MWK vs AMW [2016] eKLR** in which it was held that for a matter to be deemed to have been *res judicata*, all the ingredients in Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) had to be present and **Tee Gee Electronics & Plastics Company Limited vs Kenya Industrial Estates Limited [2005] eKLR** wherein it was held that *res judicata* would not apply if the suit had been dismissed for want of prosecution as the same had not been heard on merit.

8. In its Ruling of 17th October 2019, this court found and held that whereas the Appellant had satisfied the three (3) pre-requisites of being granted an order for stay of execution pending appeal, it could not grant the said order for the reason that it had only sought an order for stay of execution pending the hearing and determination of its Notice of Motion application dated 19th December 2018 and filed on 20th December 2018 and not pending the hearing and determination of the Appeal herein.

9. In Section 7 of the Civil Procedure Rules, it is provided as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

10. It was therefore the considered view of this court that the present application was not *res judicata* as the same had now sought the prayer for stay of execution pending the hearing and determination of the Appeal herein, which had not been considered in the said Ruling of 17th October 2019.

11. Bearing in mind that this court had ascertained to itself that the Appellant had satisfied all the three (3) conditions for being granted an order for stay of execution as set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, it did not see the need of analysing the same issues again.

12. As the issue of liability was hotly contested by the Appellant, this court was not persuaded that it should order the release of half of the decretal sum to the 1st and 2nd Respondents pending the hearing and determination of the Appeal herein.

DISPOSITION

13. For the foregoing reasons, the upshot of this court's decision was that the 1st and 2nd Respondents' Preliminary Objection dated 22nd November 2019 was not merited and the same is hereby dismissed. In turn, this court found the Appellant's Notice of Motion application dated 22nd October 2019 and filed on 23rd October 2019 to have been merited and the same is hereby allowed in terms of Prayer No (2) therein as follows:-

1. THAT there shall be an order for stay of execution of the Judgment of Hon Arika SRM, that was delivered on 29th February 2016 in Nairobi Milimani Civil Suit No 1536 of 2013 Margaret Mercy Achieng Onyango & Another (Suing as the Administrators of the Estate of Felix Healon Omondi(deceased) vs Biomedical Laboratories Ltd pending the hearing and determination of the Appeal on condition that the Appellant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the 1st and 2nd Respondents, the decretal sum of Kshs 5,425,640/= within sixty (60) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 13(2) hereinabove, the conditional stay of execution shall automatically lapse.

3. Either party is at liberty to apply.

4. Costs of the present application and those of the 1st and 2nd Respondents' Preliminary Objection will be in the cause.

14. It is so ordered.

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

J. KAMAU

JUDGE