



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 231 OF 2015

DR. KAMAL S. GIDDIE.....PLAINTIFF/RESPONDENT

-VERSUS-

MEHREEN BHATTI.....1ST DEFENDANT/APPLICANT

MEHERISH BHATTI.....2ND DEFENDANT/APPLICANT

SHAMA ASIF.....3RD DEFENDANT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 30th January, 2020 taken out by the 1st and 2nd defendants/applicants herein, in which they sought for an order for stay of execution of the judgment/decreed delivered by this court on 13th December, 2019 pending the hearing and determination of the appeal.
2. The Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of the 1st applicant.
3. In opposing the said Motion, the plaintiff/respondent put in the replying affidavit he swore on 19th February, 2020.
4. When the Motion came up for interparties hearing before this court, the parties were directed to put in written submissions; however, at the time of writing this ruling, no submissions had been availed for this courts reference.
5. I have considered the grounds laid out on the body of the Motion and the facts deponed in the affidavits supporting and opposing the Motion.
6. In brief, the respondent instituted the suit against the applicants and the 3rd defendant and sought for reliefs in the nature of general, exemplary and punitive damages together with the costs of the suit and interest thereon for defamation. The suit against the 3rd defendant was later withdrawn.
7. The applicants subsequently filed a statement of defence and counterclaim whereof they sought for damages for medical negligence on the part of the respondent.
8. Upon hearing the parties, this court vide the judgment delivered on 13th December, 2019 awarded the respondent a sum of Kshs.3,000,000/ to be paid by the applicants jointly and severally, while dismissing the applicants' counterclaim with costs.
9. The guiding provision in considering an application for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules**.
10. The first condition is that the application must have been made without unreasonable delay. The applicants did not specifically address this court on this condition, while the respondent is of the view that there has been an inordinate and unnecessary delay in bringing the Motion.
11. It is noted that the Motion was filed on 3rd February, 2020 within an estimate timeline of one and a half months from the date of delivery of judgment. I find that there has been no unreasonable delay in bringing the Motion.
12. Under the second condition, the applicants must show to this court's satisfaction the substantial loss they would suffer if the order for stay is denied.

13. On their part, the applicants have stated that unless the order for stay is granted, they are anxious that the respondent will move to execute the decree, thereby rendering the appeal nugatory. The respondent on his part argued that the applicants have not demonstrated the substantial loss they stand to suffer and further argued that he is a reputable doctor with a medical practice of over 30 years which goes to show that he is not a man of straw and would therefore be able to repay the decretal sum in the event that the appeal succeeds.

14. This court has previously held that substantial loss constitutes the cornerstone of an application for stay hence an application ought to demonstrate the same.

15. The applicants have not been specific as to the substantial loss they would suffer if the order for stay is denied. However, a critical examination is that they are likely to be rendered destitutes before their appeal is heard and determined. I am persuaded that may be a substantial loss in the unique circumstances facing the appellants.

16. The final consideration is the requirement that security for the due performance of the decree should be provided. The appellants have not offered any. However, the court has the discretion to make order directing an applicant to provide security even where no offer is made.

17. In the end, the motion dated 30.1.2020 is allowed. Consequently, an order for stay of execution pending appeal is granted on condition that the appellants/applicants deposits the judgment sum of ksh.3,000,000/= in an interest earning account in the joint names of learned counsels and or firms of advocates appearing in this appeal within 30 days from the date hereof. In default execution to issue.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 18th day of September, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st and 2nd Defendants/Applicants