



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NUMBER 59 OF 2019

ENDAVOUR INSTRUMENT AFRICA LTD.....APPELLANT/APPLICANT

VERSUS

(1) PETER MONG'ALE NZANGA

(2) PAULIER MWIKALI PETER.....RESPONDENTS

RULIN G

1. Before me is a Notice of Motion dated 17th October, 2019 brought up by **Endeavor Instrument Africa Ltd**, the **Appellant/Applicant** herein who have moved this Court under **Section 3, 3A & 63 (e) Civil Procedure Act, Orders 4 Rule 6, 51 Rules 1, 3 & 4 of the Civil Procedure Rules** for the following Orders namely:-

(i) Spent

(ii) Spent

(iii) That there be stay of execution of the judgment of the Trial Court delivered on 26th September 2019 pending the hearing and determination of this appeal.

(iv) Any other relief deem fit by this Court to grant.

(v) That costs be, in cause.

2. The grounds of the above prayers are listed as follows:-

a. That the Respondent obtained judgment against the Applicant in Mutomo PMCC. No.24 of 2019 on 26/9/2019.

b. That the Applicant was dissatisfied with the said judgment

c. That the Applicant has since filed an appeal against the decisions on the amount awarded on pain suffering and loss of dependency.

d. That the trial court did not grant any stay.

e. That the Appellant/Applicant is apprehensive that the Respondent may proceed to execute since there is not stay of execution.

f. That that appeal filed raises triable issues.

g. That the appeal filed is in good faith and is not meant to cause delay to the Respondent's enjoyment of prints of judgment.

h. That if the Respondent executes, the Applicant stands to suffer irreparably and the appeal may be rendered nugatory.

i. That the Applicant is ready and willing to furnish security.

j. That this application has been brought expeditiously.

k. That it just and fair for the orders sought to be granted.

3. The application is ground on the **Supporting Affidavit** of **Antony Mwangi**, sworn on 17th October, 2019.

4. The **Deponent** avers that he is the **Legal Officer** at **Geminia Insurance Company**, the insurer of the **Appellant** herein. He further states that he is aware that the **Respondents** were awarded a total of kshs.1,270,736/= in the lower court as follows:-

(i) Pain and suffering – Ksh. 50,000/=

(ii) Loss of expectation of life – Ksh. 100,000/=

(iii) Loss of dependency – Ksh.1,500,000/=

(iv) Special damages – Ksh. 38,420/=

Sub total **Ksh.1,688,420/=**

a. Less expectation of life Ksh. 100,000/=

b. Less 20% Ksh. 337,684/=

Total Ksh.1,270,736=

5. The **Deponent** has generally reiterated the listed grounds above adding that the **Respondent** is a man of straw and if the **Appellant** is successful in appeal, he may not be in a position to refund.

6. The **Applicant** in its written submissions made through **Musa Juma** and **Company Advocates** contends it will suffer irreparable loss if it was forced to pay up the decretal amount of Kshs.1,270,736/= arguing that the sum is big. It urges this Court to exercise its discretion in its favour citing the Court of Appeal decision in **Reliance Bank Ltd –vs- Norlake Investments Ltd (2002)**, EA 227 to support its submissions that it stands to suffer substantial loss if stay is not granted.

7. The **Applicant** further submits that the **Respondent** have failed to demonstrate that if paid the decretal sum they will be in a position to refund the amount if the appeal is partially or wholly successful. In this respect it relies on the decision of **Focin Motorcycle Company Ltd. –vs- Ann Wambui & Another (2018) eklr.**

8. The **Applicant** asks this Court to grant it to stay so that it can pursue its appeal without the danger of it being rendered nugatory in the event of execution. It asks this court to exercise its discretion in such a way that is not burdensome to it.

9. It further avers it is ready and willing to furnish such reasonable security as this Court may order.

10. The **Respondents** are opposed to this application and relies on the Replying Affidavit sworn by their Counsel **Christine Jerobore Ruto** sworn on 4th October,2019.

11. The **Respondents** claim that this application is defective as it does not satisfy the conditions set out under **Order 42 Rule 6 (2)** of the **Criminal Procedure Rule**. According to the **Respondents**, there is no imminent risk of execution since no warrants have been issued since 26th September, 2018 when the judgment was delivered.

12. The **Respondents** posit that the appeal filed has no chance of success because the grounds in their view is only about quantum and are weak because the **Applicant** consented to 80% liability.

13. They aver that the application has been made in bad faith only to cause delay justice hence prejudice them. They urge this Court to order at least that they are paid half the decretal amount and the other half be deposited in an interest earning account.

14. In their written submissions, the **Respondents**, the **Respondents** reiterate that this application has not met the conditions set out under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. They opine that the **Applicant** has not demonstrated that it stands to suffer substantial loss unless stay is granted. They rely on the decision in the case of **Antoine Ndiaye –vs- African Virtual University [2015] eklr.**

15. They further urge this Court to find that a stay of execution will delay enjoyment of their fruits of judgment without justifiable cause and have cited the decision of **Winfred Nyauwa Maina –vs- Peterson Onyango Gichana [2015] eklr** to support their contention.

16. This Court has considered this application and the response made. The Applicant has invoked the inherent powers of this Court under **Sections 3, 3A and 63(e)** of **Civil Procedure Act** and the Provisions of **Order 42 Rule 6** of **Civil Procedure Rule** in seeking a stay of

execution of judgment which is the subject of the appeal filed herein. The **Applicant** has unnecessarily and improperly invoked the inherent powers of this Court under **Civil Procedure Act** because of the presence of express Provisions dealing with stay which is **Order 42** of the **Civil Procedure Rule**. A party can only resort to inherent powers of this Court where the express Provisions of law/rules are lacking but where there express Provisions do exist, a court can only be asked to invoke those powers particularly where there are attendant condition such as in this instance.

17. The Provisions of **Order 42 Rule 6** clearly stipulate that no appeal or second appeal shall operate as a stay of execution of decree unless sufficient cause is shown and **Subsection (2)** of the same Rule expressly state as follows:-

“No order for stay of execution shall be made under Subrule (i) 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 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.....”

18. The above Provisions shows that a grant of stay of execution is prescriptive and restrive in nature owing to the conditions set to be considered before a Court can grant stay.

19. Firstly an **Applicant** must show good cause to persuade a court to exercise its discretion to grant stay but there is a rider to the exercise of that discretion which is the fact that an **Applicant** must demonstrate that a substantial loss is likely to be occasioned and the fact that the application has been made without delay.

20. I have considered the grounds raised in this application and the question posed is whether the **Applicant** herein has shown a good cause. A good cause in this instance is a demonstration that there is an arguable appeal filed. I have perused through the proceedings in the lower court and the undeniable fact is that the appeal herein is basically on quantum awarded given that liability was agreed by consent at the ration of 80% to 20% in favour of the **Respondents**. The issues raised in the appeal herein in my raises triable issues and it cannot be said to trivial. I am satisfied to that extent that the **Applicant** has met the minimum condition of showing good cause for seeking stay.

21. Secondly on the question of substantial loss, the **Applicant** cannot claim that the **Respondents** were not entitled to an award of damages because given that liability had been settled, an award of damages was expected because the claim was fatal and evidence was tendered to prove that fact.

22. The only point that seems to favour the **Applicant** is that its claim that the **Respondents** are persons of straw and are unlikely to refund any amount if the appeal were to succeed has not been challenged. This Court finds that that statement made on oath has not been controverted denied or challenged by the **Respondents**. They have not sworn an affidavit to respond to the said adverse claims and so the claim that the **Applicant** stand to suffer substantial loss remain unchallenged. That ofcourse does not mean that this court is overlooking the fact that the **Respondents** deserved to be awarded general damages on account of fatal loss of their kin.

23. On the 3rd condition of lodging the application without delay, this Court finds that this application was filed in a timely manner given that the judgment was delivered on 26th September, 2019 and this application was filed on 26th October, 2019.

24. I also find that the **Applicant** has offered security to satisfy the decree passed against it which is another condition precedent to granting of stay.

In the premises this court finds merit in the application dated 17th October, 2019. The same for the aforesaid reasons is allowed on the following terms:-

a) There shall be a conditional stay of execution pending the determination of the appeal filed herein.

b) The Applicant is directed to pay half decretal amount to the Respondents within 21 days from the date of this ruling and the other half be deposited in a joint interest earning account in the names of both counsels on record in this appeal.

c) The Appellant is directed to expedite the processing of its appeal and he has 30 days from the date of this ruling to file the record of appeal. The Deputy Registrar of this court shall facilitate the typing and supply of proceedings upon payment of court charges by the Applicant.

d) Costs of this application shall be in the appeal

Dated, Signed and Delivered at Kitui this 21st day of October, 2020.

R. K. LIMO

JUDGE