



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO.89 OF 2013**

JOSEPH KIMELI A. SITONIK.....1<sup>ST</sup> APPELLANT  
JOSEPH K.YUIYA.....2<sup>ND</sup> APPELLANT  
KIBET SANG.....3<sup>RD</sup> APPELLANT  
RICHARD KOECH.....4<sup>TH</sup> APPELLANT  
KIPKURUI A.YANGALA.....5<sup>TH</sup> APPELLANT  
DAVID KIPRONO TUIYA.....6<sup>TH</sup> APPELLANT  
JOYCE CHEPTO SUMONI.....7<sup>TH</sup> APPELLANT  
KIPLANGAT ROTICH.....8<sup>TH</sup> APPELLANT  
ESTHER KIPKORIR.....9<sup>TH</sup> APPELLANT  
KIPKORIR KUCHO.....10<sup>TH</sup> APPELLANT  
GRACE CHEPLANGAT.....11<sup>TH</sup> APPELLANT  
JANE CHELANGAT.....12<sup>TH</sup> APPELLANT  
PAUL CHERUIYOT.....13<sup>TH</sup> APPELLANT

**-VERSUS-**

GROGOKEN LIMITED.....1<sup>ST</sup> RESPONDENT  
MICHAEL MUCHIRI KIBE.....2<sup>ND</sup> RESPONDENT  
PATRICK KARANJA.....3<sup>RD</sup> RESPONDENT

**RULING**

1. This is a ruling on application dated **15<sup>th</sup> April 2020**. It seeks to stay this Honorable Courts Judgment/Decree dated **27<sup>th</sup> February 2020** pending intended appeal.

2. Grounds on the face of the application are that the applicant is dissatisfied with the Court's Judgment dated **27<sup>th</sup> February 2020** and has filed notice of the intended appeal in the Court of Appeal; that if execution is not stayed, the appeal will be rendered nugatory and the applicant will suffer substantial loss; that the application has been brought timeously.

3. The application is supported by affidavit sworn by **Nancy Kasyoka** the Legal Officer Jubilee Insurance Limited. She restated grounds on the face of the application and added that the appeal filed has high chances of success and the respondents do not stand to suffer any prejudice if stay is granted; and the applicant is ready and willing to comply with any orders as to security pending appeal by depositing the

portion of decretal amount in a joint interest earning account in the names of Advocates on record.

4. Parties agreed to proceed by way of written submissions

#### **APPLICANTS/RESPONDENT'S SUBMISSIONS**

5. The respondent submitted that the respondents commenced this suit in Molo Court where they entered appearance and after hearing judgment was entered in the lower court on 14<sup>th</sup> May 2013; the respondents/applicants being dissatisfied filed this appeal which proceeded for hearing and judgment was delivered on 27<sup>th</sup> February 2020. The respondents submitted that they have come to this Court under **Order 42 Rule 6 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**

6. Respondent submitted that **Order 42 Rule 6(2)** provide that the Court must be satisfied that: -

**a. Substantial loss shall be occasioned on the applicant.**

**b. The applicant has been made without unreasonable delay.**

**c. The applicant has given adequate security for performance of decree as ordered by the court.**

7. The respondent submitted in the case of **Kiambu Transporters Vs Kenya Breweries**; the Court held that the above conditions must be satisfied before stay of execution pending appeal is granted.

8. On condition to file application without delay, the respondents submitted that judgment was delivered on 27<sup>th</sup> February 2020 and this application was filed on 8<sup>th</sup> May 2020 and Notice of Appeal filed on the same day; that the Notice of Appeal was lodged within 14 days of delivery of judgment as required under **Rule 75(2) of the Court of Appeal Rules 2010**.

9. Counsel submitted that the Notice of Appeal was filed as stipulated but despite this application being prepared early enough, there was delay in filing due to Covid 19 pandemic as the Courts were closed to public as well as litigants. Counsel submitted that they filed this application after the **CJ David Maraga** urged Courts to make use of e-filing mediums and electronic platforms making the Courts virtually accessible to litigants. The respondent cited the case of **Jaber Mohsen Ali & Another vs Priscillah Boit & Another E&L No.20 of 2012 [2012]** where the Court held that what is reasonable delay is dependent on the surrounding circumstances of each case.

10. On whether substantial loss will be occasioned, the respondents/applicants submitted that this suit was selected as a test suit in a series of 13 matters and decision on liability is bound to apply in the remaining 12 files in the series; that the amounts payable to applicants will vary depending on decision of the Court of Appeal and the outcome may end up in favour of the respondents/applicants herein.

11. The applicants further submitted that the applicants are liable to pay the respondents an award not less than 2,000,000 which is quite substantial amount ;that in the replying affidavit filed in response to the application, the respondents have not demonstrated that they are in a position to refund the decretal amount should the appeal succeed; that the appellants have not attached affidavit of means with the capability to refund the decretal amount; that save for **Joseph Kimeli Sitonik** who said he is mason, the rest of the appellants said they are farmers; that they further failed to show that they have any known assets capable of offsetting the decretal amount.

12. The respondents submitted that they are amenable to tendering security to Court as part of conditions to having this application allowed. The respondents submitted that the applicants having failed to discharge the evidential burden of proving that they will be able to refund the decretal amount if the appeal succeeds, they propose to deposit the entire decretal amount in a joint interest earning account pending determination of the intended appeal.

13. On whether the intended appeal is arguable, the applicants submitted that an arguable appeal has been described as an appeal that is not necessarily expected to succeed but one in which there is at least one issue which the Court should pronounce its decision

#### **RESPONDENTS' SUBMISSION**

14. The Respondent submitted that **order 42 rule 6(1) and (2) of the Civil Procedure Rules** sets out the conditions that must be fulfilled as already captured in paragraph 6 above and submitted that in the case of **Munya**, the High Court established the applicant seeking stay pending appeal must show the appeal or intended appeal is arguable and not frivolous; and unless the order of stay sought is granted, the appeal or intended appeal were it to eventually succeed would be rendered nugatory.

15. On arguable appeal, the respondents submitted that applicants did not attach a draft memorandum of appeal to the application to show the grounds upon which they are appealing demonstrate arguable appeal and on this limb the appeal should fail.

16. On whether appeal would be rendered nugatory if stay is not allowed, the respondent submitted that the applicant allege that they will suffer substantial loss if the application is not allowed but did not specify the substantial or irreparable loss they would suffer; and this being a monetary decree it is unlikely that the appeal would be rendered nugatory if payment is made.

17. On furnishing security pending appeal, the respondent submitted that the applicant stated that they are amenable to furnishing security but did not specify how much and submitted that they should be ordered to pay the entire decretal sum plus cost.

18. The respondent concluded that the application is unmeritorious, an afterthought and an abuse of the Courts intended to frustrate the respondent from enjoying the fruit of their judgements; and urged the Court to dismiss the application.

**ANALYSIS AND DETERMINATION**

19. I have considered arguments by both parties herein. The applicants/respondents have lodged a second appeal in the Court of Appeal. I note from record that the trial court apportioned liability at 50:50 between the GK vehicle in which the appellants herein were travelling in and motor vehicle registration number KBC 119M.

20. This Court upon reevaluation of evidence found the respondents 100% liable for the accidents. The applicants/respondents being aggrieved have filed appeal in the Court of Appeal. The appeal was lodged within the prescribed time.

21. Conditions for grant of stay of execution pending appeal as provided in **Order 42 Rule 6(2) of the Civil Procedure Rules** as hereunder:  
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**i. The application must be made without delay**

**ii. That the applicant must demonstrate that they will suffer substantial loss unless the order sought is granted**

**iii. Such security as the court orders for due performance of such decree as may ultimately be binding on him has been given by the applicant.**

22. The above conditions were restated in the case of **Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa[2016]eKLR** .

23. The applicants have indicated that they are amenable to depositing decretal amount being security for grant stay pending appeal.

24. On whether the application has been brought to Court without unreasonable delay, I note from averments in two affidavits filed by the applicants that the judgment herein was delivered shortly before the December recess and application was filed about a month after recess. The applicants have explained that they believed this matter would be settled with the other two files in the series which the respondents confirmed having dispatched cheques for settlement at the time of filing replying affidavit. In my view the explanation delay is not inordinate and explanation given is sufficient.

25. In respect to deposit of security, the respondents' argument is that the decretal amount should be paid as this application is intended to deny him fruits of successful litigation. The respondents' argument is that the total award to the respondents is almost 2,000,000 and it is unlikely that they will refund if the appeal is successful.

26. The applicants' argument is that they should shoulder 50% liability and not 100 % as ordered by this Court. In view of that argument I am of the opinion that the applicant will not suffer any prejudice if half of the decretal amount is paid to the respondents and half deposited in a joint interest earning account in the names of both Advocates.

**27. FINAL ORDERS**

1. Stay of execution do issue pending appeal on condition that half the decretal amount be paid to the respondents and the remaining half to be deposited in a joint interest earning account in the names of both Advocates
2. Applicants to comply with order 2 above within 30 days from the date of this ruling failure which execution to proceed.
3. Costs of this application to abide by the outcome of the appeal.

**Judgment dated, signed and delivered via zoom at Nakuru This 26<sup>th</sup> day of November, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Ms. Chelule H/B for Mr. Muchela counsel for respondents

Ms. Makori counsel for Respondents