



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 81 OF 2008

MARGARET NDUTA KAMAU.....1ST PLAINTIFF

ISAAC MUREITHI KIMONDO.....2ND PLAINTIFF

(Suing as the administrator ad litem of the estate of

APOLLO KAMA KIMONDO –Deceased)

-VERSUS-

BOLPACK TRADING CO. LIMITED....1ST DEFENDANT

JAMES MWARANIA.....2ND DEFENDANT

KILEA MUTHUKA.....3RD DEFENDANT

JESSE NGETA KARIUKI.....4TH DEFENDANT

RULING

1. This ruling is the outcome of the motion dated 22/10/2020 taken out by the 1st defendant in which it seeks for the following orders:

- i. THAT this matter be certified as urgent and the application be heard ex parte at the first instance.**
- ii. THAT the execution of the judgment and decree delivered on 24th September 2020 and all subsequent orders against the applicant/1st defendant herein be stayed pending the hearing and determination of this application.**
- iii. THAT the execution of the judgment and decree delivered on 24th September 2020 and all subsequent orders against the applicant/1st defendant herein be stayed pending the hearing and determination of the main appeal.**
- iv. THAT the execution of the judgment and decree delivered on 24th September 2020 and all subsequent orders against the applicant/1st defendant herein be stayed in compliance with the orders of stay in NRC HCC NO. 465 OF 2011 (OS) IN THE MATTER OF BLUE SHIELD INSURANCE CO. LTD (UNDER STATUTORY MANAGEMENT) specifically staying all judgments and all executions against all policyholders whose motor vehicles like KAP 170F were insured by BlueShield Insurance Co. Ltd.**
- v. THAT this honourable court be pleased to grant leave for service of court processes in this suit and the intended appeal be by way of substituted service through press daily adverts upon the 2nd and 3rd defendants/ respondents.**
- vi. THAT costs of this application be in the cause.**

2. The motion is supported by the affidavit sworn by Shahbaz Khan.

3. When served the plaintiffs filed the replying affidavit sworn by Margaret Kamau and grounds of opposition to resist the motion.
4. When the motion came up for hearing learned counsels appearing in the matter made oral submissions. M/s Tindi learned advocate for the 4th defendant informed this court that the 4th defendant was not opposing the motion.
5. The 1st defendant's advocate averred that it filed a notice of appeal on 29th September 2020 against this court's decision delivered on 24.9.2020. The applicant pointed out that it has an appeal with overwhelming chances of success. It was argued that unless the order for stay is granted the applicant would suffer irreparable loss. The applicant offered to deposit any reasonable share as directed by the court for the due performance of the decree.
6. It is also argued that the motion was filed without unreasonable delay. The 1st defendant pointed out that it was wrongly enjoined to this suit yet it was not the employer of the 2nd and 3rd defendants. The applicant applied for leave to serve the 2nd and 3rd defendants by substituted services since they did not enter appearance nor defend the suit.
7. The plaintiffs opposed the motion arguing that the same was filed after an inordinate delay. It is also argued that the 1st defendant has not demonstrated the substantial loss it would suffer if the order for stay is denied.
8. The applicable principles to consider in determining an application for stay of execution pending appeal are stated in Order 42 rule 6 of the Civil Procedure Rules. **First** is that the application must be filed without unreasonable delay. The record shows that the application was filed after the lapse of 23 days from the date of judgment. I am convinced that the application was filed without unreasonable delay.
9. The **second** principle is that an applicant must show the substantial loss it would suffer if the order for stay of execution pending appeal is not granted. The applicant stated that it would suffer irreparable loss if it is forced to settle a judgment sum in respect of parties (i.e 2nd and 3rd defendants) who were not its employees.
10. I am alive of the fact that this court found in the motion dated 30.10.2020 that the applicant in that application had demonstrated that the plaintiffs are not in a financial position to make a refund in case the decretal sum is paid and the appeal turns successful. On the basis of the above reasons, I am satisfied that the applicant herein will suffer substantial loss if the order for stay is denied. The applicant has offered to deposit a reasonable share as security for the due performance of the decree.
11. In the end, I am satisfied that the motion dated 22.10.2020 has merit. Consequently, the same is allowed giving rise to issuance of the following orders:

- i. An order for stay of execution of the decree is granted pending appeal on condition that the 1st defendant provides a bank guarantee or an insurance bond for the decretal sum within 30 days from the date of this ruling. In default the order for a stay automatically lapses.**
- ii. The applicant is granted leave to effect service by substituted way of advertisement in at least one daily newspaper of contrary wide coverage.**
- iii. Costs of the motion to abide the outcome of appeal**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of December, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant