



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 3 OF 2018

TIMOTHY LIMO.....1ST APPELLANT

JOHN KIPTOO BARSEMOL.....2ND APPELLANT

CHRIS KIPRONO KEMBOI.....3RD APPELLANT

VERSUS

JOEL KINYANJUI (Suing as the legal representative of the estate of the late

JACOB MUCHIRI KINYANJUI.....RESPONDENT

RULING

1. This is a ruling on an application for stay of proceedings pending hearing of an appeal from the Order of trial Court made of 10.4.2018. The Notice of Motion dated 9/5/18 was supported by the Affidavit of Wanjiru Njuguna, Counsel for the applicant urging that the appeal would be rendered nugatory if the stay of proceedings was not granted and that the appeal was meritorious.

2. For the respondents, it was urged by a Replying Affidavit by the Administrator of the Estate of the Plaintiff in the trial Court, that the appeal had no chances of success as the Order appealed from was a discretionary Order which the appellate Court may not interfere with and that no prior application of stay had been made and or refused by the trial Court to warrant the making of the application before the appellate Court.

3. I have considered the application and the Affidavits of the parties together with their respective written submission filed herein.

Arguable Case

4. An application for stay of execution or proceedings under Order 42 Rule 6 of the Civil Procedure Rules need only demonstrate sufficient reason, and such reason has been found in any arguable point which may be presented to the appellate Court for determination. The arguable point need not be one that must eventually succeed on determination of the appeal.

5. Having examined the Memorandum of Appeal, I find that the applicant has demonstrated an arguable case in the questions whether the trial Magistrate erred in allowing the application for revival of the abated suit “*when a similar application had been dismissed*”; whether Order 24 Rule 3(2) of the Civil Procedure Rules on revival of abated suits requires that “*time has first been extended*” before grant of application for revival of the suit; and whether section 3(e) of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act 2013 applied to the suit. Only one arguable point, however, is necessary to demonstrate an arguable case.

Whether the appeal will be rendered nugatory

6. Although a successful appeal will reverse any Order or judgment of the trial Court, the trial of the suit in the meantime will attract costs in time and resources of the Court and the parties which is not in line with the overriding objective of the Civil Process under section 1A of the Civil Procedure Act.

Security

7. Order 42 Rule 6(2) of the Civil Procedure Rules requires that security, not for costs as urged by counsel for the applicant, but for “*due performance of such or Order as may ultimately be binding on him.*” However, the provision of security is only mandatory in cases of “*Order for stay for execution*” not stay of proceedings as herein.

I, therefore, do not consider an Order for security to be appropriate in this application.

Prior application before trial Court

8. The application for stay for execution or proceedings pending appeal, made before the Court to which such appeal is preferred is available “*whether the application for such stay shall have been granted or refused by the Court appealed from.*” I, therefore, do not see a basis for the proposition that such an application for stay must first be made before the trial Court.

Orders

9. For the reasons set out above, the Court grants the application for stay of proceedings as prayed in prayer (3) of the Notice of Motion dated 9/5/2018.

10. Pursuant to the overriding objective of section 1A of the Civil Procedure Act, the Court directs that the Record of Appeal must be lodged with the Court within 30 days, and in default the stay of execution herein granted shall lapse and be of no effect.

11. Costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF JANUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kairu & MCCourt Advocates for the Appellant.

M/S Mboga G.G. & Company Advocates for the Respondent.