



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 100 OF 2018**

**1. ALEX NJOROGE**

**2. NJOROGE MUNDIA.....APPELLANT**

**VERSUS**

**FLORENCE NDUKU MUTUA.....RESPONDENT**

**RULING**

1. The appellant have filed a notice of motion application dated 27<sup>th</sup> August, 2018. They seek stay of execution of the judgement in **Chief Magistrates' Court CMCC No. 618 of 2015** delivered on 19<sup>th</sup> July, 2018 pending hearing and determination of the appeal. The appellants prayed that they be allowed to deposit the decretal sum in a joint interesting earning account in the joint names of the parties' advocates.

2. The grounds upon which the motion is based are on the face of the application and the supporting affidavit by Caroline Kimeto who is the Legal Manager of Britam General Insurance Company Limited the appellants' insurer. It was the appellants' contention that the appeal has high chances of success given that the award of general damages is high in comparison to the injuries and decided cases. That the application has been brought expeditiously and without unreasonable delay. That the appellants will be highly prejudiced as this appeal will be rendered nugatory if stay of execution is not granted and the said appeal succeeds. That the respondent's financial position and economic status is unknown to the appellants and they are apprehensive that if the sum is paid to the respondent, they shall not be able to recover the said sum or any part thereof in the event the appeal succeeds. That the appellants are willing to abide by such reasonable conditions as the court may order and in particular to avail deposit of the entire decretal sum in joint names of both parties' advocates.

3. In response thereto, the respondent filed a replying affidavit on 13<sup>th</sup> September, 2018. She contended that Caroline Kimeto is a stranger to the present proceedings and lacks locus standi and therefore incompetent to swear the affidavit. That Caroline Kimeto lacks the requisite authority to swear the said affidavit since she purports to belong to both Britam General Insurance Company and Monarch Insurance Company and therefore her affidavit should be struck out. That the judgment in this matter was entered on 31<sup>st</sup> July, 2018 where the court whilst exercising due diligence and applying the law accordingly awarded KShs. 205,550.00 which amount is reasonable and justifiable in the circumstances of the present case. That the appeal remains a mere allegation since her advocate has not been served with a memorandum of appeal. That the appellants' claim to have filed an appeal is a diversion whose main aim is to circumvent and delay the course of justice by denying the estate of the deceased the right to timely enjoyment of the fruits of the judgement. That the allegation that she is unable to refund the decretal sum if paid is unfounded, misleading unsubstantiated and calculated to deceive. That she is a business person receiving over KShs. 50,000/- per month from various streams of income. In the alternative the respondent stated that the application should be allowed on condition that two thirds of the decretal sum thus KShs. 136,666.67 be paid to her advocate on record directly and the balance thereof be deposited in a joint interest earning account held between the advocates on record.

4. I have given due consideration to the application herein. The principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the Civil Procedure Rules. The applicant must establish that substantial loss may result to him/her unless the order is made; that the application has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been furnished.

5. The appellants seek to stay a money decree. In determining the issue of substantial loss, financial position of both parties have to be put into consideration. See **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410**. The appellants allege that the respondent will not be able to refund the decretal sum. In such a scenario, the burden is upon the applicant to prove that the Respondent will not be able to refund as alleged. See **Caneland Ltd. & 2 Others v. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999**. It is however not possible for an applicant to know the respondent's financial means. Settled law is that all an applicant can reasonably do, is to swear that the respondent will not be in a position to refund the decretal sum. Upon so swearing, the evidential burden shifts to the respondent to show that he or she is financially capable. See: **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001**. Applying the test, the respondent in her affidavit contended that she is a business person who earns KShs. 50,000.00 per month and is able to refund the decretal sum in the event the appeal succeeds. Other than the assertion, the respondent has not tendered any evidence to prove her means or rather her financial capacity. In the circumstances, I find that the respondent failed to rebut the applicants' claim and it follows that the applicants are likely to suffer substantial loss.

6. On the issue of time, the motion was filed on 29<sup>th</sup> August, 2018 while the judgement sought to be appealed against was delivered on 19<sup>th</sup> July, 2018. Clearly, the motion has been brought within the prescribed period of 30 days and is thereby timeous. The appellants have further offered to deposit the decretal sum as security. In the circumstances, I find that the appellants have satisfied the requirements for grant of stay.

7. Accordingly, I find merit in the application and it is hereby allowed in the following terms:

***a) There be stay of execution of the judgement in Machakos Chief Magistrates' Court CMCC No. 618 of 2015 on 19<sup>th</sup> July, 2018***

*pending hearing and determination of the appeal.*

*b) The appellant do deposit the decretal sum in a joint interest earning account in the names of the parties' advocates within 14 days from the date of this ruling failing which the stay shall automatically lapse.*

*c) The costs of the Application shall abide in the appeal.*

It is so ordered.

Dated and delivered at Machakos this 25<sup>th</sup> day of April, 2019.

**D. K. KEMEI**

**JUDGE**