



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.196 OF 2018

TRAKANA MOMBASA LTD.....1ST APPELLANT

DEDA JAJI NZUIYA.....2ND APPELLANT

-VERSUS-

GEORGE AMWAYI ISAYA.....RESPONDENT

(Being an Appeal from the Judgment/Decree of Hon. Wahome,

Chief Magistrate, Molo delivered on 11th December, 2018 in Molo CMCC No.127 of 2018)

RULING

1. This is a ruling on application dated 15th April 2019 which seeks stay of decree dated 19th March 2019 in Molo CMCC No.127 of 2018 and any consequential orders thereto. Grounds on the face of the application are that the applicant was granted conditional stay pending appeal in the trial court; condition being that they deposit half the decretal amount of Kshs.6,594,180.00.
2. Further ground is that the conditions for stay are oppressive, defeatist of the appeal lodged, and renders the appeal nugatory and it will put the appellant to ruinous difficulties.
3. That payment of half decretal amount without security will amount to substantial satisfaction of the decree yet the respondent has not demonstrated ability to reimburse the money in the event that the appeal succeed
4. That the terms for stay if not set aside will amount to compromise of the appellants right of appeal.
5. The application is supported by affidavit sworn by Caren Jaguga legal officer of the applicant's insurer M/S Fidelity Insurance. She deponed that the appeal filed raises serious issues of law and appeal should be heard on merit
6. She further averred that due substantial amount involved, the appellants are amenable to providing bank guarantee for performance of the decree or deposit part of the decretal amount in a joint interest earning account in the name of both Advocates; that no prejudice is likely to be occasioned to the respondent in the event the appeal succeeds. Further that it is improper to impose terms tantamount to settling a judgment/decretal sum to a respondent before an appeal with high chances of success is heard and determined.
7. The legal officer further averred that that this matter is in the series of three matters which if judgments sum combined add up to Kshs.10,765,415.00.

RESPONDENT'S SUBMISSIONS

8. In response, the respondent submitted that the application is bad in law, made in bad faith, inept and lacks merit; an afterthought and amount to abuse of court process. The respondent averred that the applicant was heard on application for stay and orders granted with conditions.
9. Respondent averred that the appellant do not have a viable appeal and his evidence in the trial court included that of an eyewitness. He added that a bank guarantee or depositing money in an interest earning account would not be fair, as it will amount to delay of the judgment.
10. Respondent further averred that as a result of the accident, he sustained very severe injuries and is not able to do anything for himself; that he has to be carried throughout and in view of his incapacitation, if the court orders are not implemented, he stands to suffer great prejudice.

11. He urged court not to look at his financial ability but substance of appeal. He added that the respondent never adduced any evidence in the trial court to rebut the respondent's evidence.

ANALYSIS AND DETERMINATION

12. This matter is in a series of three files. The other two files being HCCA NO.197 and 198 both of 2018. I have made a determination on prayer for stay of execution pending appeal in HCCA NO.198 of 2018. I adopt my findings in the ruling in that file and issue orders as hereunder:-

FINAL ORDERS

1. Stay of execution do issue on condition that the applicant do deposit half the decretal amount in a joint interest earning account in the name of both Advocates herein
2. Deposit to be done within 21 days from today's date
3. Failure to comply with order 2 above execution process to proceed.
4. Mention after 30 days for directions on appeal.

Judgment Dated, signed and delivered at Nakuru this 27th day of June 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Ms. Sambu Counsel for Appellant

Gekonga Counsel for Respondent