



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.198 OF 2018

TRAKANA MOMBASA LTD.....1ST APPELLANT

DEDA JAJI NZUIYA.....2ND APPELLANT

VERSUS

RICHARD KETER CHEPKWONY (Suing as the legal rep. of the estate of

JONATHAN KIPLAGAT CHANGWONY (Deceased).....RESPONDENT

(Being an Appeal from the Judgment/Decree of Hon. Wahome, Chief Magistrate, Molo delivered on 11th December, 2018 in Molo CMCC No.125 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.125 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.2,872,775.00.
2. Further that the conditions for stay are oppressive, defeatist of the appeal lodged, and besides rendering the appeal nugatory, it will put the appellants 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 succeeds. That the terms for stay if not set aside will amount to compromise of the appellants right of appeal.
4. The application is supported by affidavit sworn by Caren Jaguga Legal Officer of the applicant's insurer. She deponed that the appeal filed raises serious issues of law and fact and has high chances of success restated grounds set out above.
5. She further averred that 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.
6. 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

7. 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.
8. 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.
9. 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

10. I have considered arguments for both parties. What I consider to be in issue is whether the applicant has an appeal with high chances of success and whether the respondent will suffer any prejudice if stay of execution is granted pending appeal.

11. I note from the memorandum of appeal attached to the application that the applicant is challenging both liability and quantum. The lower court file has not been availed to enable look at the evidence adduced in the lower court and judgment delivered. It would therefore be difficult for me at this stage to make a finding as to whether the appeal has high chances of success.

12. I however note that the applicant is agreeable to abiding by conditions that this may may find appropriate to impose and they have proposed offer bank guarantee or deposit part of decretal amount in an interest earning account in the joint names of Advocates herein. I know the respondent's enjoyment of successful litigation will be delayed but it would be in the interest of justice to allow an aggrieved party to exercise its right of appeal; especially in a matter where the appeal has been filed without delay. I am therefore inclined to allow prayer for stay of execution on conditions set out 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 to confirm compliance with Order 1 and 2 above and 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