



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 21 OF 2019

KYALO MUSYOKI.....APPELLANT

VERSUS

BIBIANA MBULWA & NICHOLAS MUENDO

KITHOME (*Suing as the Administrators of Estate*)

***of Kisingu ngului (Deceased)*.....1ST RESPONDENT**

MAKINDU MOTORS LIMITED.....2ND RESPONDENT

JOSHUA MAKAU WAMBUA.....3RD RESPONDENT

RULING

1. The Appellant/Applicant filed this application dated 17/04/2019 seeking an order of stay of execution pending appeal. The main ground being that the trial court had granted 30 days stay of execution on 7th day of March 2019 and the said stay has lapsed.
2. That the Applicant is apprehensive that the Respondent may seek to execute the decree if an order of stay is not granted.
3. The application is supported by the affidavit of Thomas Geoffrey Onyancha Advocate for the Appellant.
4. He has deponed that the Judgment amount is Kshs. 740,000/= which is a colossal sum. That the appeal raises valid points of law and fact. The Applicant is willing to offer security for the appeal as shall be determined by the court.
5. In his submissions filed on 14/06/2019 Mr. Onyancha argues that the Applicant has satisfied all the essential conditions for the grant of stay of execution namely;
 - substantial loss may result to the Applicant unless the order is made.
 - the application has been made without undue delay.
 - security for costs has been given by the Applicant.
6. That there is nothing to show that the Respondent is capable of refunding the decretal sum in the event of a successful appeal.
7. He referred the court to 2 cases namely;
 - (i) **Civil Appeal No. 20 of 2016 Dr. G. N. Muema P/A (sic) Mt View Maternity & Nursing Home –Vs- Miriam Maalim Bishar & Jimale Rashid Hassan Civ.**
 - (ii) **Civil Appeal No. 18 of 2017 at Malindi Amal Hauliers Ltd –Vs- Abdul Nasir Abukar Hassan.**
8. In her replying affidavit the Respondent Bikiana Mbulusa Ngima opposed the application. She deponed that the judgment sum of Kshs. 740,000/= is less than the Kshs. 1 Million that the Applicant had promised to give her as compensation. She deponed further that she owns 20 held cattle valued at Kshs. 1 Million and so can refund the decretal sum if paid. She added that the Applicant adduced no evidence to challenge her evidence during the trial.

9. M/s Mutunga for the Respondent in her submissions opposed the application.

10. She argued that stay of execution is not automatic and the Applicant had not shown that he has an arguable appeal. She also referred to the Kshs. 1 Million offer by the Applicant in the lower court. That the Respondent has the means with which to make a refund if the money is paid.

11. Mr. Onyancha in his supplementary affidavit denied that the Applicant had promised to pay the Respondent Kshs. 1 Million as compensation.

12. From the material before me it is confirmed that the Applicant has filed an appeal against the judgment in Makindu – spm civil case No. 12 of 2013. From the grounds of appeal it is clear that the Applicant is challenging the whole judgment which was delivered on 07/03/2019. The appeal was filed within time on 05/04/2019. The trial court had granted 30 days stay of execution. The application herein was filed on 16/04/2019 which is about 11 days after the expiry of the 30 days. I find this not to be inordinate delay.

13. On the issue of the promise to compensate the Respondent I can only confirm that once the lower court record is availed.

14. The Respondent in her replying affidavit has indicated that the Applicant did not adduce any evidence in the lower court to counter her evidence. In reply Mr. Onyancha in his supplementary affidavit deponed that the Respondent was denied an opportunity to adduce evidence when his application for an adjournment was denied by the trial court. Again I am not able to confirm that in the absence of the record.

15. There is no dispute that the Respondent lost her loved one through this accident. Whichever way someone was found liable and she has a judgment in her favour. There has been no delay in filing the appeal and the application.

16. I grant the prayer for stay of execution on the following conditions;

(i) The Applicant to pay Kshs. 300,000/= to the Respondent through her advocate within 30 days.

(ii) The balance of the judgment sum to be secured through a bank guarantee within 30 days.

(iii) Non compliance will result in automatic vacation of the order staying execution.

(iv) Costs in cause.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 29TH DAY OF JULY, 2019 AT MAKUENI IN OPEN COURT.

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HON. H. I. ONG'UDI

JUDGE