



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 34 OF 2017

ALI SUMEYA T/A BASH HAULIERS LIMITED..... APPELLANT

VERSUS

CYNTHIA ODIWA AND CLEOPHAS ONDIEK AGINGU (Suing as Administrators

of the Estate of the Late JAMES MUSYOKA MWANZIA).....RESPONDENTS

RULING OF THE COURT

1. Before me is an Application by way of Notice of Motion dated 27/04/2017 filed by the Appellant/Applicant Ali Sumeya T/a Bash Hauliers limited. It was brought under Order 42 Rule 6 and Order 22 (i) of the Civil Procedure Rules and Sections 1A, 1B, 63(e) and 3A of the Civil Procedure Act. The Applicant seeks the following prayers, two of which have been spent as follows:-

1. (spent)

2. (spent)

3. That this Honourable court be pleased to grant a stay of execution of the judgment delivered by Hon C.A. Ocharo P.M on 27/02/2017 in Machakos CMCC No. 616 of 2013. Cynthia Odiwa and Cleophas Ondiek Agingu (suing as Administrators of the Estates of the late James Musyoka Mwanzia) Vs Sumeya T/a Bash Hauliers Ltd pending the hearing and determination of the appeal herein.

4. The costs of this Application be provided for.

2. The Application has grounds on the face of the Notice of motion and affidavit in support dated 25/04/2017 sworn by George Mangale Mwajosi who is a Senior Industrial Relations Officer of the Appellant/Applicant. Among the grounds is that the trial court erred in awarding damages that were inordinately high and that the appeal was arguable and not frivolous as well as that the Applicant will suffer substantial loss if execution is allowed to go on. The Applicant also indicated his willingness to deposit the decretal sums pending the hearing of the appeal. Finally the Applicant contended that the Respondent might not be able to refund the monies in the event the appeal succeeds.

3. The Application is opposed. A Replying Affidavit dated 11/05/2017 by Cynthia Odiwa was filed on 12/05/2017. It was deponed inter alia that the Applicant has not satisfied the conditions for the grant of an order of stay of execution and that the application is meant to deny the Respondent the fruits of the judgement and finally that should the court be inclined to allow the Application then the Applicant should pay half the decretal sums while the other half be deposited into an interest earning account in the names of both Advocates for the parties.

4. Learned Counsels for the parties filed written submissions. The Applicant's submissions were filed on 3/10/2017 while the Respondents submissions were filed on 28/09/2017. I have perused both submissions and the various authorities cited. Indeed the Appellant's Application is basically brought under Order 42 Rule 6 of the Civil Procedure Rules which provides for the parameters under which stay of execution of a decree or order can be granted pending Appeal. The same provides as follows:-

“6(2) No order for stay of execution shall be made under sub-rule (1) unless-

a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and the Application has been made without unreasonable delay.

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

5 As regards the duration taken by the Applicant in filing this Application, it is noted that the Judgement was delivered on the 27/02/2017 and the Memorandum of Appeal was lodged on 27/03/2017. The Application was filed on 3/05/2017 which is about two months and one week from the date of delivery of the Judgement. I find the said period to be reasonable and not inordinately late as contended by the Respondent. The Application was therefore filed without inordinate delay.

6. As regards the issue of substantial loss the Applicant has indicated that the decretal sums is running into about Kshs. 2 million and if the Respondent is not restrained will proceed to execute against the decree and thereby render the Applicant's Appeal nugatory in the end. The Applicant has further expressed his fears of the Respondents inability to refund the monies in the event the Appeal succeeds. I find that once the Applicant has indicated that the Respondent is a person of straw and not in the any gainful employment, the burden should then shift to the Respondent to show that she is not a person of straw. The issue of the means or wherewithal of the Respondents finances and income is certainly an issue within her knowledge and she should therefore come out and state the same. The Respondent has not done so. The unexplained financial position of the Respondent is sufficient reason to justify the Appellant's fears that she may not be able to reimburse the monies should the appeal succeed in the end. The appeal filed herein is not frivolous and is arguable and as such the Applicant should be allowed to ventilate the same and at the same time the Respondent who is the successful litigants in the court below should not be unduly kept away from the fruits of the judgement. This then calls for a balance to be struck and which has been provided by the Applicant who has agreed to furnish security for the due performance that may ultimately be binding upon him. The security once deposited will assuage any fears or concerns of both the Applicant and the Respondent as they canvass the appeal. I note that the Applicant's main concern in the judgement appealed against is the aspect of the multiplier on the loss of dependency and is agreeable to a lower one of between 12 – 15 years. Learned counsel for the Respondent submitted that the Applicants' counsel had proposed in the lower court general damages of Kshs. 1,525,300/= excluding special damages. It was therefore the submission of the Respondent's counsel that half of the decretal sums be paid and the balance be placed in an interest earning account pending the determination of the Appeal. If the correspondence between the Applicant's insurers vide an e-mail dated 4/3/2017 and their Advocates regarding the issue of the need to lower the multiplier to 12 – 15 years is to be considered, then I find the proposal by the Respondent's counsel would not prejudice the Applicant.

7. In the result the Applicants Application dated 27/04/2017 is allowed in the following terms:-

a. The Applicants to pay to the Respondents half the decretal sums and the balance to be deposited into an interest earning account in the joint news of the Advocates for the parties within the next forty five (45) days and in default the order of stay shall lapse.

b. The costs of the Applications shall abide in the Appeal.

It is so ordered.

Dated and delivered at Machakos this 17th day of January, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Mutua for Ombati - for the Appellant/applicant

No appearance for Muhia - for the Respondent

Kituva - Court Assistant