



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

MISC. CIVIL CASE NO. 4, 5 AND 6 OF 2017

BOARD OF TRUSTEE ANGLICAN CHURCH OF KENYA....APPLICANT

VERSUS

NASIBO IBRAHIM ABDI

ABDI SAAM DUBA & ANOTHER

BENSON BORU JARSO.....RESPONDENTS

(MISC.CIVIL APPLICATION NUMBERS 4/2017, 5/2017 AND 6/2017)

RULING

The applications dated 13th December, 2017 seek the following orders:

1. That this Honourable court be pleased to grant leave to the applicants to file an appeal out of time against the decision and judgment of the Principal Resident Magistrate's court at **MARSABIT in MARSABIT PMCC NO. 37 of 2016 – BENSON BORU JARSO Vs. BOARD OF TRUSTEES OF THE ANGLICAN CHURCH OF KENYA DIOCESE OF MARSABIT.**
2. That upon granting prayer NO. 3 above, this Honourable court be pleased to issue an order for stay of execution of the judgment and decree in **MARSABIT PMCC NO. 37 OF 2016** pending the filing, hearing and determination of the said Appeal.

The applications are supported by the affidavits of **SAMUEL BAKE ADO DURITO**. The respective respondents filed replying affidavits in response to each application.

MR. KAIMBA appeared for the applicant. Counsel maintains that the trial court delivered its judgment on 30/10/17. He was instructed by his client to file an appeal on 4/12/17. It is submitted that the appeal has high chances of success as the amount of damages awarded by the trial court is beyond that court's jurisdiction. The applicant is willing to abide by any terms imposed by the court.

MR. ORAYA appeared for the respondent and opposed the applications. Counsel maintains that the issue of liability was settled by consent. The applicant cannot escape liability. The applications are delaying tactics meant to delay the respondents from realizing the fruits of their litigation. Counsel maintains that the application lacks merit and should be dismissed. Should the court grant the applications, then the decretal sums plus costs should be deposited in a joint interest earning account in the names of both counsels.

The dispute herein involves a road traffic accident which occurred on 11th April 2015 along the MARSABIT-MOYALE road. The respondents were passengers in motor vehicle registration number KBE 518P owned by the applicant. On 10/4/2017 counsel for the parties recorded consent on liability whereby the applicant was to shoulder 80% liability while the respondents were held 20% liable.

The judgment of the trial court was delivered on 30/10/2017. The current applications were filed on 13th December, 2017. Although there is no strong explanation by the applicant on the delay in filing the appeals, I do find that the delay is not inordinate: The record of the trial court show that when the judgments were delivered, counsel for the applicant was not present. The period of about 45 days delay is not inordinate taking into account the distance involved in prosecuting matters in MARSABIT.

The applicant contends that the amount awarded by the trial court in form of damages is excessive. That issue will be determined when the appeal is fully heard and determined. Liability was agreed upon and the only issue on appeal is that of quantum. In **PMCC number 36 of 2016**, the trial court awarded general damages of **Ksh 4 million** less the 20% Contribution. In **PMCC number 27 of 2016**, the trial court awarded **Ksh 3,470,500** as the total award less 20% Contribution. In **PMCC number 37 of 2016**, **Ksh7, 240,000** was awarded less the 20% Contribution. The appeals arise from those awards.

The applicant is entitled to pursue its appeal as it is not satisfied with the decision of the trial court. The cumulative sum awarded in the three cases is over **Ksh 10 million**. This is a huge amount. It would be imprudent for this court to order the applicant to deposit the entire sum in a joint account. However, the respondents are entitled to enjoy the fruits of their litigation. They should be defending the appeal while knowing that there is hope in getting their awards. Liability was agreed upon. They are entitled to some compensation irrespective of the outcome of the appeals. The applicant cannot be allowed to prosecute the appeals without suffering the inconvenience of fulfilling some conditions.

I do find that the application is merited and is hereby allowed subject to the following terms:-

1. Applicant to file and serve its memorandum of appeal within thirty (30) days hereof.
2. The applicant to deposit part of the decretal sum in a joint interest earning account of both counsels within sixty (60) days as follows:

a. PMCC NO. 36/2016 – KSH 1.0 Million

b. PMCC NO.27/2016 – KSH 1.0 Million

c. PMCC NO.37/2016 – KSH 1.5 Million

TOTAL – KSH. 3.5 Million

3. Costs of the application shall follow the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 8th DAY OF MARCH, 2018.

S. J. CHITEMBWE

JUDGE.