



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE MISC APPL. NO. 237 OF 2016

KENNEDY ONGERE.....1ST APPLICANT

JOSEPH WAMBUGU.....2ND APPLICANT

VERSUS

ANTONY KINYANJUI KARIUKI.....1ST RESPONDENT

MICHAEL MBOYANO.....2ND RESPONDENT

KENYA BUS SERVICES MANAGEMENT.....3RD RESPONDENT

RULING

1. The Application dated 7th February, 2018 seeks orders:

1. Spent

2. Spent

3. That there be orders of stay of execution of the judgment and decree of this Honourable court, judgment delivered on 24th June 2016, pending the hearing and determination of Civil appeal No. 331 of 2017.

4. That time within which to comply with Orders issued on 30th November, 2017 be enlarged and/or that the be granted a further 14 days, or such other time as the court may specify, to comply with the orders granted.

2. The application is based on the grounds stated therein and is supported by the affidavit sworn by Stella Mathenge, advocate for the Applicant. It is stated that judgment was entered in the Lower Court on 8th March, 2016. That the Applicants were found 20% liable and ordered to pay Ksh. 323,305 as the decretal sum plus costs and interest. Subsequently, the Applicants were given leave to appeal out of time upon complying with the conditions given for stay of execution but the conditions were not complied with in time. The delay in complying with the conditions is blamed on the unavailability of the court file. It is stated that the cheque for the deposit of security is ready and that the Applicants are ready to comply with the court orders.

3. The Application is opposed. The 1st Respondent filed the grounds of opposition dated 19th February, 2018. The said grounds are as follows:

1. The original decree was given on 8th April, 2016. Appeal No. 331 of 2017 was filed on 29th June, 2016 hopelessly out of time. It was validated by order made on 19th October, 2016 on condition the decretal sum was deposited in a joint account in 30 days. There was no compliance. By another order made on 30th November, 2017 the applicants were granted another 30 days to comply with the earlier orders. There was no compliance. This matter is therefore *res judicata*. There is, also, abuse of court process.

2. The Applicants' share of liability was only 20% by consent recorded in court which is Ksh.323,305/= yet they seek to stay execution of everything which is in bad faith.

3. There was no order to deposit the decretal sum in court and the entire application is misconceived.

4. I have considered the application, the response to the same and the submissions made by the counsels for the respective parties.

5. The orders for the deposit of security for the due performance of the decree were made on 19th October, 2017 and extended for a further 30 days on 30th November, 2017. However, the Applicants still failed to deposit the security. There is therefore no satisfactory explanation given for the delay. Be as it may, now that the cheque for the deposit of the security is said to be ready, I allow the application on condition that the said deposit be made within 14 days from the date hereof.

6. It is noted that there is no dispute that the Applicants were to shoulder 20% of liability. For the avoidance of doubt, the stay of execution herein only affects the Applicants and does not touch on their Co-Defendants 80% share of liability.

7. Costs of the application to the Respondent.

Dated, signed and delivered at Nairobi this 22nd day of May, 2018

B. THURANIRA JADEN

JUDGE