REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 54 OF 2018

ALEX KIPRUTO MALEL.....1ST PLAINTIFF

CHERANGANI HILL LIMITED.....2ND PLANTIFF

VERSUS

EVELINE KAVUKA KANYERE (Suing as legal administrator of the estate of

KENNEDY AYIGA BUKUKU EMBUKANE, DECEASED.....RESPONDENT

RULING

1. The Applicants are the Appellants in the present Civil Appeal. They were Defendants in ***Molo Chief Magistrate's Civil Suit No. 76 of 2017***. The Respondent was the Plaintiff.

2. After a fully-fledged trial, the Learned Trial Magistrate delivered a judgment on 17/04/2018 in which he assessed liability at 90%:10% against the Appellants and damages at Kshs. 10,907,264.80/- all inclusive. The Appellants are aggrieved by that judgment and have preferred an appeal before this Court. They have filed a Memorandum of Appeal with fourteen grounds of appeal.

3. In addition, the Respondents have filed the present Application dated 14/05/2018. It seeks the following substantive prayer:

> THAT there be stay of execution of the decree herein pending the hearing and determination of this appeal against the judgment and order of the Honourable Magistrate against the applicant/appellant

4. The Application is supported by the Affidavit of Lilian Simiyu, a Legal Officer of Phoenix of East Africa Assurance Company Ltd, the Company that insured the Appellant's motor vehicle which was involved in the accident which was the subject matter of the litigation in the lower Court.

5. The Application is opposed. Mr. Gilbert O. Mamwacha, the Advocate for the Respondent filed a Replying Affidavit in opposition.

6. An Application for stay is, procedurally and jurisprudentially, a well-trodden path. The governing law is Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsuled in that Rule in the following terms:

> 6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (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 that the application has been made without unreasonable delay; and
>
> (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.

7. The principle encapusuled in that Rule has been expounded by our decisional law. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

> *It was laid down in* ***M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979***, (following **Wilson v Church (No 2) (1879) 12 Ch 454 at p 488**) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.
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> Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

8. Hence, under our established jurisprudence, to be successful in an application for stay, an Applicant has to satisfy a four-part test. He must demonstrate that:

> a. The appeal he has filed is arguable;
>
> b. He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
>
> c. The application was made without unreasonable delay; and
>
> d. He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

9. In the present case, the Respondent has not attempted to argue that the filed Memorandum of Appeal does not raise any arguable point of appeal. That is just as well. I have looked at the Memorandum of Appeal and I have therefore no difficulty in concluding that the grounds of appeal enumerated are arguable. I should point out that to earn a stay of execution, one is ***not*** required to persuade the Appellate court that the filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict. The Appellant contests both apportionment of liability as well as on assessment of damages.

10. On the question of substantial loss the Applicant sought to establish that the appeal will be rendered nugatory by the high likelihood that the Respondent will be unable to refund any amounts paid to him. This is an allegation raised in the Supporting Affidavit and it is not controverted in any way by the Respondent. In ***National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another*** the Court of Appeal held thus:

> This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because a respondent because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

11. In this case, the Respondent's only response is that he is entitled to the fruits of his judgment and pleads with the Court to order that at least half of the decretal sum to be paid to him so that the amount can be spent on the children of the Deceased for their basic necessities. This is a humanistic plea, one understood with much empathy – but considering the contested nature of the case, it is probably best to await the final resolution before the proceeds of the litigation can be liquidated.

12. It is not contested that the Application was timeously made. However, on security for the due performance of any decree which might ultimately be binding upon the Appellant, the Appellant offers an interesting argument: that given the decision by Justice Onguto in ***Law Society of Kenya v Hon. AG & 3 Others [2016] eKLR,*** the amount of security ordered should be capped at Kshs. 3 Million. The argument misrepresents the import of that decision: That case upheld the constitutionality of the amendments to the Insurance (Motor Vehicles Third Party Risks) Act which capped the amount payable by an insurer in respect to claims by a third party against an insured following a road traffic accident to Kshs. 3 Million. That judgment said nothing about the liability against an owner of a motor vehicle sued by a victim of an accident. The present suit is one against the owner of the motor vehicle which caused an accident. The judgment entered is against the owner. It is lawful for the judgment to go above Kshs. 3 Million. Of course, the Insurance Company can only be liable to the tune of Kshs. 3 Million. But the owner of the motor vehicle is liable for the full amount entered as judgment.

13. As such, the Insurance Company cannot ask for a capping of the full decretal sum only on account of the sum exceeding the capped amount it is statutorily obliged to pay under the Insurance (Motor Vehicles Third Party Risks) Act. Indeed, the very fact that the Insured, the Appellant, is potentially liable to pay an amount exceeding the insured amount is, in my view, more of a reason to demand that the insured furnishes security for the due performance of any decree that might ultimately be binding upon him.

14. In the circumstances I will grant the stay of execution requested upon the following conditions:

> **a. That the Applicant deposit the entire decretal sum in in court within thirty days of today;**
>
> **b. That the Applicant does file a Record of Appeal within ninety (90) days of today so as to expedite the appeal process.**
>
> **c. Costs of this Application will follow the costs in the Appeal.**

15. Orders accordingly.

Dated and delivered at Nakuru this 28th day of June, 2018.

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JOEL NGUGI

JUDGE