



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 11 OF 2018

MURIUKI RUTH.....APPELLANT

-VERSUS-

MUENI MBALUKU & JOHN MUKUMBU MUASYA

(suing as personal representative of the

estate of late John Mbaluku (deceased).....RESPONDENTS

RULING

INTRODUCTION

1. By a notice of motion dated 12/02/2018, the Appellant/Applicant seeks stay of execution of the trial court decree in Makindu CC 534/2015 pending hearing and determination of the appeal *inter alia*.
2. The motion is anchored on the provisions of order 42 (6&7) Civil Procedure Rule 2010 *inter alia* and is based on the grounds on the face of the motion.
3. The same is supported by the affidavit of Caroline Kimeto sworn on 12/02/2018.
4. The same motion is opposed and the Respondent has filed Replying Affidavit sworn by Evans M. Muchama on 08/03/2018.
5. The parties filed and served written submissions.
6. The Applicant case is that the Respondent was given judgment in her favor on 07/12/2017 whereby the Appellant was held liable to the extent of 70% and the Respondent side 30% to blame. The court quantified the award to the tune of Kshs.1,803,886 plus costs and interest.
7. The aforesaid verdict provoked the instant appeal and the motion canvassed herein. The appeal impugns both the findings on liability and the quantum as excessive in the circumstance of the case.
8. There is averment that the trial magistrate findings were and are not supported by the evidence adduced and law.
9. The Applicant is apprehensive that execution may be levied for the amount awarded and in event the appeal succeeds the same may be rendered nugatory as Respondent may not be able to refund the decretal amount.
10. There is averment that the appeal has high chance of success vide grounds set out in the memorandum of the appeal annexed to the Supporting Affidavit.
11. The applicant avers that the application was filed timeously and execution will occasion Applicant side hardship if sought orders are not granted.
12. Further the Applicant avers that she is ready via her insurance to deposit entire decretal amount in the interest earning account in court as security under Order 42(6) CPR.
13. The Appellant submits that she has met the threshold for grant of orders set in that the application was filed without unreasonable delay there will be substantial loss if order sought is not granted.

14. And she is ready to furnish security for performance of the decree as per law provided. She cites the case of **KIAMBU TRANSPORTERS VS KBC (1997) EKLK**.

15. The court notes that the Applicant submits that the Respondent is willing to concede the application, but the point of departure or disagreement is the condition to be attached to that concession in that the Applicant proposes the depositing of the entire decretal amount in court but the Respondent seeks to be paid 50% of the same pending appeal.

16. The Respondent case is that the appeal has no slightest chance of success. The Respondent via her advocate provides the 50% of the decretal amount to be paid to the Respondent pending appeal.

17. It is submitted that the Respondent will be able to repay the amount if paid pending appeal in event appeal succeeds.

ISSUES, ANALYSIS AND DETERMINATION

18. After going through the pleadings, affidavits and the parties submissions, I find issues arising are:-

i. Whether the conditions for grant of stay have been met?

ii. If above is affirmative, what are the appropriate orders.

iii. What is the order as to costs?

19. The scanty evidence on record (pleadings) appears to suggest that the deceased motor vehicle and that of the Applicant collided as the one driven by the deceased entered main road thus occasioning fatal accident in which the deceased died.

20. Thus attracting the fatal accident claim in which an award of Kshs.2, 255,800 was awarded and apportionment of liability in favor of Respondent made at a rate of 70:30 and against Appellant.

21. This is gathered in the amended memorandum of appeal filed on 12/02/2018. The court has not seen any trial court pleadings proceedings and judgment to be able to discuss the possibility of the chances of the appeal.

22. This court is confined to scan the facts furnished by parties to enable it establish whether the threshold for grant of stay of execution pending appeal under the provisions of order 42(6) and (7) Civil Procedure Rule 2010 has been demonstrated.

23. The provisions aforesaid requires prove of timeous filing of the application, prove of potential substantial loss in event order sought is denied and willingness and ability of the Applicant to furnish security for performance of the decree.

24. On the first limb, the judgment was delivered on 07/12/2017 and the instant Notice of Motion was filed on 12/02/2018 a span of about two months.

25. The same span has not been contested by the Respondent as inordinate delay or unreasonable delay. The court thus accepts same to be timeous filing. On the second limb of possibility of substantial loss being inflicted upon Applicant in event the order is not granted, the Applicant submits that there is no prove Respondent will be able to refund the decretal amount in event the same is paid to her pending appeal and appeal succeeds.

26. The Respondent has not sworn any affidavit to rebut that nor demonstrate her means and ability to refund the same in event she is paid decretal amount and the appeal succeeds. Thus court makes a finding that limb has been satisfied.

27. On the third limb, the Applicant avers that he is ready and able to furnish security for the performance of the decree pending appeal.

28. The Respondent response is that the 50% of the same amount should be paid to her pending appeal as she is entitled to the fruits of the judgment.

29. The court has thus noted that the entire application was on the condition of stay as the Respondent is not seriously contesting the first two limbs of Order 42 (6) CPR only the conditions of stay.

30. The Applicant has not demonstrated that even if the appeal succeeds the liability attributed to the deceased will be 100%. The absence of proceedings and judgement rendered by the trial court handicaps the court in having a view as to the possibility of the chance of success of the appeal.

31. Thus the court will grant stay prayed on the following conditions:-

1) The stay of trial court decree is granted on conditions that:-

i. Kshs.300,000/= is paid to the Applicant pending appeal.

ii. The balance to be deposited in interesting earning account in joint names of the parties advocates

2) The above (1) to be implemented within 45 days in default execution to issue.

3) Costs in the main cause.

SIGNED, DELIVERED THIS 20TH DAY JUNE OF 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE