



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 193 OF 2016

WILLIAM MWELI MULI & AGNES WAUSI MWELE (Suing for and on

behalf of the family and estate of ESTHER MBITHE MWELE).....PLAINTIFFS

VERSUS

WILSON WANYOIKE NJOROGE.....1ST DEFENDANT

KIRIGUN STANLEY.....2ND DEFENDANT

NORTHERN CONSTRUCTION LIMITED.....3RD DEFENDANT

RULING

This is an application dated 16th March, 2018 for the substantive orders that there be a stay of execution of the judgment delivered on 7th December, 2016 pending the hearing and determination of the applicants' intended appeal to the Court of Appeal. There is also a prayer for extension of time to file and serve Notice of Appeal and that the firm of J. Makumi & Company Advocates be allowed to come onto record in place of the firm of Kairu & Mc court Advocates. The application is brought under Order 9 Rule 9, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules; Sections 3A, 95 of the Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya.

The reasons therefor have been set out and there is also a supporting affidavit sworn by the 1st defendant herein. The application is opposed and there is a replying affidavit sworn by the 2nd plaintiff. Counsel agreed that the application shall be decided based on affidavit evidence.

I have considered the grounds and rival affidavits by the parties. The record will show that an earlier application was filed by the firm of Kairu & Maccourt Advocates on 8th February, 2018 which appears to have been abandoned. That application sought the same orders.

It may not be factually true that the applicants came to learn of the judgment on 16th February, 2018 from their insurers. The applicants were represented by the firm of Kairu and Mccourt Advocates who were instructed by the insurance company. A party represented by counsel is deemed to know about the proceedings and outcome thereof, when those proceedings are conducted and determined in the presence of counsel. By their own admission, they were represented and that is why I have said it is factually incorrect that they came to know about the judgment on 8th February, 2018.

That notwithstanding, they have a right to change counsel and representation; therefore leave is granted for the firm of J. Makumi & Company Advocates to come onto record on behalf of the applicants. The orders sought by the applicants are discretionary. That discretion has to be exercised judicially taking into consideration the interests of both parties.

The plaintiffs have a judgment in their favour. At the same time, the applicants have a right of appeal. The applicants submit that if leave is not granted, they are likely to suffer loss and if stay of execution is not allowed the appeal shall be rendered nugatory.

Communication from the previous advocates on record to the advocates for the plaintiffs, relating to settlement of the claim by the applicants, committed the applicants to pay a sum of Kshs. 1,025,600/=. That commitment has not been contradicted or denied and therefore remains binding, notwithstanding it was made by the previous advocates.

On the other hand, the plaintiffs admit part settlement of the decretal sum. Without any evidence to show that fact, the court can only assume that it is the insurance company that has settled its liability under the policy.

That being the case, and the applicants having committed themselves to abide by any conditions set, I make the following orders;

Time to file the appeal is extended by 30 days from the date of this ruling. There shall be a stay of execution on condition that the applicants pay the plaintiffs the sum of Kshs. 1,025,600/= within 30 days from the date of the ruling. In default execution shall proceed.

The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 14th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE