



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 145 OF 2016

GITHUKA DENIS.....1ST APPLICANT/APPELLANT

AUGUSTINE THUKU GITHU..... 2ND APPLICANT/APPELLANT

- V E R S U S -

DORICE ATIENO MIRUKA.....RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 28.7.2016 taken out by Githuka Dennis and Augustine Thuku Githu, the 1st and 2nd appellants/applicants. In the aforesaid motion the applicants are basically applying for an order for stay pending appeal. The motion is supported by the affidavit of Victor Kiminja. When served with the motion, Dorice Otieno Miruka, the respondent herein filed a replying affidavit she swore and that of Mr. Okao, her advocate to oppose the motion. When the motion came up for hearing, this court gave directions to have the same disposed of by written submission.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. Before considering the substance of the motion it is important to first state the background of the motion. The respondent filed a compensatory suit before the Chief Magistrate's Court Milimani Commercial Court's, Nairobi for the injuries she allegedly sustained in an accident which occurred on 10.10.2010 along Jogoo road. It is said that the respondent was lawfully walking as a pedestrian when she was knocked down by motor vehicle registration no. KBE 342Y which motor vehicle was owned by the 1st respondent and at the material time driven by the 2nd respondent. The appellants filed a defence to deny the respondent's claim. When the suit came up for hearing, parties recorded a consent order whereby the appellants agreed to shoulder 75% liability while the respondent would shoulder 25% liability. It would appear from the records that parties agreed to file medical reports and submissions. The court then proceeded to write its judgment on the basis of the documents produced by consent. In the end the learned Senior Principal Magistrate entered judgment in favour of the respondent and against the appellants in the following terms:

i. General damages for pain and suffering	ksh.2,000,000/=
ii. Future earning	ksh.2,520,000/=
iii. Cost of domestic worker	ksh. 600,000/=
Less 25% contribution	ksh.1,205,000/=
Net amount	ksh.3,840,000/=

3) The appellants were aggrieved by the aforesaid decision hence this appeal. On appeal the appellants put forward the following grounds in their memorandum.:

1. The learned magistrate erred in law and fact in awarding the plaintiff/respondent ksh.2,000,000/= as general damages which is excessive taking into account the nature of the injuries suffered by the plaintiff/respondent.

2. The learned magistrate erred in law and fact in awarding the plaintiff/respondent ksh.2,000,000/= as loss of future earnings when the same was not strictly proved by the plaintiff/respondent and in total disregard of the fundamental principles of awarding the same.

3. The learned magistrate erred in law and fact in erroneously awarding kshs.600,000 as cost for domestic worker when against the weight of the evidence.

4. The learned magistrate erred in law and fact in awarding the plaintiff general damages which were inordinately high in total disregard of the principles of awarding general damages.

5. The learned magistrate erred in law and fact in awarding damages for loss of future earnings and domestic worker when the plaintiff/respondent duly not adduce evidence to support the same.

4) Having given the background of this motion, let me now consider the merits or otherwise of the motion. The appellants/applicants are of the submission that unless the order for stay is granted their appeal will be rendered nugatory. It is said that if the decretal sum is paid to the respondent it is unlikely that the respondent will be in a position to repay. The appellants pledged to abide by the reasonable terms as to the provision of security for the due performance.

5) The respondent is of the submission that the appellants should not be granted the orders because the appellants defied the court orders issued by the trial magistrate on 22.7.2016 and those issued by hon. Mr. L. Kassam on 13.4.2016. The respondent beseeched this court to make an order directing the appellants to deposit the decretal in an interest earning account in the joint names of the learned advocates if it is inclined to grant the order for stay of execution. This court was further beseeched to issue an order directing the appellants to pay half of the decretal sum of ksh.1,920,000/= to the respondent pending appeal.

6) The principles to be considered in an application for stay pending appeal are well settled. In the case of **Mpaka Road**

Development Ltd vs= Bharat Rach & Another (2005) eKLR it was held *inter alia*:

“That for the applicant to succeed in this application, he must demonstrate to the satisfaction of the court that substantial loss will ensue if the order is not granted, that he has filed the application without undue delay and that he is willing and able to give such security as ordered by the court for the due performance of the decree.”

7) There is no doubt that the motion dated 28.7.2016, the subject matter of this ruling was timeously filed.

8) The important question to be answered is whether or not the appellants will suffer substantial loss if the order for stay is denied.

9) The appellants have clearly stated that if the decretal sum is released to the respondent, she will not be in a position to refund the same if the appeal turns successful. The respondent did not contest this assertion in her submissions. In fact the respondent beseeched this court to issue an order to direct the appellants to pay her half the decretal sum to enable her meet her daily expenses arising from her treatment and upkeep. I am convinced that the appellants will suffer substantial loss if the order for stay

is not granted. The next issue is the sort of security the appellants should provide. In the circumstances of this case I think a fair order is to have the decretal sum deposited in an interest earning account in the joint names of learned advocates and or firms of advocates appearing in this appeal.

10) In the end I grant the appellants an order for stay of execution pending appeal on condition that the decretal sum of ksh.3,840,0000/= be deposited in an interest earning account in the joint names of or firms of learned advocates within a period of 30 days. In default, the motion shall be treated as having been dismissed. Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent