



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 258 OF 2017

NELLY KIBIBI KITIKU SHEMU (sued as the Administrator

of the Estate of FRANKLINE MUNGA Deceased)....**APPELLANT**

VERSUS

1. WILLIAM DOUGLAS KAHINDI

2. SALOME MWEZA KOKANI (suing as the administrators of

the estate of **MOSES KATANA KAHINDI**.....**RESPONDENTS**

RULING ON TERMS OF STAY PENDING APPEAL

1. On 19/2/2018 when the parties attended court to urge the application for stay pending appeal they agreed that the appellant be granted stay pending appeal but were unable to agree on the terms anticipated under Order 42 Rule 6(2)b. They therefore left it for the court to set the terms of stay regarding the security to be provided by the Appellant/Applicant.

2. Order 42 Rule 6(2) provide:-

“No order for stay of execution shall be made under Subrule 1

unless:-

(a)

(b) Such security as the court orders for the due performance of such decree as may ultimately be bonding on him has been given by the applicant”.

3. The imperative is that the Applicant must give security as the court orders for the due performance of any decree that may result once the appeal is determined.

4. In this matter, the application by the application dated 14/12/2017 averred at ground 7 of the Notice of Motion and paragraph 9 of the Affidavit in support sworn by and appreciated D. Muyaa Advocate the applicant’s obligation in law that she is willing to put up reasonable security for the award pending appeal.

5. In the words of the Applicant herself the sum due under the decree in terms of the Respondents letter dated 1/12/2017 is Kshs.6,450,170/=. That is the sum the Applicant will be exposed to pay in the event the Appeal fails. It is therefore the sum the applicant has to secure for the court to grant to it stay in terms of the law cited above.

6. In the Replying Affidavit filed, the Respondent have exhibited to court the submissions filed by the Appellant before the trial court to show that the Applicant did not take the hard position that the Respondent is entitled to no damages at all. In those submissions the Appellant submitted that the Respondent could be awarded Kshs.80,000 under the heading loss of expectation of life and Kshs.3,623,544 under the heading lost years subject to the agreed contribution of 50%. I understand those submissions to take the position that the plaintiff would be entitled to a sum Kshs.1,851,772/= net of costs.

7. That is the sum I consider the appellant to have said, before Judgment, that she could pay to the respondent and therefore a sum that the

Respondent ought not be kept away from but ought to be paid forthwith.

8. I therefore Order and direct that the Applicant gets stay on terms that the Appellant/Applicant pay to the Respondent part of the decretal in the sum of Kshs.1,851,772/= and deposit the balance thereof, being Kshs.4,598,398/= into an interest bearing account in joint names of the Advocates for the parties within 30 days from today.

9. In default of compliance with the said terms, the order of stay herein granted shall stand lapsed and the Respondent shall be at liberty to execute the decree of the lower court.

10. The costs of the Application shall be on the Appeal.

Dated and Delivered at Mombasa this 23rd day of February 2017.

P.J.O. OTIENO

JUDGE