



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO 58 OF 2016

THE HEADMISTRESS

LORETO CONVENT MSONGARI.....1ST APPELLANT

LORETO SISTERS.....2ND APPELLANT

VERSUS

L W M (SUING THROUGH NEXT OF KIN AND PARENT L W N.....RESPONDENT

RULING

Stay of execution pending appeal

[1] The application dated 15th February 2017 is seeking for stay of execution of the decree arising from the judgment of Chief Magistrate, Lucy Ambasi delivered on 7th November 2016 in Meru CMCC NO 257 OF 2014. The application is expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 rule 6, Order 22 rule 22, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law. It is grounded upon the affidavit of JANET KABUCHORU and other grounds set out in the application.

[2] Janet Kabuchoru swore the Supporting affidavit in her capacity as the legal officer at Pacis Insurance Company Limited, the Insurer of the Appellants. She deposed that they are exercising their mandate under the policy of insurance herein to sue and or defend court matters arising from the said insurance policy. She averred that liability herein is not in dispute as it was agreed by consent except that they were aggrieved by the quantum of damages which was assessed by the trial court at Kshs. 5,000,000 general damages and Kshs. 10,000 special damages. Hence, they instructed their advocates to file this appeal and also apply for stay of execution of the decree herein. She opined that unless stay is granted, they will suffer prejudice, because their appeal which has high chances of success will be rendered nugatory. She, however, undertook to giving such security as the court shall order including depositing the entire decretal sum in a joint interest account in the names of counsels herein. She made that proposal because she was convinced that the Respondent may not refund the money if it is paid over to her especially considering the decretal sum is staggeringly huge sum of money. For those reasons, she prayed for stay of execution whether conditional or unconditional.

Respondent replied

[3] The Respondent did not keep mum. She filed a Replying Affidavit sworn on 22nd of February 2017 and averred inter alia:-

- (a) That no execution of the decree has commenced yet in the primary suit;
- (b) That quantum of damages was accordingly assessed and is commensurate with the injuries suffered by the minor herein;
- (c) That the Appellant conceded to 90% liability yet they do not intend to remit any sums whatsoever to the Respondent which is an indication that this appeal and application were filed in bad faith;
- (d) That it is not true that she cannot refund the decretal sum, for she has the financial muscles to do so if called upon;
- (e) That it is not correct for them to aver that no prejudice will be suffered by the Respondent if stay is granted as such stay would stand on the way of realization of the fruits of the judgment herein; in any event the money is needed for the minor's future medical expenses;
- (f) That the application should be dismissed but if it must be granted then on condition that ½ of the decretal sum be paid to the respondent and the other ½ to be deposited in an interest earning account in the names of counsels.

DETERMINATION

Balancing the rights

[4] As I have stated in many other cases, in an application for stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules, the court must always be minded that the two parties before it have distinct rights. On the one hand, the Appellant has his unfettered right of appeal which must not be prejudiced. For the Appellant, prejudice would arise if he is rendered mere holder of barren result of the appeal which cannot be realized because the Respondent is unable to refund the decretal sum. If you care to read, you must have noticed that I have referred to such an appellant as a pious explorer in the judicial process; I am passing a subtle judicial hint here. For instances see the case of **ABDULLAHI SAID SALAT vs UGAS SHEIKH MOHAMED [2016] eKLR** that:

To illustrate the kind of loss that is to be prevented through stay, I normally equate a successful appellant to mere holder of a barren result which he cannot realize. It bears repeating that to allow a right to be dwindled in that manner will be like “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs would be most regrettable.

On the other hand, the Respondent has a right to immediate realization of his judgment which should not be impeded or postponed unless for lawful and sufficient cause. Therein lie a dilemma; the two rights are competing for attention, thus, the need for the court to carefully balance these rights in order to hold them to almost symmetrical bound. That is what I call novel judicial act that must be performed in an application for stay of execution pending appeal. In order to assist the court to reach to a just decision thereto, the law has fashioned broad prescriptions under Order 42 rule 6 of the Civil Procedure Rules, to wit:-

- (a) Whether the application has been brought without undue delay;**
- (b) Whether substantial loss would occur upon the Appellant unless stay is granted; and**
- (c) The kind of security to be given by the Appellant for the due performance of the decree which might ultimately become binding on the applicant.**

I will examine them in seriatim.

Application timeous

[5] This ground is a simple one and fairly straight-forward. Judgement herein was delivered on 7th November 2016. The appeal was filed on 30th November 2016. And the application for stay was filed on 20th February 2017. I note also that the Appellants had filed an application for stay of execution before the trial court on 5th December, 2016. The said application was heard a ruling dismissing it was delivered on 14th February, 2017. In the circumstances, the Appellants are surely not indolent suitors. Accordingly, their application before this court was filed timeously. The first hurdle has been surmounted. I move to the next test.

Substantial loss occurring

[6] This is the cornerstone of the jurisdiction of this court in granting stay of execution under Order 42 rule 6 of the Civil Procedure Rules. In the persuasive decision by the High Court of Uganda at Kampala in **SEWANKAMBO DICKSON VS. ZIWA ABBY HCT-00-CC MA 0178 OF 2005:-**.

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”.

In money decrees such as the one before me, substantial loss lie in the respondent’s inability to refund money paid to him by the Applicant if the appeal succeeds. But, the Applicant bears the legal burden to show this inability. And, when he has laid sufficient evidence which shows some financial inability on the part of the Respondent, then the respondent may be required to file an affidavit of means to discharge his evidential burden. Other than mere statement that the Respondent may not be in a position to refund such a manifestly high sum, there is absolutely nothing tangible that was placed before this court upon which one can say that the Respondent has no sufficient means. That notwithstanding, I find useful guide in two submissions by the parties herein. The Applicant confirmed that it is able, ready and willing to deposit the entire decretal sum in an interest earning account in the joint names of counsels. The Respondent is not averse to that proposal except she suggested that one half of the decretal sum to be deposited as such, and the other one half to be paid over to her. From paragraph 9 of the Replying Affidavit I am able to discern that the purpose of the one half to be paid to her is for future medical expenses of the minor herein. I have had the advantage of reading a copy of the judgment of the trial court which was filed together with the Memorandum of Appeal and I note that the minor requires post-surgical graft to cover the scars over her scalp and face. From the evidence on record, it has been shown that such kind of procedures is costly. With all fairness in this matter, that need is a major consideration here especially given that the Respondent has a judgment in his favour. Accordingly, in order to balance the rights of the parties herein, I order:

- (1) That the Applicant shall, within 30 days pay one half of the decretal sum to the Respondent for the minor’s medical expenses and other sustenance needs;**
- (2) That the Applicant shall, within 30 days cause the other one half of the decretal sum to be deposited in an interest earning account in the joint names of counsels for parties herein; and**
- (3) In view of my decision above, I order that each party shall bear own costs of the application. It is so ordered.**

Dated, signed and delivered in open court at Meru this 28th March 2017

F. GIKONYO

JUDGE

In the presence of:

M/s. Mutinda advocate for respondent

Mr. Muriithi advocate for appellant - absent

F. GIKONYO

JUDGE