



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 122 OF 2016
BUSWAYS KENYA LIMITEDAPPELLANT
VERSUS
JANE MICERE KANAMU (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF JOHN KINYUA KANAMU (DECEASED)1ST
RESPONDENT

JONES MUTUA2nd RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 3rd November 2016, filed by the Appellant, seeking orders that there be a stay of judgment and decree in **Machakos CMCC No. 103 of 2013- Jane Micere Kanamu (Suing as the Legal Representative of the Estate of John Kinyua Kanamu (Deceased) vs Busways Kenya Limited and Another**, pending the hearing and determination of the appeal filed herein. The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on the same date by Joan Oburu, the Legal Manager as Directline Assurance Company Limited, who are the insurers of the Appellant.

The grounds in summary are that on 28th September 2016, the Chief Magistrate's Court at Machakos delivered its judgment in **Machakos CMCC No. 103 of 2013 - Jane Micere Kanamu (Suing as the Legal Representative of the Estate of John Kinyua Kanamu (Deceased) -vs- Busways Kenya Limited and Another** whereby the Court awarded the 1st Respondent damages amounting to Kshs. 6,167,412/= against the Appellant, together with interest and costs of the suit. Further, that during delivery of the Judgment, the subordinate Court also granted the Appellant a thirty (30) days stay of execution of the judgment and decree ensuing therefrom, which stay lapsed on the 28th October 2016.

The Appellant, being aggrieved by the Judgment of the trial court, filed the current Appeal on 25th October 2016 and states that given that the stay of execution has lapsed, the 1st Respondent will be at liberty to execute through attachment of the Appellant's attachable assets to satisfy the judgment award of Kshs 6,167,412/= plus costs and interest. As such, the Appellant stands to suffer irreparably if it is compelled to pay the sums aforesaid to the 1st Respondent before the Appeal herein is heard and determined, as it may never recover the decretal sum from the Respondents if the appeal proves successful.

The Appellant averred that this position is informed by the fact that the 1st Respondent testified before

the trial court that she was dependent on the deceased for her upkeep and is therefore not a person of means; and she currently has no known means of income and thus lacks any known mode of repaying the decretal sum should the appeal prove successful.

Lastly, the Appellant averred that the Appellant's insurer is ready and willing to deposit the sum of Kshs 3,000,000/= in Court as security, which is the maximum sum payable under the policy of insurance in the event of any liability arising from an accident involving the Appellant's motor vehicle in respect of third party bodily injuries.

The foregoing averments were reiterated in submissions dated 30th December 2016 filed by the Appellant's Advocates, Mohamed Madhani & Company Advocates, in which various judicial decisions were cited on the Appellant's compliance with the requirements of Order 42 Rule 6 of the Civil Procedure Rules.

The Response

The Respondent opposed the Appellant's application in a Replying Affidavit she swore on 7th November 2016, wherein she denied that she was dependent on the deceased for upkeep and therefore not a person of means. Further, that it was equally not true that she currently has no known means of income, as she testified in the trial Court that she is an Agricultural Officer and her earnings are over Kshs 85,000/=, and she is therefore of means to refund the decretal sum in the unlikely event the appeal herein is successful. The 1st Respondent attached a copy of the proceedings in the trial Court in support of her averments.

The 1st Respondent averred that the subordinate court on 28/9/2016 pronounced judgment in her favour in the sum of Kshs. 6,167,412/=, and the Appellants insurers intend to provide security only for the sum of Kshs. 3,000,000/=. That it is therefore only fair that she be allowed to execute for the unsecured sum of Kshs. 3,167,412/=, particularly given that the matter which is the subject of this appeal proceeded largely in the absence of the Appellant's Advocates despite being served with hearing notices, and they did not adduce any evidence during trial.

Mulu & Company Advocates for the Respondent filed written submissions dated 20th January 2017, wherein the foregoing arguments were reiterated, and it was contended that the Appellant had not met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, as it had not clearly stated what substantial loss he stands to suffer and had not provided sufficient security.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue before the Court is whether the judgment and decree delivered in **Machakos CMCC No. 103 of 2013- Jane Micere Kanamu (Suing as the Legal Representative of the Estate of John Kinyua Kanamu (Deceased) -vs Busways Kenya Limited and Another** should be stayed pending the hearing of the appeal. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) The court is satisfied that substantial loss may result to the applicant unless the order is

made and that the application has been made without unreasonable delay; and

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

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, this Court notes that judgment was delivered in the lower court on 28th September 2016; the Memorandum of Appeal was filed herein on 25th October 2016 while this application was filed on 3rd November 2016. There was therefore no inordinate delay in filing the application.

On the fulfillment of the second condition, an applicant needs to show what specific loss or prejudice he will suffer if he pays the decretal sum. The Appellant has in this respect stated that his goods will be attached and auctioned if the stay of execution is not granted, and the Respondent may not be able to refund it the decretal sum of Kshs. 6,167,412/=, in the event that its appeal succeeds. The 1st Respondent on the other hand has averred that she is a woman of means in employment as an agricultural officer, which averment was not controverted by the Appellant.

Lastly, on the third condition, the Appellant indicated that it is only willing to furnish security of Kshs 3,000,000/= which is the limit the insurance company can pay under its insurance cover. Therefore, as the Appellant is not willing to offer security for the balance of the decretal sum, the same ought to be paid to the Respondents who shall be prejudiced as they will be denied the fruits of their judgment in this regard.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 3rd November 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment and decree in **Machakos CMCC No. 103 of 2013- Jane Micere Kanamu (Suing as the Legal Representative of the Estate of John Kinyua Kanamu (Deceased) -vs Busways Kenya Limited and Another** delivered on 28th September 2016 pending the hearing and determination of the Appellant's appeal, only on condition that the Appellant pay the 1st Respondent a portion of the decretal sum of Kshs 3,167,412/=, and shall deposit the balance of the decretal sum of Kshs 3,000,000/= in an interest earning account in the joint names of the Appellant's and 1st Respondent's Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Notice of Motion shall follow the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27th day of March, 2017.

P. NYAMWEYA

JUDGE