REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CIVIL CASE NO. 196 OF 2016

LOCHAB BROS LIMITED……..……1ST APPELLANT

GEOFFREY WANJALA SIMIYU.....2ND APPELLANT

VERSUS

CAROLINE KINGORA ……...…….....….....RESPONDENT

RULING

1. The Applicant seeks stay of execution of the judgment and decree and judgment issued against the Appellants/Applicants ("Applicants") in Kikuyu Senior Principal Magistrate Civil Case No. 69 of 2013 pending the hearing and determination of the appeal.

2. The Applicant has timeously appealed against the lower court judgment. They submit that they are ready to abide by any conditions for the stay – including the furnishing of security – as imposed by the Court.

3. The Application is opposed by the Respondent. Their advocate, Macharia Mirara, filed a Replying Affidavit resisting the Application.

4. The facts are, briefly, as follows. In the lower court, the original suit was filed by the Respondent against the Respondents. It was a personal injury claim respecting an accident in which the Respondent was injured. At the conclusion of the case, the Learned Trial Magistrate awarded general damages of Kshs. 150,000 and Special Damages of Kshs. 5,100. This assessment of quantum followed an earlier decision in which liability for these and other cases arising from the same accident were consolidated and tried to establish liability. Liability was decided against the Applicants at 100%. The only issue to be tried in this particular case, therefore, was proof of injuries and quantum.

5. The Applicants are aggrieved by the decision on quantum and has appealed to this Court. Meanwhile, the Applicant shave approached this Court seeking for a stay of execution of the judgment. So far as I can see from both the Notice of Motion dated 12/01/2017 and the Supporting Affidavit, the only reason stated as a ground for seeking stay is that the appeal will be rendered nugatory if execution proceeds.

6. In their submissions, after submitting at length about the arguability of the appeal and its high chances of success, the Applicants submit that the Respondent is ?not a person of means? and therefore stay should be granted since there is no chance of recovering any monies paid to her.

7. The Respondent opposed the Application. In the main, both in the Replying Affidavit and in their submissions, the Respondent aims to demonstrate that there is no serious appeal; that the points on appeal

are merely vexatious and aimed at delaying the moment of reckoning. Both the Replying Affidavit and submissions by the Respondent assiduously argue the point that they are persuaded that the Appeal stands no chance of success.

8. The Respondent also contests that she is a woman of straw unable to repay any decretal amounts paid to him. Relying on section 107 of the Law of Evidence Act, the Respondent says that the Applicants have put forward no evidence to demonstrate that she has no means – and that the burden is theirs to so prove.

9. The procedural posture of the Application is that this is an application for stay of the judgment of the lower Court. It is, therefore, governed, primarily, by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsuled in that Rule in the following terms:

> 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
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> 2. No order for stay of execution shall be made under sub-rule (1) unless—
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> > (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.

10. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

> It was laid down in ***M M Butt v The Rent Restriction Tribunal,*** **Civil Application No Nai 6 of 1979**, (following ***Wilson v Church*** **(No 2) (1879) 12 Ch 454 at p 488**) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

11. Hence, under our established jurisprudence, to be successful in an application for stay, an Applicant has to satisfy a four-part test. He must demonstrate that:

> a. The appeal he has filed is arguable;
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> b. He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
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> c. The application was made without unreasonable delay; and
>
> d. He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

12. I have perused the Memorandum of Appeal filed in this case. I am unable to say that the grounds of appeal enumerated are in-arguable. I should point out that to earn a stay of execution, one is ***not*** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The

Applicant has easily met that standard. Here, the Applicants intend to argue on appeal that there was no evidence on record to justify an award on damages. That is, indisputably, an arguable issue on appeal.

13. But what is the substantial loss that the Appellant is likely to suffer if the order is not granted? As shown above, the Applicant sought to establish that the appeal will be rendered nugatory by the high likelihood that the Respondent will be unable to refund any amounts paid to her. On this point, our case law is unanimous in the position enunciated in ***National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another*** thus:

> This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because a respondent because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

14. In this case, the Applicants did not as much as claim that the Respondent is a woman of straw in their Supporting Affidavit. They merely asserted that the appeal will be rendered nugatory. They make the claim for the first time in their submissions in response to the Respondent's

Replying Affidavit in which his advocate bristles at any such suggestion (which had not yet been raised). It is true that the legal position in Kenya is that once an Applicant for stay credibly raises the issue of lack of means by a Respondent (judgment-creditor) to refund decretal amounts, the evidential burden is shifted to the Respondent to demonstrate that she has the resources to repay any amounts paid to her.

15. Here, however, the Applicants did not as much as make the claim in their filed papers. That claim is made, for the first time, in their submissions. Needless to say, that is not enough. It is not automatic that the Court will assume that a Judgment-Creditor is impecunious once an applicant for stay in a money decree says that his appeal will be rendered nugatory. Indeed, the opposite is the case as demonstrated in ***Kenya Hotel Properties Ltd v Willsden Properties Ltd Civil Application number NAI 322 of 2006*** (UR).

16. It is, therefore, my conclusion that the Applicants have not demonstrated that there will be substantial loss unless stay is granted. Since the other two conditions for the grant of stay are not disputed (that the application was timeously made and that the Applicant is willing to furnish security and has so offered), it follows that the Applicant has not met the conditions placed by Order 42 Rule 6.

17. Consequently, the Application dated 12th January, 2017 must fail. The same is dismissed with costs.

18. Orders accordingly.

Dated and delivered at Kiambu this 23rdday of March, 2017.

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JOEL NGUGI

JUDGE