



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 34 OF 2016

(An appeal from the Judgment of the Chief Magistrate, Embu in CMCC No. 97 of 2016 dated 30/05/2016)

SAMUEL KABUTHIA NDANA.....APPELLANT/APPLICANT

V E R S U S

JENNIFER WAWIRA NJERU.....1ST RESPONDENT

CECILIA MUTHONI NJERU.....2ND RESPONDENT

R U L I N G

1. In his motion dated 1st July 2016, the applicant seeks for orders for stay of execution of the judgment delivered on 30/05/2016 in Embu CMCC No. 97 of 2016 pending hearing and determination of the appeal.
2. The grounds relied on are that the applicant was dissatisfied with the judgment of the learned magistrate in that the award was manifestly excessive. This appeal has already been lodged against the said decision. The respondent is extracting the decree with a view of executing the judgment.
3. It is deposed that the appeal will be rendered nugatory in the event that the orders are not granted. The payment of the decretal sum may result in substantial loss to the applicant for it may be difficult for the respondent to refund the amount should the appeal be successful. The applicant offers to give a bank guarantee from a reputable bank as security for judgment.
4. The application was opposed by the respondent in that this application ought to have been filed in the lower court. There is evidence that the appellant was convicted of the offence of causing death by dangerous driving before the principal magistrate Baricho in Traffic case No. 240 of 2013. That the applicant has not made any steps towards the preparation of the appeal record for he has not yet applied for certified copies of proceedings.
5. It is deposed further by the respondent that the offer of security in way of a bank guarantee is risky since the bank which has not been named could collapse any time and expose the respondent to great risk. Finally, the respondent argues that the requirements of Order 42 Rule 6 have not been satisfied.
6. The respondent argues that it was wrong for the counsel to swear the supporting affidavit. The counsel explained that since he is representing the appellant who is the insurance company, he was fully briefed of the matters deposed. He further stated that most of the information was from the court file.
7. I have perused the brief affidavit consisting of seven short paragraphs excluding the introductory and the closing one. I find nothing wrong with the counsel swearing the supporting affidavit for his corporate client the insurance company.
8. As for the hierarchy of courts, I agree with the respondent that the applicant ought to have started with the court which heard his case and only come to this court in the event that the application is refused. The hierarchical order of the courts presents the parties with wider avenues of appeal and creates order in the structure and organization of the courts in the administration of justice. This court still has jurisdiction to hear the application but the lower court was the place to seek this remedy. The breaking the chain may be dealt with by way of costs but cannot be used to deny the applicant the right to be heard.
9. The appeal is against both liability and quantum. The fact that the respondent was convicted of causing death by dangerous driving does not affect his right of appeal or minimize his chances of success especially on quantum.
10. Order 42(6) requires the applicant to satisfy the following:-

(a) That the application is brought without delay.

(b) That the applicant is likely to suffer substantial loss if the order sought are not granted.

(c) That there is security for the due performance of the decree.

11. The judgment in this case was delivered on 30/05/2016 while this application was filed on 4/07/2016. This was about 34 days after delivery of the judgment and it is a reasonable period in the circumstances. There was, therefore no undue delay in filing of this application.

12. The applicant argues that the decree is quite substantial being over Kshs.5,000,000/= and that if the amount is paid to the respondent he is likely to suffer substantial loss. The amount is in my considered opinion substantial and it may be difficult for a party who is not financially empowered to refund.

13. No affidavit of means was filed by the respondent to demonstrate that he is not a man of straw. It cannot be ruled out that refunding the decretal amount may be an uphill task on the part of the respondent.

14. The offer of security by way of a bank guarantee and without naming the relevant bank is as good as no security. The counsel offered deposit of Kshs.2,000,000/= in his submissions. It is the counsel Mr. G. N. Mugo who swore the supporting affidavit which strengthens his authority to make the offer on behalf of his client. The amount offered is far below the decretal amount and this court had discretion to make the necessary orders in the interests of justice.

15. I have considered the issues in this application in light of the submissions of the parties. I find the application merited and it is hereby granted in the following terms:-

(i) That the orders for stay pending appeal are hereby granted on condition that the applicant deposits Kshs.3,000,000/= in an interest earning account in the names of the counsels for the parties within thirty (30) days.

(ii) That in default of the deposit within the period given, the orders for stay will automatically be vacated.

(iii) That the applicant meets the costs of this application.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

P. N. Mugo for Jaoko for Respondents

1st respondent present