



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 451 OF 2012

E W M (suing as the next friend and mother

to B M (minor). PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED. ... 1ST DEFENDANT

JOSEPH K. WANGETHE. 2ND DEFENDANT

R U L I N G

This is an application by way of Notice of Motion dated 4th February, 2016 by the 1st Defendant/Applicant seeking orders: -

1. That the court may be pleased to order stay of execution of the judgment in this suit delivered on the 30th November, 2015 pending the hearing and determination of the 1st Defendant intended to Appeal to the Court of Appeal.”

The application is premised on the grounds that: -

a) The Plaintiffs mother and next friend’s occupation is unknown. She has no known source of income. The 1st Defendant is therefore apprehensive that the Plaintiffs mother would equally be unable to refund the decretal sum in the event the appeal succeeds even if the same were recoverable from her.

b) The Plaintiff and next friends said inability to refund the same would render the intended appeal nugatory.

c) The judgment requires that the general damages award for pain and suffering, diminished earning capacity and cost of future medical expenses be deposited in a joint bank account opened by the minors mother and the Deputy Registrar for the benefit of the minor and that the interest be released to the said next friend towards the minor’s upkeep.

d) The 1st Defendant is apprehensive that the Plaintiff and her mother would be unable to refund any amount paid to them in the event the appeal succeeds. That would render the appeal nugatory.

e) The 1st Defendant, through its insurer, is ready and willing to furnish security by depositing the judgment sum in an account opened in the joint names of the two firms on record for the

Plaintiff and the 1st Defendant or secure the same in any other manner prescribed by court.

The application is supported by the affidavit of Caroline W. Warui an Insurance Officer with the 1st Defendant/Applicant sworn on 4th February, 2016 where she depones that the 1st Defendant was dissatisfied with said judgment on both liability and damages awarded and had filed Notice of Appeal and letter seeking certified copies of proceedings and judgment. That in the judgment, the trial judge ordered that the general damages awarded for pain and suffering, diminished/loss of earning capacity and future medical expenses be deposited in a joint bank account operated by the minor's mother and the Deputy Registrar and that interest thereof be utilize by the next friend towards the minors upkeep until he attains the age of majority or in the case of further medical expenses, until a bionic arm is found for purchase.

He depones further that there was no order securing special damages meaning the same is to be released to the Plaintiff. That the minor Plaintiff has no known source of income. That the trial court awarded him damages for diminished/loss of earning capacity.

Counsel avers that the 1st Defendant was reasonably apprehensive that both the Plaintiff and his mother would not be in a position to refund the judgment sum or any portion thereof released or paid to them in the event that the 1st Defendant's intended appeal succeeds. In the event the 1st Defendant's succeeds, the said appeal would be rendered nugatory, and a mere academic exercise.

She further avers that the 1st Defendant, through its insurer, is willing and able to furnish security by depositing the portion of the judgment sum due from them (Ksh.6,544,762/-) in an interest earning account to be opened in the joint names of the two firms of Advocates representing the Plaintiff and the 1st Defendant.

The Respondent opposed the application she filed a replying affidavit sworn on 1st day of February, 2016. She depones that the applicant has not put in draft memorandum of appeal to show their grounds of appeal hence the applicant does not show any likelihood of success of their appeal. She depones that the intended appeal by the applicant is frivolous and the Applicant has no arguable grounds for the same.

She further depones that Order 4 Rule 6 requires that for an order of stay to be issued, the Applicant must show that they will incur substantial loss and that the Applicant has not shown that they will incur any substantial loss in the event that the order for stay is not granted.

She avers that to establish that substantial loss will result. The Plaintiff must show that execution will create a state of affairs that will irreparably affect or negate the every essential core of the applicant as the successful party in the appeal and that the Applicant has not in any manner whatsoever in their application showed the substantial loss that will be occasioned to them.

He further avers that it is the Plaintiff and him who were to suffer substantial loss due to delayed settlement of the decretal amount. That for security as stated in Order 42 Rule 6, they propose that the Respondent pays the Plaintiff an amount of Ksh.2,170,700/- being the amount submitted by the Defendant in the trial because the Plaintiff is a minor and struggling to learn and use one hand and the same is proving difficult.

By consent this application was to be disposed of by way of written submissions. Both parties filed their respective submissions. Mr. Mege for the applicant submitted that being dissatisfied with judgment and decree, the Applicant filed a notice of appeal, where they intend to challenge both liability and quantum of damages awarded. He urged the court to grant the order of stay of execution pending the hearing of the appeal on the grounds that if no stay is issued and execution proceeds the appeal will be rendered nugatory as the Respondents may not be able to refund the sum if the appeal succeeded as they are people of shraw. He submitted that the Plaintiff is a minor and the next friend is not gainfully employed and has no financial ability to refund the damages awarded in the event the appeal is successful.

M/s Chepngetich for the Respondent submitted that the Applicant have not demonstrated to court or show the court the substantial loss they will suffer if the stay is not granted, their fear that the Respondent has no known financial means cannot be sufficient ground. Counsel for further submits that there has been inordinate delay in filing this application, as judgment was entered on 30th November, 2015 and the application filed on 5th February, 2016 a period of 67 days. Counsel submits that although the Applicant has stated that they are ready to offer security by having the decretal sum deposited in an interest-earning account, no steps have been taken to actualize the same. Finally counsel submits that the suit involved a minor who sustained injuries and any delay in the availability of the decretal sum awarded will have a great negative impact on his life.

The grounds upon whether a court can grant stay of execution are now settled. Order 42 Rule 6 provides that: -

“1. No appeal or second appeal shall operate as a stay of section 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.

2. No order of 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***
- b) The application has been made without unreasonable delay; and***
- c) 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.”***

In this application the Applicant has expressed fears that if execution proceeds and decretal sum paid to the Respondent, it may be difficult to refund the same and would cause them substantial loss. They are, however, ready and willing to deposit the whole of the decretal sum in a joint interest earning account in the names of both advocates for the Plaintiff and Defendant. I find that will provide credible security for the satisfaction of the decree in the event they do not succeed in their appeal. I, therefore, allow the application on condition that the whole of the decretal sum be deposited in an interest earning account in the names of the advocates for the Plaintiff/Respondent and that of the Defendant/Applicant within 30 days from today’s date.

In the event such deposit is not made within 30 days form today’s date, execution to proceed forthwith.

Dated, signed and delivered at Nairobi this 18th day of September, 2017.

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S N RIECHI

JUDGE