REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 47 OF 2017

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANTS

VERSUS

1. SILVESTER EDWARD MUTISO

2. JOEL MUTUA MUTISO (Both suing as

administrators Ad Litem of the estate

of **DORCAS KAMANTHE MUTISO (DECEASED)....RESPONDENT**

RULING

1. The Appellant has filed a notice of motion dated 19th April, 2017 seeking orders that:

> i. This court be pleased to grant a stay of execution of the judgment and decree issued in Kithimani PMCC No. 105 of 2015 on 23rd March, 2017 Silvester Edward Mutiso & Joel Mutua Mutiso (Both suing as the administrators ad litem of the estate of Dorcas Kamanthe Mutiso (deceased) v. Directline Assurance Company Limited pending the hearing and determination of this appeal.

2. This application is based on the grounds set out on the body of the application and the supporting affidavit of Pauline Waruhiu, the General Manager- Claims Department of Messrs Directline Insurance Company Limited sworn on 19th April, 2017. She stated that judgment was issued by the trial court in favour of the respondents wherein they were awarded a sum of KShs. 1,477,795/- together with interest in the said sum from 7th August, 2014 and costs arising from the judgment delivered in Kithimani PMCC No. 26 of 2011. The appellant subsequently filed this appeal which she said has high chances of success. That the appellant's advocates have applied for certified copies of the proceedings, judgment and decree but have not yet received the said. That the 30 days stay of execution granted by the trial court lapses on 23rd April, 2017 and the appellant is apprehensive that the respondents will levy execution since the respondents' advocates have indicated to the appellant that he has obtained a decree in preparation to execute. That if the respondents so levies, the appellant shall suffer substantial loss and detriment since the appeal shall be rendered nugatory and/or the appellant shall be unable to recover the decretal sum because the respondents have no known source of income and/ or assets. She expressed the Appellant's willingness to furnish security.

3. In response thereto, the 2ndRespondent on his own behalf and on behalf of the 1st respondent filed a replying affidavit on 17thMay, 2017. He contended that; that there is no such communication on extraction of decree and that there is in fact no decree which has been extracted capable of warranting execution; that the Appellant has not disclosed the kind of loss it may suffer; that the appellant has not

proved that they respondents are unable to refund the decretal sum and that he is not personally known or his source of income to the appellant and the assertion that he cannot be able to refund the decretal amount is a mere allegation.

4. In its submissions, the appellant cited the provision of order 42 rule 6 of the Civil Procedure Rules. It was argued that the requirements set therein had been satisfied by the appellant. On substantial loss, the appellant relied on vast authority among them, **Mukuma v. Abuoga (1988) KLR 645**, **Baiba Dhidha Mjodho v. Van Leer East Africa Ltd (Greif (K) Ltd (A Business of Breif Bros Co-op) (2006) e KLR** and **National Industrial Credit Bank Limited v. Aquinas Francis Wasike & another (UR)** argued that the issue of substantial loss is paramount in determining an application for stay of execution. That in absence of evidence to buttress the respondent's source of income or livelihood, the respondents have failed in discharging the burden of proving that they have financial capability to refund the decretal sum. The appellant stated that the application was made without delay since it was made before the lapse of the thirty (30) days period of stay granted by the trial court and further that the appellant is willing to furnish security.

5. I have given due consideration to the motion, replying affidavit and the submissions. This application is based on Order 42 Rule 6 (1) and (2). That Rule provides:

> ***"6.(1) No appeal or second appeal shall operate as a stay of a decree or order appealed from except in so far as the court appealed from may order but, the court appealedfrom may for sufficient cause order stay of execution of such decree ororder, and whether the application for such stay shall have been grantedor refused by the court appealed from, the court to which such appealis preferred shall be at liberty, on application being made, to considersuch 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 fromwhose 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 performanceof such decree or order as may ultimately be binding on himhas been given by the applicant."***

6. The said rule was considered in **Peter Ondande t/a SpreawettChemis v. Josephine Wangari Karanja [2006] e KLR**. The court heldas follows:

> ***"The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him."***

7. In the instant case, there was no delay since this motion was filed before the lapse of the 30 days period of stay of execution.

8. On substantial loss the appellant's contention was that it is apprehensive that the respondent will be unable to refund the decretal sum in the event the appeal succeeds. On this point, I am fortified by the Court of Appeal's decision in the case of **ILRAD v. Kinyua(1990) KLR 403 at Page 406** where it was held as follows:

> ***"We have considered what Mr. Sehimi has said. However, we must "observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent's) alleged impecunity".***(Emphasis mine)

9. The same position, was held in a rather recent decision by the Court of Appeal in **Nairobi Industrial Credit Bank Limited**(supra). In that case the court held:

> ***"…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."***

10. Applying the test, the respondents merely stated that the appellant did not know them or their assets and that the said was a mere assertion. It was incumbent upon the respondents to bring forth evidence of their financial standing which they did not. In the circumstances, the appellant is found to have satisfied that it shall suffer substantial loss.

11. The Appellant herein has indicated willingness to deposit security and that limb is not in contention.

12. In view of the foregoing,I find that the appellant has satisfied the requirements of Order 42 rule 6 of the Civil Procedure Rules, thus requirements for grant of stay of execution. The application is allowed on the following terms:

a) The appellant to deposit the entire decretal amount into an interest earning account in the joint names of the advocates for the parties within the next 45 days.

b) In default, execution do issue.

c) The costs of this application to abide in this appeal.

Dated, Signed and Delivered at Machakos this 17th day of November,2017.

D.K. KEMEI

JUDGE

In presence of:

Musila for Kisinga for the Appellant

N/A for Mwihia for the Respondents

Munyao – Court clerk