REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 318 OF 2013

GRACE BELDINA ADHIAMBO.....PLAINTIFF/RESPONDENT

VERSUS

BOWERS OKELO.....1ST DEFENDANT/APPLICANT

JOSEPH OGUTU.....2ND DEFENDANT/APPLICANT

RULING

By way of a Notice of Motion dated 26th May, 2017, the Applicants moved this Court seeking orders for stay of execution of the judgment delivered on 16th February, 2017 awarding the Respondent the sum of Kshs. 5,733,407/= pending the hearing and determination of their intended Appeal. The application is supported by the Affidavit of **PAULINE WARUHIU**, a General Claims Manager at Direct Line Assurance Company Limited who are the insurers of the motor vehicle registration number **KBR 376B**. She depones that she has been authorized by the Defendants/Applicants to make the affidavit on their behalf. The grounds of the Application are that Defendants/Applicants are apprehensive that the Plaintiff/Respondent may levy execution against them since she has already taxed the Bill of costs while the Appellants appeal is likely to succeed, that the Applicants will suffer irreparable loss and damage if execution is not stayed, that the judgment is of substantial amount and if the Plaintiff/Respondent is paid, she may deal with the same in a manner prejudicial to the Defendants/Applicants and if the appeal is successful, may not be able to recover the same from the Plaintiff/Respondent, that he Defendants/Applicants are willing and ready to furnish security within the provisions of Insurance (Motor Vehicle Third Party Risks) Act CAP 405 which limits liability to a sum of Kshs. Three Million (3,000,000/-) arising out of a claim by one person. That the application has been made in good faith and will not occasion any prejudice to the Plaintiff/Respondent.

The Application dated 26th May, 2017 is opposed by the Plaintiff/Respondent who filed a Replying Affidavit dated 11th September, 2017 and sworn by **GRACE BELDINA ADHIAMBO**, the Plaintiff/Respondent herein. It is deponed that the application is unmeritorious and the same has only been brought with the intention of denying the Respondent the fruits of the judgment. The Respondent avers that the Defendants are only appealing against the Judgment on quantum and therefore liability is not being challenged. That she sustained injuries which have rendered her physically incapacitated to a large degree and therefore needs the decretal sum to enable her start life afresh, that there are no convincing reasons that have been given as to why the defendants should furnish security for Kshs. 3,000,000/= that they claim is within the provision of Insurance (Motor Vehicle Third Party Risks) Act CAP 405 which limits liability to that amount when it arises out of a claim by one person and they have also not demonstrated what loss, if any, they will suffer if she is allowed to execute the Judgment/Decree.

That she has a judgment after waiting for more than 4 years since the suit was filed and 6 years from the date of the accident, thus, she is entitled to enjoy the fruits of her judgment.

Further, the Respondent avers that there is no evidence that the Defendants wrote the letter dated 28th June, 2017 to Court as it is neither stamped by the Court nor was it copied to Wangai Nyuthe & Co. Advocates. That the Defendants are being mischievous as they served orders given on 29th May, 2017 bearing the hearing date as 27th June, 2017 yet the Application dated 29th May, 2017 bore 26th June, 2017 as the hearing date. That the Defendants are further being mischievous as they have now instructed Paul Mungla & Co. Advocates vide a Notice of Appointment filed on 6th September, 2017 yet the Application has been drawn and filed on the 8th September, 2017 by Kairu & Mc Court Advocates. That the Defendants are stretching the court's discretion to grant Stay of Execution by seeking multiplicity of stay of executions to wit on 16th February, 2017, a stay of execution was granted, 25th May, 2017, another stay of execution was granted and on 29th May, 2017, yet another stay of execution was granted and the Respondent avers that all this is calculated to delay her from enjoying the fruits of her judgment. That the Applicants have not demonstrated what loss, if any, they will suffer if she is allowed to execute the Judgment/Decree. That the Defendants have not applied for proceedings to enable them prepare the Record of Appeal and therefore the Defendants are not serious with the appeal but are just delaying the finalization of the matter.

The application was canvassed orally in court on 22nd September, 2017. I have read and considered the cited authorities as well as the oral submissions by both counsel.

The principles for granting an order of stay of execution are provided for under Order 42 Rule 6 of the Civil Procedure Rules which are;

(a) That the application has been made without unreasonable delay;

(b) That security for costs has been given; and

(c) That substantial loss may result to the Applicant unless the order for stay is made.

The corner stone of the jurisdiction of the court under Order **42** Rule 6 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of ***James Wangalwa & Another vs Agnes Naliaka Cheseto*** **HC Misc No. 42 of 2012 OR {2012} eKLR** where it was held *inter alia* that:-

> ***"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself , does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.***
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> ***The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni, {2002} 1 KLR 867 …….the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"***

The Respondent states that there are no convincing reasons as to why the Defendants should furnish security for Kshs. 3,000,000/= that they claim is within the provision of Insurance (Motor Vehicle Third Party Risks) Act CAP 405 which limits liability to that amount when it arises out of a claim by one person; this, she claims is a new issue which was never covered by either parties when they filed their Statements of Issues on 4th October, 2013 and 27th September, 2013 and therefore it cannot be introduced at this late hour. Indeed, no such issue was covered and as such, cannot be considered. In normal

circumstances, the security is the Decretal amount or what the court deems fit.

I agree with the Respondent that the Applicants have not demonstrated the loss they would suffer if the Respondent is allowed to execute and neither did they make submissions on the same. They merely said that they agree that the Plaintiff/Respondent is entitled to the fruits of her judgment but also added that they too have a right of Appeal. It is insufficient to merely assert that. In an application of this nature, the Applicant should demonstrate the damages he/she would suffer if the order for stay is not granted since by granting stay, it would mean that the *status quo* remains the same thus denying a successful litigant the fruits of his/her judgment which should not be done if the applicant has not given the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410.**

On whether or not the application was brought without undue delay, there was a delay of over 3 months which was not explained at all by the Applicants.

For an order of stay of execution to be granted, the court has to be satisfied that the applicant has met the provisions of Order 42 rule 6. This was well emphasized in the case of ***Elena D.Korir vs Kenyatta University (2012) eKLR*** where **Justice Nzioki Wamakau** had this to say:-

> "***the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.***"

Further in considering whether to grant a stay of execution , the Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** stated that , " ***In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.***"

In the circumstances of this case, the Applicants bore 100% of the liability and this is not in dispute, and the Appeal is only on quantum. I have referred to the cases cited by the Respondents, that is, **Winfred Mutheu Kiamuko & Another vs. Swaleh Breki Islam & Another, Civil Case No. 130 of 2009 and** I am persuaded that the Respondent can enjoy ½ of the decretal sum while the rest awaits the outcome of the Appeal. Consequently, I direct that the Applicants pay ½ of the decretal sum within 45 days from the date hereof, in default, execution to issue. The Applicant to deposit the remaining decretal amount in a joint interest earning account to be opened by both counsel pending the hearing and determination of the Appeal. Such decretal sum to be deposited within 30 days from the dated of this ruling failure of which the stay orders shall lapse.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **20th** day of **December, 2017**

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L. NJUGUNA

JUDGE

In the presence of:-

.....PLAINTIFF/RESPONDENT

.....1ST DEFENDANT/APPLICANT

.....2ND DEFENDANT/APPLICANT