



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANIOUS CIVIL APPEAL NO. 110 OF 2015

ALEXANDER MULI NGUMBI

HANIFA MOHAMMEDAPPLICANTS

VERSUS

ROSE MUKAI KALU.....RESPONDENT

RULING

The Application

The application before the court is an Amended Notice of Motion dated 10th November 2015, filed by the Applicants under the provisions of Order 22 Rule 22, Order 42 Rules 4 and 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, and sections 3 and 3 A of the Civil Procedure Act. The Applicants are seeking the following orders:

1. That there be a stay of execution of the judgment/Decree delivered herein on 18th May 2015, pending the hearing and determination of the Applicants Civil Appeal No. 110 of 2015 filed in Machakos High Court .
2. That the decretal amount of Kshs 804,625/= deposited by the Applicants into the Respondent's Advocate's account be deposited to Court as a condition for stay pending appeal.

The Applicants' grounds are set out on the face of the Amended Notice of Motion and in a supporting affidavit and further affidavit sworn on 17th June 2015 and 17th November 2015 by Sandra Nyakweba, the Claims Director of Directline Assurance Company Limited, the insures of the motor vehicle registration number KAV 294 X, which is the subject vehicle in the claim on which the judgment herein was delivered.

The main ground is that the Applicants are aggrieved with the judgment delivered on 18th May 2015, which was entered against them as regards liability and general and special damages, and that they have filed an appeal against the judgment. Further, that this Court did on 2nd July 2015 order stay of execution and that the Applicants deposit the decretal sum in Court but did not give a time period, and that this order was extended variously on 24th September 2014 and 3rd December 2015.

In addition, that the Applicants did on 15th October 2015 deposit the decretal sum of Kshs 804, 625/=, but erroneously in the Respondent's Advocates account instead of court. That upon realizing the mistake the

Applicants' advocates did write to the Respondent's Advocates to deposit the said decretal amount in court or return the same, but have not received any response. The Applicants annexed a copy of the said letter and a copy of the remittance of the said funds.

Kairu & McCourt Advocates, the learned counsel for the Applicants, filed written submissions dated 11th June 2016, wherein it was urged that this Court has unfettered discretion to give stay of execution and reliance was placed on the provisions of Order 42 Rules 4 and 6 and Order 22 Rule 22 of the Civil Procedure Rules, and that the Applicants had met the conditions set by the said provisions. Reliance was also placed on various judicial authorities in this regard.

The Response

The Respondent opposed the Appellant's application in two Replying Affidavits she swore on 30th November 2015 and 2nd March 2016, wherein it was urged that the Applicants had not shown what substantial loss they will suffer and that their averments that the Respondents' physical whereabouts are unknown do not have any basis. Further, that the Applicants' application has been overtaken by events since the Respondents had already been paid the decretal sum, and she annexed a cheque and payment/discharge voucher from her Advocates as evidence.

The Respondent's learned counsel, Mulu and Company Advocates, reiterated the above arguments in submissions filed in Court dated 23rd June 2016.

The Issues and Determination

I have read and carefully considered the pleadings filed. The issue before the Court is whether the execution of the judgment of the trial Court should be stayed and if so on what terms. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution 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, 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.

(2) No order for stay of execution shall be made under subrule (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 performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

As regards whether the stay of execution should issue, I note that the orders of stay had already been granted by this Court, and the only issue in this application is whether the decretal sum should be deposited by the Respondent in Court as security and a condition of the stay. The decretal sum was remitted by the Applicants to the Respondent's Advocate on 15th October 2015. The current amended application was filed on 18th November 2015 which was after a period of slightly over one month. There was thus no inordinate delay in filing the application.

The Applicants have in this respect stated that the Respondent will not be able to refund her the amount paid to her as the decretal sum in the event of the appeal succeeding. The Respondent on the other hand stated that there is no basis for this averment. I am of the opinion that as this Court's orders were clear that the said security be deposited in Court, and the Applicants chose to pay the Respondent the said sum, the Applicants thereby are responsible for and accepted the risk of the said decretal sum not being paid in the event of their appeal succeeding.

The Court cannot be used to unravel mistakes made by the Applicants, who must bear the consequences of their action, particularly as the orders sought are going to prejudice the Respondent who was not at fault. In addition the fact of paying the Respondent indicates that the Applicants were not going to suffer any substantial loss thereby.

The Applicants' Amended Notice of Motion dated 10th November 2015 is accordingly denied and the Applicants shall bear the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 30th day of August, 2016.

P. NYAMWEYA

JUDGE