



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

CIVIL APPEAL NO. 39 OF 2016

ILSAN ENTERPRISES LTD.....APPELLANT

VERSUS

FREDRICK MUIA PETER.....RESPONDENT

RULING OF THE COURT

The application

1. The Notice of Motion application before the Court is dated **7th October, 2016** and is filed pursuant to **Order 42 Rule 6(2) and 3 and Order 51 Rule 1 of the Civil Procedure Rules**. The application prays for the following orders;

- a. This application be certified urgent and service thereof be dispensed with in the first instance.
- b. The Honourable court be and is hereby pleased to order that there be a temporary stay of execution of the judgment and decree in this matter pending the hearing *inter partes* and determination of this application.
- c. That Honourable court be and is hereby pleased to order that there be a stay of execution of the judgment and decree pending the hearing and determination of applicants' appeal against the judgment.
- d. Costs be provided by the respondent in any event.

2. The application is premised on the grounds that unless stay is granted, execution process can be commenced any time and the applicants' property is in danger of being auctioned before the hearing of the pending appeal. This process would occasion the applicant substantial loss and irreparable damages. It is in the interest of justice and fairness that the orders sought be granted. Unless stay of execution is granted, the appeal will be rendered nugatory and a mere academic exercise and the appellant will suffer substantial loss and damage. The appellants/applicants is unlikely to recover the judgment/decretal amount from the plaintiff/respondent in the event that the appeal is successful. The appellants/applicants will abide with reasonable terms as to security for due performance of the order. The appellant/applicant is ready and willing to deposit the amount of Kenya shillings two million sixty five thousand three hundred and eight (2,065,380.00) in a joint interest earning account in the name of both the advocates of the parties on record as the said security pending the hearing and determination of the appeal

3. The application is supported by affidavit of **Janerose Gitonga** sworn on **7th October, 2016** which expounds on the said grounds.

The Response

4. The application is opposed by the respondent vide a replying affidavit sworn on **13th October, 2016**. The respondent's case is that the application is made in bad faith to deny the respondent the fruits of his rightfully obtained judgment. The respondent was a passenger in motor vehicle registration number **KBT 794A** when the same was hit by motor vehicle registration number **KAV 935Q/ZD 4332** owned by the appellant. The respondent is currently working and capable of repaying the decretal sum in the event the purported appeal succeeds. The respondent is advised by their advocate and which advice he verily believes to be true that the applicant has not satisfied the conditions for stay in that:

- i. The applicant has not shown that it will suffer substantial loss if stay is not granted.
- ii. The applicant has not shown that it knows the respondent, he is of straw and cannot repay the decretal sum.
- iii. The applicant has not shown how the appeal will be rendered nugatory.

5. The respondent's case is that appeals in money decree are never rendered nugatory, and that there is no appeal with any chances of success. The respondent was awarded future medical expenses for an artificial leg and if stay is granted, he will be prejudiced since he will have no money to purchase the artificial leg. The respondent is in need of artificial leg and needs money or part payment of the decretal sum to enable him purchase an artificial leg.

Submissions

6. Parties made oral submissions in court, which I have considered. The only issue for determination is whether the applicant has satisfied the conditions set out in **Order 42 Rule 6 of the Civil Procedure Rules** for granting of stay of execution of decree pending the hearing and determination of the appeal.

Order 42 Rule 6(2) of the **Civil Procedure Code** provides;

“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 performance of such decree or order as may ultimately be binding on him has been given by the applicant”

7. The applicants have submitted that they would suffer loss if the application is not granted, while the respondent submitted that no loss would be suffered since the respondent would be able to refund the decretal sum should the intended appeal succeed. So the possible loss being referred to herein is simply the ability or otherwise of the respondent to refund the decretal sum should the intended appeal succeed. The other conditions under **Order 42** as to timely filing of the application for stay, or granting of security have in my view, been satisfied by the appellant, in that the application was filed within a reasonable delay. The applicants are also willing to provide security by depositing with court the entire decretal sum.

8. The duty of this court then is to balance the interests of the applicant who has the right to appeal, and that of the respondent who also has the right to enjoy the fruits of the judgment.

9. To address this issue, the court notes that the judgment on liability was established by trial court at 100% against the appellant. The appellant seeks a reversal of the said finding.

10. This court further notes that the decretal sums herein are substantial and that although the respondent is working hence a man of means, refunding the decretal sums could be a challenge to any salary earner. Therefore, the applicant is likely to suffer a loss. A loss here means any difficulty, whether actual or infrastructural, which the applicant may have to face in the recovery of the sums due to it from the respondent. If the appellant pays the decretal sum in lump sum, any recovery from the respondent by way of installments over a period of time would itself amount to a loss. A loss need not be quantitative, provided it is determinable qualitatively. Even though it is not the duty of this court to look at the merits of the appeal, it is a fact that there is judgment in favour of the Respondent. It is therefore the finding of this court that the respondent is entitled to be given part of the decretal sum even as the balance is secured through some process.

11. In the upshot, the applicants' application for stay before the court is allowed as prayed with the costs in the cause on the following terms;

- a. The respondent shall be paid half ($\frac{1}{2}$) the decretal sum herein within fourteen (14) days from the date hereof.
- b. The remaining half ($\frac{1}{2}$) shall be deposited in a joint interest earning account in the name of the parties' advocates within fourteen (14) days.
- c. Costs in the cause.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF DECEMBER, 2016.

E. OGOLA

JUDGE

In the presence of;

Mr. Mutune holding brief for A.K. Mutua for Respondent

No appearance for Applicant

Court Assistant – Mr. Munyao