



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL NO.34 OF 2014
(FORMERLY MOMBASA HCCA NO.148 OF 2014)
(FROM ORIGINAL KADHI'S SUIT NO. 15 OF 2014 AT MALINDI)
TATU M. MWAMBURI..... APPELLANT

VRS

1. CHARO MWANDORO DUNDA
2. NATHANIEL NDOKOLANI KABOMBO (*Legal administrator*
***of the estate of the late KANA KADZITU KITSAO*)DEFENDANTS**

RULING

The application dated 26/11/2014 is seeking an order of stay of execution of the judgment in Kilifi SPMCC No.289 of 2009 delivered on 21/10/2014 pending the determination of this appeal. It is supported by the appellant's affidavit sworn on the same date. The respondents filed a replying affidavit sworn on 5/12/2014. Parties agreed to determine the application by way of written submissions.

The applicant maintains that substantial loss will be suffered if the order being sought is not granted. The decretal sum as per the trial court's judgment is Ksh.1,833,910 and this is a substantial amount. It is contended that there was an error in the assessment of the deceased's income whereby the trial court assessed it at Ksh,1000/= per day.

On their part, the respondents maintain that there is no sufficient cause to grant the order being sought. The respondents are successful litigants who should not be denied the fruits of their litigation without a good cause being established. This is a money decree and the appeal will not be rendered nugatory if payment is made. It is also submitted that the application has been filed quite late. No application for stay of execution was filed before the trial court. The current application is premature and that no security was offered by the applicant.

The dispute herein can be traced to a road accident which occurred on 2/12/2008. The respondents are husband and brother of the late Kanga Kadzitu who died out of the road accident. The two respondents are the administrators of the deceased's estate. The applicant filed this appeal on 26/11/2014. I have gone through the five grounds of appeal and the main issue revolves around the amount of damages awarded as opposed to whether the appellant was liable to pay the damages.

The judgment was delivered on 21/10/2014. The current application was filed on 26/11/2014. It is not clear when the costs were assessed and decree issued. I do find that there was no unreasonable delay in

the filing of the current application.

The next issue is whether the applicant will suffer substantial loss. The total amount as per the judgment is Ksh.1,630,000/= plus costs and interest. According to the applicant the costs and interest make the amount payable to be Ksh.1,833,910/-. This is substantial amount. The deceased used to deal in selling palm wine. There is no evidence that the administrators of the deceased's estate will be able to refund the decretal amount should the appeal succeed. It is true that payment of the decretal sum in a money decree does not render the appeal nugatory. However, if the successful litigant is not in a position to refund the decretal amount should the appeal succeed, then the interest of justice call for non payment of the money to such a litigant.

Given the circumstances of this case, it is clear that parties have litigated for long. The applicant is entitled to pursue the appeal while at the same time, the respondents are entitled to enjoy the fruits of their successful litigation. I do find that the application is merited and shall be granted on the following terms:

- i. The applicant to pay a sum of ksh.300,000/= to the respondents as part of the awarded damages within sixty (60) days hereof.
- ii. The applicant to deposit a sum of Ksh.600,000/= in a joint account of both counsels within ninety (90) days hereof.
- iii. Costs of the application shall follow the outcome of the appeal.

Dated, signed and delivered at Malindi this 28th day of May, 2015.

SAID J. CHITEMBWE

JUDGE