

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 3 OF 2013

AGNES ATIENO AIRO..... PLAINTIFF

VERSUS

AGA KHAN UNIVERISTY HOSPITAL, NAIROBI..... DEFENDANT

RULING

1. By the plaint dated 4th January 2013, and amended on 4th April 2013, the plaintiff herein sued the defendant before this court claiming damages for medical negligence. On 15th May 2015, judgment was entered in favour of the plaintiff and against the defendant in sum of ksh.4,820,000/= representing the cost of raising and educating a child and for pain, suffering and loss of amenities.
2. Being dissatisfied, the defendant filed an appeal to challenge the decision before the court of appeal. The defendant has now taken out the notice of motion dated 24th August 2015 praying for an order for stay of execution of the decree pending appeal.
3. When the motion came up for interpartes hearing, learned counsels appearing in the matter urged this court to consider the material placed before it and render its decision. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application. The defendant avers that the plaintiff intends to execute the decree unless an order for stay is granted. The defendant further pointed out that if the plaintiff actualises her threat to execute the decree, the defendant's hospital operations will be crippled thus causing substantial damage and loss. The plaintiff on her part admitted in her replying affidavit that she intends to execute the decree. She accused defendant of filing the application for stay after unreasonable delay. She also averred that the defendant has not shown the substantial loss it would suffer if the order for stay is denied.
4. The principles to be considered in an application for stay are well settled. First an applicant must show the substantial loss it would suffer if the order is denied. In this case, there is no doubt that the plaintiff intends to execute the decree to recover the decretal sum which will obviously run beyond kshs.5million. The defendant has stated that the execution process may cripple its hospital operation thus causing untold suffering to patients. The plaintiff did not deny in her replying affidavit this assertion. I am convinced that the defendant has shown that it would suffer substantial loss if the order for stay is denied.
5. The second principle to be considered is that an applicant must file the application for stay without unreasonable delay. The plaintiff has alleged that there was unreasonable delay in before filing the motion. I have already shown that judgement was delivered on 15.5.2015. The motion was filed on 24.8.2015. A delay for three (3) months in my view is not an unreasonable delay.
6. Thirdly, the court must take into consideration the provision of security for the due performance of the decree. On this principle, the parties are in agreement that there is need to provide security.
7. In the end, I find the motion dated 24.8.2015 to be well founded. I grant the order for stay of execution of the decree pending appeal on condition that the defendant deposits the principal sum of kshs.4,832,000/= in an interest earning account in the joint names of the firms of advocates

within 60 days from the date hereof, in default the plaintiff will be at liberty to execute.

8. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 20th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant