



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 43 OF 2015

PINE TREE AGENCIES LIMITED.....1ST APPELLANT

JAMES ETABALE AKENGA.....2ND APPELLANT

VERSUS

LUCY CHEMWETICH.....RESPONDENT

(Being an application for stay from the judgment of the Resident Magistrate in

Iten RMCC No. 35 of 2010 delivered on 11th March 2015)

RULING

1. The appellants are aggrieved by the decree of the lower court made on 11th March 2015. The respondent had sued the appellants for negligence. The parties agreed on liability at the ratio of 90% to 10% in favour of the respondent. After considering the evidence, the learned trial magistrate awarded the respondent Kshs 900,000 in general damages; and, special damages of Kshs 31,012. The net award was thus Kshs 841,012 or thereabouts.
2. The appellants contend that the assessment of general damages was erroneous or excessive. They also contest the award of special damages. The memorandum of appeal was filed on 30th March 2015. The appellants now pray for stay of execution of the decree pending the hearing of the appeal. The motion is expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act; and, Order 42 of the Civil Procedure Rules 2010. There is a supporting affidavit sworn by Susan Wakiaga, an assistant manager at the appellants' underwriters.
3. The appellants had lodged a similar motion in the lower court. It was refused. The appellants aver that the appeal has high chances of success; that execution is imminent; and, that the respondent is not a person of means. It was submitted that if execution proceeds, the appeal will be rendered nugatory. The applicants have offered to provide security for the performance of the decree. Lastly, the applicants aver that they have brought the application with expedition.
4. The motion is contested. There is filed a notice of preliminary objection dated 15th July 2015. The objection revolves around the competence of the deposition by Susan Wakiaga. The respondent has also filed a replying affidavit on even date. The respondent's case is that the appeal is hopeless. She contends that the application is vexatious and an abuse of court process; and, that it is a strategy contrived to deny her the fruits of her judgment. She avers that she sustained grave injuries in the suit accident. She states that liability had been conceded and that the appellants had proposed general damages of Kshs 200,000 in the lower court. She denies that she is a pauper. She avers at paragraph 12 that she is a business lady and capable of refunding the decretal sum. She also avers that her costs have not been taxed. Accordingly, execution is not imminent.
5. The appellants have filed submissions dated 10th September 2015 with authorities annexed. The

respondent's submissions were filed on 28th September 2015. On 29th September 2015, learned counsel for the appellants and respondent made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion, the pleadings, the preliminary objection and depositions.

6. I cannot make a final finding on the appeal at this stage. The appeal has not even been admitted. As a matter of fact, the record of appeal has not been filed. This court however has wide and unfettered discretion to grant stay pending appeal. Order 42 Rule 6 of the Civil Procedure Rules 2010 provides-

“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.”

7. The rationale for stay was well explained by Cotton L.J. in Wilson v Church (No. 2) 12 Ch D [1879] 454 at 458-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

8. In Butt v Rent Restriction Tribunal [1982] KLR 417 at 419, Madan JA (as he then was) delivered himself thus-

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

9. The court will also grant a stay if special circumstances of the case dictate it. Attorney General v Emerson and others 24 QBD [1889] 56 at 59. In the Butt decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. Those general principles were restated in Madhupaper International Limited v Kerr [1985] KLR 840 at 846.

10. This court is also enjoined by article 159 of the Constitution; and, by sections 1A and 1B of the Civil Procedure Act, to do *substantial justice* to the parties. That is the court's overriding objective. See Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, Stephen Boro Gitaha v Family Finance Bank & 3 others. Nairobi, Court of Appeal, Civil Appeal 263 of 2009 (UR 183/09) [2009] eKLR, Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR.

11. The present motion was presented to court on 3rd June 2015. The impugned judgment was delivered way back on 11th March 2015. However, the applicants had moved the lower court for stay of execution. The lower court dismissed the application on 14th May 2015. I thus find that the present application was brought without undue delay.

12. The fact that the appellants' motion was dismissed by the lower court does not preclude them from approaching this court on a similar motion. It is expressly provided in Order 42 Rule 6 (1)

- that 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. The words that follow that sentence provide that a person aggrieved by a stay granted by the lower court may move the appellate court to set aside the order. No order of stay was granted by the lower court: instead, the appellant's motion for stay was dismissed. I cannot then say that the present motion is vexatious or an abuse of court process. See Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR.
13. I will now turn to the preliminary objection. Its fulcrum is that the supporting affidavit was sworn by a *stranger*. The affidavit was sworn by Susan Wakiaga, an assistant manager of ICEA-Lion Insurance Company Limited. Obviously, the company is *not* a party to this suit. But that is to miss the point. In the deposition, it is clearly deposed that the *company* is the *underwriter* of the appellants' vehicle. Under the principles of *subrogation*, the company would be entitled to defend the suit or litigate this appeal through its insured. I thus find that the preliminary objection lacks legal foundation. Fundamentally, it does not raise a pure point of law. Mukisa Biscuit Manufacturing Company v West End Distributors Ltd [1969] EA 696. It is a matter that would call for evidence on the true status of the deponent or connection with the suit. I thus *decline* the invitation to strike out the deposition or the application.
 14. The key question is whether the appellant has demonstrated substantial loss. The decree is for a *substantial* sum. I am also alive that as a general proposition the execution of money *decree* does not constitute substantial loss. See Kenya Shell v Benjamin Karuga [1982-88] 1 KLR 1018, Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR.
 15. The appellants claim that the respondent would *not* be in a position to refund the decretal sum if the appeal is successful. It is deposed at paragraph 9 of the supporting affidavit that the respondent is neither in gainful employment nor does she have any tangible assets. The respondent takes up cudgels on that statement. Although she claims to be in a position to refund the decretal sum, she does not elaborate on the matter. All that she states is that she is a *business lady*. The business is not defined. There is no reference to its books of accounts, assets or capacity to refund the sums in question. It behoved the respondent to demonstrate she is not a man of straw. See MDC Holdings limited and others v J.P. Machira Nairobi, Court of Appeal, Civil Appeal Nai 7 of 2002 (unreported), Butt v Rent Restriction Tribunal [1982] KLR 417. The appeal seems arguable. I cannot say it is hopeless. There is thus a danger that the appeal or part of it may be rendered nugatory.
 16. Justice is however a two way street. The appellants admitted liability for the accident at the ratio of 90%. The respondent is thus *unlikely* to walk out of this court empty handed. The appellants had proposed general damages of Kshs 200,000 in the lower court. I am alive there is an appeal on the special damages of Kshs 31,012. The point to be made however is that the respondent has a lawful decree; she continues to suffer from the effects of the accident. A full stay would mean that she cannot reap the fruits of her judgment. The offer for security or for all the money to be held in a joint interest earning account would provide little solace. The prejudice is self-evident. Justice in this case demands that the respondent be paid part of the decree. I think half of the sum awarded in general and special damages is reasonable. The balance would then be held in an interest earning account of the lawyers of record pending the appeal. That ensures the *equality of arms* of both parties.
 17. The upshot is that there shall be a *conditional* stay of execution of the decree in Iten SRMCC 35 of 2010 pending the hearing and determination of this appeal. The stay is granted upon *two conditions*: first, the appellants shall within *thirty days* of today's date pay to the respondent Kshs 420,506 being *half* of the sum awarded as special and general damages. Secondly, the appellants shall within *thirty days* of today's date *deposit* the *balance* of the *decretal* sum in a joint *interest earning* account of both advocates in a *reputable* bank. In default of any or all of the conditions, execution shall proceed forthwith. Finally, the appellants shall file the record of appeal; and, set down the appeal for *directions* within *ninety days* of today's date. The costs of this motion shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 12th day of November 2015

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Okara for Mrs. Khayo for the appellants instructed by Nyairo & Company Advocates.

Mr. R. Wafula for the respondent instructed by R. M. Wafula & Company Advocates.

Mr. J. Kemboi, Court clerk.