ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 94 OF 2012

OKEMWA ANGIMA.....APPELLANT

VERSUS

JOHN OUKO AYIM.....RESPONDENT

R U L I N G

In the Chief Magistrate's court at Kisumu the respondent obtained a judgment of Kshs. 707,440/= with costs and interest against the applicant. The suit followed an accident on 7-11-2006 along Oyugis - Kisumu road when a motor vehicle registration number KAV 484V Toyota Matatu collided with a motor cycle registration No. GKA 607B. The deceased Monica Achieng Ouko was a passenger on the motor cycle. She was died while being treated for the injuries she had suffered in the accident. She was aged 41 and was working as an Assistant Agricultural Officer at the time. The respondent was sued as the owner of the motor vehicle. The suit was under the Law Reform Act and Fatal Accidents Act by the respondent in his capacity as the administrator of the estate of the deceased. He blamed both rider of the cycle and the driver of the motor vehicle in negligence for the accident and death. The applicant was sued as the registered owner of the vehicle who was vicariously liable in negligence. The rider and the driver were found to be equally to blame for the accident. The applicant was asked to pay Kshs. 707,440/= with costs and interest.

The applicant was aggrieved by the decision and filed this appeal to challenge both liability and quantum. He filed an application for stay in the lower court. The application was heard inter parties and an order made that he deposits the decretal sum into an interest earning account to be operated by the counsel of the parties. The deposit was to be done in 30 days. The order was on 8-10-2012.

On 29-11-2011 the applicant filed the present application seeking the stay of the orders of 8-10-2012 and the stay of execution of decree pending the hearing and determination of the appeal on condition that he deposits into court the title deed of his land as security instead of the order that he deposits the decretal sum into a joint account.

The respondent opposed the application and supported the condition of stay as ordered by the lower court.

It is not true, as was submitted by counsel of the applicant, that the application is *res judicata* now that a similar application was heard and decided by lower court. Under Order 42 rule 6 (1) of the Civil Procedure Rules this court has jurisdiction to hear and determine this application

> **".....whether the application for such stay shall have been granted or refused by the court appealed from....."**

The written submissions by Mr. Owega for the applicant dwelt at length on the merits of the appeal. Such merits, however, can only be for the Court of Appeal. Before this court, the applicant has to show that he stands to suffer substantial loss if an order for stay is not granted; the application has to be brought without unreasonable delay; and he has to furnish security for the due performance of such decree or order as may ultimately be binding on him.

There was no question about delay in the bringing of the application. Further, the parties appear to agree that there be stay. The disagreement is on the condition for such stay. The respondent favours the order by the lower court for the deposit of the decretal sum into a joint account. The applicant seeks to be allowed to instead lodge a title deed for his land. The respondent pointed out that in the application for stay that the applicant filed in the lower court he stated that he was comfortable with any condition that the court would impose. He did not say he would be unable to deposit the decretal sum. He is employed by the Kenya Revenue Authority. Infact in paragraph 16 of the affidavit he swore to support that application he deponed as follows:

> **"16 THAT the applicant is ready to abide by any condition set by this court for the granting the stay of extension sought therein."**

The respondent opposed the application. The lower court allowed the application on the condition above.

It should be recalled that this was a money decree. Although the applicant was exercising his undoubted right of appeal, the court was to consider that the respondent was entitled to realise the fruits of the judgment. The applicant was only going to be successful if he showed that if stay was not granted he was going to suffer substantial loss because the respondent did have the means to refund the decretal sum, if the appeal was successful and the refund ordered. It is notable that both in the lower court and before this court, there was no averment regarding the means of the respondent or his inability to refund the decretal sum. The respondent was consequently not entitled to stay of extension (Carter & Sons Ltd -VS- Deposit Protection Fund Board and Others, Civil Appeal No. 291 of 1997 at Nairobi).

Now that the applicant was granted stay, he claims that th terms on which it was granted are

> **"harsh, punitive and unfair as the sum I am required to deposit is extremely substantial and which I am not able to raise."**

He did not disclose the amount he was able to raise. He had said he would abide by any conditions set by the court. He did not offer a title deed to the court. Before this court he has not stated the acreage or value of the title deed. He has not exhibited any title deed. He is the one who was seeking the exercise of discretion in his favour. He was required to be as forthcoming as possible with information.

In these circumstances, I confirm the condition of stay as ordered by the lower court. I ask the applicant to deposit into a joint interest earning account at the decretal sum (Kshs. 707,440/= plus costs and interest) within 30 days from today. Such account shall be operated by counsel for both parties. In case of default, execution shall issue without further application. The applicant has been indulged. He will pay costs of this suit.

Dated, signed and delivered at Kisumu this 29th day of July, 2013.

A.O. MUCHELULE
JUDGE