



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 408 OF 2009**

**JOEL KIPNGETICH MASIKE.....APPELLANT**

**Versus**

**ELIZABETH KINUTHIA.....RESPONDENT**

**RULING**

The Respondent's thirty years old son, Pinto Njenga Kinuthia (the deceased) was on 26<sup>th</sup> June 2001 knocked down by the Appellant's vehicle and suffered fatal injuries. He was pronounced dead on arrival at hospital a few minutes after the accident.

After obtaining a grant of letters of administration, his mother later sued the Appellant in Milimani CMCC No. 10569 of 2003. That court held the Appellant 100% liable and awarded her Kshs.840,000/=. The Appellant has appealed against that judgment.

Pending the hearing and final determination of that appeal the Appellant has applied under **Order 41 Rule 4(1)** of the **Civil Procedure Rules** for stay of execution.

In both his affidavit in support of the application and his counsel's submissions the Appellant contends that as the Respondent is a woman of straw, and if stay is not granted and the decretal sum is released to her, she will not be able to pay it back if the appeal is allowed thus rendering it nugatory. He further contends that the Respondent will not suffer any prejudice as the whole decretal sum has been deposited in court. Regarding delay in bringing this application, the Appellant contends that was caused by failure to obtain a decree in good time.

For the Respondent it is contended that the Appellant having sat on his rights for about eleven months he has, as it were, lost his right of appeal and this application should be dismissed with costs. If, however, the application is allowed, then some amount should be released to the Respondent to assist the deceased's minor children.

I have considered the matter. To succeed in an application like this, **Order 42 Rule 4(2)** of the **Civil Procedure Rules** requires the Applicant to make the application expeditiously and to demonstrate that he will suffer substantial loss if stay is not granted and to offer security for the due performance of the decree. In addition to this, the High Court and the subordinate courts do, like the Court of Appeal, in most cases consider whether or not the appeal will be rendered nugatory if stay is not granted.

In this case the Appellant has satisfied the third requirement by depositing the decretal sum in court. The remaining issues are therefore whether or not this application was brought without unreasonable delay, whether or not the Appellant will suffer substantial loss and whether or not the appeal will be rendered

nugatory if stay is not granted. I will consider all of them together.

The Appellant contends that he could not make this application earlier as there was delay in obtaining the decree. That is a frivolous argument. First, one does not require a decree to apply for stay. Secondly it was te duty of his counsel to extract the decree and have it signed. We are not told what caused the delay in obtaining a signed decree.

On substantial loss I think the Applicant has a point. The Respondent has not demonstrated to court that she has means of refunding the decretal sum if the appeal is allowed. If the decretal sum is released to her, she is obviously going to spend it. If the appeal is allowed, she may not be able to refund it. That will cause substantial, if not total loss to the Appellant and thus render his appeal nugatory.

Taking all these factors into account, although the Appellant is guilty of delay, in the interest of justice the Appellant should be accorded an opportunity to ague his appeal. The Respondent should also not be denied the right to enjoy the fruits of her decree. In this case it should be recalled that the deceased left two minor children without any means of support. I have to balance the two rival positions.

It is not proper for a court considering an application for stay of execution to make any remarks that may prejudice the hearing of the appeal. It is, however, incumbent upon the court to consider whether or not the appeal is arguable. If the appeal is shown to be frivolous, it is the duty of the court to dismiss the application for stay. To hold otherwise in such situation would occasion injustice to the Respondent.

With this caution in mind all I should say in this matter is that given the fact that the Appellant's vehicle knocked the deceased down, I do not think the Appellant will escape scot-free. In the circumstance, I allow this application on condition that half the decretal sum is released out of the deposit in court to the Respondent forthwith. As the proceedings have been typed and the record of appeal filed, the Appellant should prosecute his appeal within six months failing which the balance of the decretal sum should be released to the Respondent.

The Respondent shall have the costs of this appeal.

**DATED and delivered this 28<sup>th</sup> day of July 2011.**

**D.K. MARAGA  
JUDGE**