



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Case 60 of 2003

MARY KINA.....PLAINTIFF

VERSUS

**MENENGAI OIL REFINERIES.....1ST DEFENDANT
JOSEPH MATHENGE NGUYO.....2ND DEFENDANT**

RULING

The plaintiff filed this suit in year 2003 claiming damages against the defendants under the Law Reform Act and the Fatal Accidents Act. The matter was heard and Judgment was rendered on 9/2/2009. She was awarded Ksh.4,442,490 plus costs. The defendants, being dissatisfied with the Judgment filed a Notice of Appeal dated 19/2/2009. The appeal had nonetheless not been filed as at the time this application was heard. The Defendant/Applicant filed the application at hand on 27/3/2009 under a certificate of urgency under Order XLI Rule 4 of the Civil Procedure Rules seeking a stay of execution of the said Judgment until the Appeal is heard and determined.

The application is premised on 4 grounds on its face and supported by the affidavit of one Regina Mwangangi Kitheka who describes herself as the Manager Legal Department Kenindia Assurance Company Limited who were the Insurers of the motor vehicle that was involved in the accident giving rise to the claim herein.

Her capacity to swear the affidavit has been challenged by counsel for the Respondent but in my considered view, being the manager in charge of the legal department, she has authority to swear the said affidavit and the same does not therefore call for striking out.

According to the applicant, unless the stay is granted, they are likely to suffer substantial loss if the decretal amount is paid to plaintiff. In his address to court, counsel for the applicant maintained that if the decretal amount is paid out and the appeal succeeds, the plaintiff may not be able to refund the same.

In her replying affidavit however, the applicant contends that she is a teacher earning Shs.40,949 per month. She has also annexed several Title Deeds to her affidavit to prove that she is not a person of straw. I may point out here that Title Deeds without valuation certificates may not be of much assistance to this court as the court has no way of attaching the monetary value to the Title Deed.

I have nonetheless very carefully considered the application, the grounds and the rival affidavits. I have also been informed by the authorities cited to me. I am conscious of the contents of the Judgment being challenged and it is highly unlikely that the entire Judgment would be overturned. Having said so, I now turn to consider whether the applicant has satisfied the requirements as set out under Order XLI Rule 4 of the Civil Procedure Rules. The principles to consider when determining whether or not to grant a stay of execution pending the hearing of the appeal are well settled. An applicant has to establish the following:-

(i) *Does he have a sufficient cause?*

(ii) *Has the applicant established that he will suffer substantial loss if the stay is not granted?*

(iii) *Was the application for stay filed without undue delay?*

(iv) *Will the appeal be rendered nugatory if the stay is not granted; and finally*

(v) *Has the applicant made an undertaking to furnish the court with security for the due performance of such a decree as the court may deem fit?*

In this case, I appreciate that the applicants filed a notice of Appeal in time. They have nonetheless not filed the appeal itself. According to the applicant, the amount involved is quite substantial and if it is paid out, they will suffer substantial loss. They further contend that the Respondent may be unable to refund the money in case the appeal succeeds and the appeal would therefore be rendered nugatory.

I note that the application was filed without undue delay and the applicant has satisfied the requirement of undertaking to furnish security as the court may direct.

Granting orders of stay is in the discretion of the court. In my view the court ought to balance both sides and strike a balance in a way that neither party will feel prejudiced by the court orders. In this case, I note that the suit was filed 7 years ago. The accident in question robbed the plaintiff and her children the emotional and material support they used to get from the deceased. The actual appeal has yet to be filed and when filed, it may take a considerable length of time. In the meantime, the Plaintiff/Respondent will continue to be deprived of the fruits of the Judgment. As stated earlier, I have gone through the pleadings in this matter. I have noted that indeed, counsel for the applicant herein even after giving an allowance of 50% shared liability had urged the court to award Ksh.2,942,092. The question therefore that begs to be answered is whether the defendants would have complained had the court awarded the said amount as damages.

In my considered view, even as the results of the intended appeal are awaited, the plaintiff should be allowed to enjoy part of the fruits of the Judgment herein. Depositing the entire decretal amount in court will not benefit the plaintiff in any way. I also note that she is in salaried employment and has some land whose value has not nonetheless been ascertained. She is not therefore “*a person of straw*” and can refund a substantial amount of the decretal amount if the appeal succeeds in toto and sets aside the entire Judgment which as I said before is highly unlikely. Having taken into consideration these circumstances, I will grant the stay, orders sought but order that 2 million shillings which is part of the decretal amount be paid out to the Plaintiff/Respondent herein. The balance of decretal amount be deposited in a joint interest earning account in the names of both counsel herein. Costs of this application will be in the cause.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 17th day of Feb 2010

In present of:- Mr. Kathungu for plaintiff present, N/A for Respondent