

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 141 of 2009

GATUNGURU TEA FACTORY LIMITED.....APPELLANT

VERSUS

BENSON MAINA WAIHAKA.....1ST RESPONDENT

MIRIAM WANGUI MWANGI.....2ND RESPONDENT
(Suing as administrators of the estate of the late JOSEPH MWANGI BENSON)

RULING

GATUNGURU TEA FACTORY LIMITED, the appellant herein, took out a motion dated 9th February 2010 in which it prayed for an order of stay of execution of the decree issued on 29th January 2010 vide the Nyeri Chief Magistrate's Court by J. Kiarie, learned Senior Principal Magistrate in CMCC 425 of 2007 pending the hearing and determination of the appeal. The motion is supported by the affidavit of **CHARLES MUNGE MURIGU. BENSON MAINA WAIHAKA** and **LYDIA WANGUI MWANGI**, the Respondents herein, opposed the motion by filing a replying affidavit of Benson Maina Waithaka.

The history leading to the filing of the motion appears to be short and straight forward. The Respondents herein filed a claim before the Chief Magistrate's Court Nyeri dated 9th July 2007 claiming special and general damages for the fatal injuries sustained by Joseph Mwangi Johnson, deceased, as a result of the negligence of the driver of motor vehicle registration number KAT 825 S. The Appellant herein filed a defence denying the Respondent's claim. The suit was heard whereupon the Respondents were awarded Kshs.927,000/= representing both special and general damages. It would appear the Appellant did not satisfy the judgment and this prompted the Respondents to execute the decree by proclaiming the Appellant's property. The Appellant is now before this court seeking to stay execution of the decree pending appeal.

It is the submission of the Appellant that it has an arguable appeal which may be rendered nugatory if the stay is not granted. It is alleged that it may be extremely difficult to recover the decretal sum from the Respondents if the same is paid should the appeal succeed. That is the substantial loss the Appellant is likely to suffer. The Respondents have opposed the application on the ground that no substantial loss will occur to the Appellant because the decretal sum will be invested in favour of children of tender age hence the amount will be readily available should the appeal succeed. It is also alleged by the Respondent that the Appellant is hell-bent to delay this matter and that is why it took time for them to file this motion.

I have considered the grounds set out on the face of the motion and the facts deponed in the supporting affidavit and the replying affidavit. I have further considered the submissions filed by the parties appearing in this dispute. The principles to be considered when dealing with such an application are well settled. First an applicant must show the substantial loss he will suffer if the order is denied; secondly there must be evidence that the application for stay was made without an unreasonable delay and thirdly that the court must consider the offer for provision of security therein. On the first principle, it has been argued that if the decretal sum is paid to the Respondents, it would be extremely difficult to recover the same. In response to this argument the Respondents have stated that the decretal sum will not be spent but would rather be invested for the benefit of the minor children. The Respondents do not aver that they are in financial position to refund the amount. It is their word that they will not spend the decretal amount if they are paid. I am persuaded by the arguments of the Appellants that it may turn out to be extremely difficult to recover the judgment amount should the appeal succeed. That in my view amounts to a substantial loss. On the second principle, judgment was delivered on 10th November 2009 and this motion was filed on

9th February 2010, I am convinced that the same was timeously filed in view of the explanation given by the Applicant. The third principle is on provision for security. The appellant has offered to deposit the decretal sum.

In the end I am satisfied the motion has merit, it is allowed as prayed with costs abiding the outcome of the appeal. An order of stay of execution of the decree pending appeal is given on condition that the Appellant deposits in an interest earning account in the joint names of the advocates appearing in the matter, the decretal sum within 30 days from the date hereof. In default the motion shall stand automatically dismissed.

Dated and delivered at Nyeri this 23rd day of April 2010.

J. K. SERGON

JUDGE