



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 395 of 2006

AGGREY ARUWA.....1ST APPELLANT

PRISCA WERE OLOO.....2ND APPELLANT

VERSUS

NICHOLAS S. AMUTAVI.....RESPONDENT

RULING

The Respondent herein filed Milimani Commercial Court RMCCC 13969 of 2004 against the appellant. A perusal of the plaint contained in the bundle of exhibits marked AA3 shows that it was an accident claim for material damage to the Respondents motor vehicle attributed to the first defendant who was driving the 2nd appellants' vehicle as an agent or servant of the second appellant. It was a special claim covering the cost of repairs to the Respondents vehicle. The defence filed blamed the accident on to the plaintiff/respondent and gave particulars of negligence attributed to the plaintiff/respondent.

This Court has been informed that judgment has been given in favour of the Respondent. The appellants became aggrieved of that judgment and have filed this civil appeal No.395 of 2006 against that decision. Their main grievance being that the decision was based on the doctrine of subrogation which had not been pleaded and by virtue of which finding the benefits of the judgment will go to benefit a 3rd party who is not party to the proceedings and from whom the appellants will have difficulty recovering the said money should the appeal succeed. It is on this basis that the appellants have come to this court by way of notice of motion under Section 3A Civil Procedure Act Order 41 rule 4(1) (2) of the Civil Procedure Rules seeking stay of execution of the judgment and decree in RMCCC 13969 of 2004.

In support of the application they rely on the grounds in the body of the application, supporting affidavit annextures and oral submissions in Court. The major points relied upon by the applicants are that:-

1. They have an arguable appeal because.

(i) The doctrine of subrogation was not pleaded

(ii) Finding that money be paid to Jubilee Insurance company not party to the proceedings was wrong.

(iii) The court failed to appreciate the Respondents admission that he had no complaint.

(iv) The Court failed to appreciate the fact that there was a collision and in that regard should have apportioned liability.

(v) That this being a monetary decree claim care should be taken so that the appellants do not suffer substantial loss of having the said money deducted from their salaries to pay the insurance company which they might have difficulty recovering the same should they succeed.

(vi) They are within the principles of law governing the granting of stay pending appeal.

The Respondent has opposed the application on the grounds set out in the replying affidavit and oral submissions in Court and these are:-

(i) The applicant has not satisfied the ingredients for granting stay pending appeal as substantial loss has not been established as it has not been demonstrated how this will arise.

(ii) The applicant has not demonstrated how it will be hard to recover the money from jubilee insurance.

(iii) That however, should the court be inclined to grant stay then the court should attach conditions to the same.

On the law the appellant/applicant referred the court to the case of KENYA

RTS AUTHORITY VERSUS PAUL NJOGU MUNGAI & OTHERS NAI. 204/1999(UR 87/93), NYAMODIOCHIENG NYAMOGO AND OTHERS VERSUS KENYA POSTS AND TELECOMMUNICATION NAI 204/1999 (UR 87/93) JAVAN LEWA MUYE VERSUS SHIVA ENTERPRISES LTD AND OTHERS NAI 153/1995(70/95 UR) and ICDC VERSUS DABER ENTERPRISES LTD NAI 223/1999(89/99 UR).

In all of these decisions one principle was echoed namely that the intended appeal should not be frivolous or that it is an arguable appeal and if successful should not be rendered nugatory.

These principles have been applied to the facts of this application together with the general principles set out in order 41 rule 4(1) and (2) Civil Procedure Rules. The findings of this court the application are that the applicant has to satisfy the following ingredients in order to qualify for the order sought.

These are:-

(1) that the application has been presented without undue delay. The memo of appeal as well as the application indicate that the grieving orders were made on 7.6.2006. The appeal was filed on 16.6.2006 while the application was presented on 4.7.2006. The sequence of events therefore show that the application was presented without undue delay.

(2) As for the second ingredient of suffering substantial loss, this arises from counsel's submission that money has been ordered to be paid to Jubilee Insurance Company not party to the proceedings and recovery of the same will be difficult. Indeed a perusal of the plaint and defence exhibited shows that Jubilee Insurance Company is not a party to the proceedings and this being the case if any money is paid to it resulting from the decree subject of this appeal, it means that the aggrieved party will be forced to initiate fresh proceedings to recover the same even if done in a summary form.

(3) The 3rd ingredient relates to the arguability of the appeal. This arises where the complaints in the appeal are to be married and considered with the findings in the judgments. The judgment has not been exhibited. For this reason it is not possible for this for this court to determine that money was ordered to be paid to a party not party to the proceedings. Likewise it is not easy for this court to establish that the complaints in the grounds of appeal have their base in the judgment. Apparently the 2nd and 3rd ingredients have not been met. That notwithstanding this court is not precluded from leaning towards substantial justice as opposed to technical justice. Technical justice would require the court to decline stay because the basis of the complaint is not shown to exist even if there is a requirement not to preempt the merits of the appeal. Substantial justice would require the court to take notice of the fact that

proceedings belong to litigants and not their agents and be slow to deny litigants a chance of availing themselves of a relief at their disposal on account of an omission on the part of their agent. More so when the merits of the complaints are yet to be gone into at the time of the hearing of the appeal and no injustice is to be suffered by the other side. Herein no injustice will be suffered if stay is granted where interests of both parties are taken care of. Such interests can be safe guarded by orders of conditional stay.

This court is inclined to grant stay pending appeal on the following terms:-

- 1). The decretal amount to be deposited in court within 60 days from the date of the reading of this ruling.
- 2). The respondent will have costs of the application.
- 3). Applicant to move with speed to process the appeal for a speedy hearing and disposal
- 4). There will be liberty to apply to either side.

DATED, READ AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE