



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Appeal 113 of 2005

MOI

UNIVERSITY:.....APPELLANT

VERSUS
BERNARD MUMO

MUSYOKI:RESPONDENT

RULING

This Is a consolidated application for stay of execution of the judgment and decree following a Ruling made by the Principal Magistrate’s Court at Eldoret in various suits on 14th November,2005 pending the hearing and determination of appeals filed against the said order by the Applicant

Sometime in the course of the year 2000, the Appellant’s motor vehicle number KZX 891 was involved in an accident in which the plaintiffs who were all employees of the Appellant were traveling. Most of the said employees were injured while others died. The plaintiffs who are the Respondents herein instituted 43 separate suits individually. About 36 of the suits proceeded for trial.

Before the trial, the Appellant’s previous advocates entered into consents with regard to liability and apportionment thereof. By similar consents with the counsel of the claimants and of third parties, the suits against the third parties were withdrawn. The suits proceeded for assessment of damages. The Trial courts assessed the quantum of damages in about 36 cases or so. The average award in each case is about Shs.60,000/= with the highest award on the injuries being Shs.75,000/=. The total decretal sum amount to about Shs.5,000,000/=.

The Appellant after the judgment, changed advocates and applied for review and setting aside of the judgments on the grounds, inter alia, that its previous advocates did not have instructions to enter into the consents on liability and discharge of the third parties who were co-defendants. The Principal Magistrate, Mrs. Mongare, disallowed the application to review the judgments/decrees giving rise to the Appeals and these applications for stay of execution pending appeal.

The Applicant, Moi University contended that the executions of the decrees amounting to sums totaling over Shs.5,000,000/= shall stall the functions of the University, paralyse its functions as a teaching institution and shall imperil the Applicants public duty, funded by taxpayers to render teaching services. The Applicant further argued that the continuity and stability of the University is in the Respondents’ own interest as they are members of staff of the University. It was submitted that if the decretal sums were paid, they would render the appeals nugatory as the Respondents will not be in apposition to repay the decretal sums. The University will therefore not be able to recover the sum of Shs.5,000,000/=.

Mr. Katwa for the University further submitted that the University was a corporate body and will be in a position to pay the decretal sums upon the conclusion of the Appeals. The University has offered to provide alternative security for the decretal sums if directed by the court.

The Respondents have opposed the application on the ground that they would be in a position to repay the decretal sums. Being employees of the University, their employer had the right to recover the respective amounts from their salaries. The Applicants submitted that all the litigants are equal in the eyes of the law and there are no special litigants to be given special consideration. They added that in Kenya it has been established that stay of execution could only be granted conditionally. They invited the court, if it was inclined to grant the stay, to order that the decretal sum be deposited in a joint account in the names of the respective counsel to be held as security for the decretal sums.

This application is made under the provisions of Order 41, Rule 4 of the Civil Procedure Rules. It is trite, that all litigants are deemed to be equal in the eyes of the law and the courts unless exceptional circumstances are shown to exist e.g. a court will always treat the rights and interest of a minor with more care and diligence and even give them priority to ensure that the welfare of the child is protected. In this case, it is money that is involved. The Applicant is an educational Institution a University while the Respondents are its employees. While the University is a public and educational Institution it has not been shown that that it requires more protection in law than the Respondents. The settlement or satisfaction of judgments and awards is not an exceptional matter in which University needs to be protected from. It is a legitimate legal and lawful obligation to discharge. The right of appeal is a right that exists and the University may exercise it.

The only question in this application is the amount of the decretal sum and whether its immediate payment would render the appeal nugatory or the damage entailed would be so severe that the Applicant might never recover from it even if the money were to be refunded to it in the event of its appeals succeeding. In the case of **C.A. No. NAI.93 OF 2002 (50) 2002 (50/200 UR) RELIANCE BANK LIMITED (IN LIQUIDATION) –VS- NORIAKE INVESTMENT LIMITED** – unreported: it was stated:-

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“The point which clearly emerges from these cases is that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Hence in the case of BUTT –V- THE RENT RESTRICTION TRIBUNAL, ante, MADAN JA, took into account the amount of money involved. In the Kenya Breweries Ltd case, the court again took into consideration the amount of money the applicant was required to pay under the decree and the court came to the conclusion that the damage that would be entailed in the immediate payment of the money might be so severe that the applicant might never recover from it even if the money were to be refunded to it in the event of its appeal succeeding. And in the Attorney General -VS- Equip Agencies case, the court took into account the fact that the money was to be paid from the public funds and further that the amount involved was so large that immediate payment of it might cripple the operations of the Ministry of Health. All these are legitimate factors for the court to take into account when it is considering the question of whether an appeal would be rendered nugatory if a stay of execution or an injunction is not granted.....”

I have taken into account the aforesaid principles established by the Court of Appeal. It is also true that before a stay of execution can be granted the applicant must satisfy the court that there is good reason to do so. In exercise of its discretion the court looks at the circumstances and facts of the case – (**see MUNGAI –VS- NDAMBA (1981) 1 KLR 367.**)

This court notes that the consolidation of the application herein and probably the determination of certain aspects of the 43 cases in the Magistrates Court Under the cover of one file was purely for convenience and for good reasons. It was prudent to do to save precious judicial time. However, the true decretal sum of each of the plaintiffs is between Shs.60,000/= to shs.75,000/=. It is the consolidation of the hearings for convenience that gives the impression that the decretal sum herein is Shs.5,000,000/= It is not. The suits were never consolidated as far as the record shows. It is only that the question of liability and consents thereto were recorded in one file. This court will, therefore, takes into account that each Respondent has his/her own decree and each is entitled to the fruits of judgment on the amount awarded.

In case of any repayment of any decretal sum it is not Shs.5,000,000/= to be paid by the Respondents jointly and severally. The amount if paid, to be refunded is the decretal sum by each individual which is a between Shs.60,000/= and Shs.75,000/=.

Be that as it may, now that by some providence the claims and awards have found themselves together and particularly the question of the enforcement of the decrees and the application for stay of execution pending appeal, this court will not be blind to the fact that any order or enforcement of the decree would entail immediate payment of Shs.5,000,000/= by the Applicant.

I do agree that in today's Kenya a sum of Shs.5,000,000/= is a substantial sum of money for any company, corporation, institution or individual. On the face of it, it would appear that a University of the stature of the Applicant should be good for Shs.5,000,000/=. This is true. However its not the worth or value of the University we are talking about here. It is its ability to pay out such a sum at once. It is about its cash flow, operations and financial management. It is not as if an organization whether commercial or otherwise has such sums in reserve awaiting to settle claims once called upon to do so.

I therefore, do agree that there is a possibility that the immediate payment of Shs.5,000,000/= would adversely affect the operations of the University. However, I do not think that this would paralyze the operations of the University or bring about its “**bankruptcy**” or liquidation. No material was placed before the court to prove this or indicate of such a possibility. In the absence of such evidence, it is hardly convincing that Moi University's operations would come to a stand still if it paid such an amount of money. If this was the case, it would be a matter of concern to this court.

I, therefore, return to the aspect of whether the appeal would be rendered nugatory on the ground that the Respondents would not be in a financial position to repay or refund to the Applicant the decretal sums if paid to them. As stated earlier, it is not for each of the Respondents to pay a sum of Shs.5,000,000/=. Each plaintiff was awarded between Shs.60,000/= and Shs.75,000/=. All the Respondents are employees of the Applicant. It would be possible for the Applicant to deduct the said sums from their salaries. The amounts also are not substantial for each individual. They are sums that even a clerk could repay in due course or even a subordinate staff.

However, this case has exceptional facts and circumstances. This is the fact that any immediate payment would be in the sum of Shs.5,000,000/=. A challenge to the judgment and decree would require determination in the same proceedings the facts of the case emanating from a single road accident.

The Applicant has stated that it is willing to provide an alternative security for the decretal sum. Unfortunately, it did not specify what specific security it is willing to give. A bank guarantee or immoveable property was not specifically suggested. I found that the Applicant was non-committal on this aspect. In my view for a stay of execution to be granted there must be some consideration. It ought not be granted unconditionally, to balance the interests of all parties.

Upon considering the aforesaid and all the circumstances of this case, I do hereby find that if the Applicant is called upon to pay the sums of Shs.5,000,000/= immediately, it may face some cash flow or temporary liquidity problems. This is a public educational institution which is also the employer of the Respondents. It is in the interest of all that there is continuity and stability of this institution.

On the other hand, the Respondents are successful litigants and they ought not be denied the fruits of their respective judgments. Each of the respondents is able to pay the decretal sum upon conclusion of the appeal. They are still employees of the applicant and their salaries can be deducted to pay the said amounts. However, there is the possibility that some of the employees may leave their employment since the relationship of personal services is always terminable.

Doing my best and balancing the interests of all the parties I do hereby grant stay of execution of the judgments and decrees herein pending the hearing and determination of the Appeals lodged by the Appellant/Applicant herein on condition that the Appellant/Applicant shall pay 50% of the decretal sum to each of the Respondents respectively within the next **45 DAYS**. The costs of this application shall be

in the Appeal. In default of payment of any of the respective amounts herein, execution to issue in respect of the affected decree holders.

I have decided not to deal with the issues raised by Mr. Kitiwa in respect of Appeals No. 28 and 29 to the extent that there are no appeals filed in respect of most of the Respondents he acts for. I think this is an issue that can be taken up at a later stage.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF JULY,2006

M. K. IBRAHIM

JUDGE