



REPUBLIC OF KENYA
HIGH COURT AT NAKURU

Civil suit 60 of 2001

DR. PAUL MUBIA MATHUPLAINTIFF

VERSUS

IBRAHIM KARIUKI GICHIMUDEFENDANT

RULING

The applicant applied for an order of stay of execution of the decree herein pending the hearing and determination of an appeal by the Court of Appeal. The application was made on the ground that the Plaintiff/Respondent had embarked upon execution of the decree and if the execution was done, the intended appeal would be rendered nugatory. The application was supported by the defendant/applicant's affidavit sworn on 5th November, 2003. The background to the said application is that on 4th June, 2003 this court delivered a judgment wherein the respondent was awarded general and special damages of Kshs.5,899,604/- as a result of serious injuries which he sustained in a road traffic accident involving his motor cycle and the respondent's motor vehicle. The applicant was aggrieved by the said judgment and decided to lodge an appeal to the Court of Appeal. The applicant has so far filed the notice of appeal only.

Thereafter the respondent's bill of costs was taxed at Kshs.326,869/- but the applicant lodged an objection to the decision of the taxing master. The applicant was apprehensive that the respondent was about to execute the decree and deponed that if the decree was executed before his appeal was heard, he would suffer irreparable loss and the appeal would be rendered nugatory. He further deponed that he was willing and ready to comply with any terms on security as to costs as the court may impose. Mr. Kamara who led Mr. Machage in arguing the said application submitted that during the hearing of the appeal, the appellant will be arguing that the honourable judge misdirected herself on the issues of liability and quantum in finding the appellant 90% liable and the respondent 10% to blame. He further submitted that where two vehicles collided head on in the middle of the road, liability should be apportioned equally.

With regard to quantum of damages he submitted that the appellant would argue that the damages awarded were excessive and particularly for loss of future earnings. The above arguments were intended to demonstrate to the court that sufficient cause had been shown by the applicant and that the appeal was arguable. Mr. Kamara further stated that there was no unreasonable delay on the part of the applicant in making the application and that the applicant was willing and able to offer such security as the court may order in granting the orders sought in the said application. Counsel cited several authorities to buttress his arguments, the prominent one being the Court of Appeal decision in ATTORNEY GENERAL VS EQUIP AGENCIES CIVIL APPLICATION NO. NAI 432 OF 2001 unreported.

The respondent swore a replying affidavit dated 14th November, 2003. One of the issues raised therein was the validity of the Notice of Appeal which had been filed by the applicant but that issue was dealt with earlier when the parties argued it as a preliminary matter and the court delivered its ruling on 10th May, 2004 when it declined to hold that the Notice of Appeal had lapsed as the appeal had not been filed

within 60 days from the date of filing of the Notice of Appeal. The respondent further stated that an appeal from a monetary decree could not be rendered nugatory by reason of payment of the decretal sum as alleged by the applicant and that the applicant could not suffer irreparable loss by reason of settlement of the decree.

The respondent's learned counsel Mrs Magana submitted that there had been inordinate delay in filing the application almost five months after the judgment was delivered. She said that the application was filed only after execution proceedings were commenced and therefore she read bad faith in bringing up the said application. Regarding the delay in the filing of the record of appeal, counsel submitted that the typed proceedings had been ready since last year but the applicant had not collected the same. She further argued that the applicant had not shown that it would suffer substantial loss if the application was not granted and she cited several authorities. In the event that the court was willing to grant the application, she submitted that a reasonable portion of the decretal sum ought to be paid to the respondent and the balance thereof deposited in court.

I have carefully considered the application before me, the affidavits filed, the authorities and submissions by counsel. The principles upon which this court will exercise its discretion in considering an application for stay of execution pending the hearing and determination of an appeal are well set out by Order XLI Rule 4(2) of the Civil Procedure Rules which provides as follows:- "No order of stay of execution shall be madeunless: (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

The applicant in his application and supporting affidavit stated that he stood to suffer "irreparable loss" but I believe he meant substantial loss as Mr. Kamara rightly put it. The two have different meanings. It is not in dispute that the respondent sustained very severe injuries and was consequently awarded a substantial amount of money which together with costs and interest amounts to about Kshs.6.5 million. Whether the decretal sum would be paid by the applicant in person or by his insurance company, that is not important for the purposes of this application. What this court has to consider is whether the person who will have to pay that money will suffer substantial loss unless the order sought is granted.

In my view, that is a considerable amount of money and if stay of execution is not ordered, the execution process which had been commenced would be completed and the applicant is likely to suffer substantial loss. Where the amount of money involved is substantial, the court will more inclined to granting an order of stay of execution pending appeal. This was one of the factors that the Court of Appeal took into consideration in granting a stay in *M. M. BUTT VS THE RENT RESTRICTION TRIBUNAL*, Civil Application No. NAI 6 of 1979 and recently in *KENYA BREWERIES LTD VS KIAMBU GENERAL TRANSPORT AGENCY LTD*, Civil Application No. NAI 100 of 2000. The second limb which I have to consider is whether there has been unreasonable delay in bringing the application. Judgment was entered for the respondent on 4th June, 2003 and immediately after delivery of the same counsel for the applicant applied for stay of execution for 30 days which was granted. The said period lapsed and since the decretal sum had not been paid the respondent commenced execution proceedings shortly thereafter.

The present application was filed on 5th November, 2003, about 5 months from the date when judgment was delivered. That delay was not explained away by the applicant. In my view, that delay is fairly long but I do not consider it unreasonable as to disentitle the applicant from grant of the said orders. The applicant submitted that if the orders sought were not granted, the appeal would be rendered nugatory to which the respondent answered by stating that a monetary decree could not be rendered nugatory by reason of payment of the decretal sum. As was stated by the Court of Appeal in *RELIANCE BANK LIMITED (IN LIQUID ATION) VS NORLAKE INVESTMENTS LIMITED* Civil Application No. NAI 93 of 2002 the term "nugatory" does not only mean worthless, futile or invalid. It also means trifling that is, of little significance or value. I believe that if stay of execution is not granted, the appeal will be worthless or trifling.

Regarding the issue of security, let me state once against that the respondent sustained very serious

injuries. He is a veterinary Doctor who is now incapable of doing what he was trained to do. In considering this issue, I wish to refer to the case of ROSENGRENS LTD VS SAFE DEPOSIT CENTRES LTD [1984] 3 ALL ER 198 which was cited with approval by the Court of Appeal in GITAHI & ANOTHER VS WARUGONGO [1988] KLR 621. Parker, LJ stated as follows:- “We are faced with a situation where a judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the plaintiffs. It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.”

The purpose of providing security in an application for stay of execution pending appeal is to ensure that the appeal is not prejudiced and that the decretal sum is available if the appeal is not successful. In the above quoted case of GITAHI & ANOTHER VS WARUGONGO the Court of Appeal granted stay of execution but ordered that some money be paid within 14 days and the rest be secured by a banker’s guarantee. In the present application, I am inclined to grant the order of stay of execution but on some terms and conditions. Mr. Kamara submitted that the applicant was willing and able to provide security by way of a bank guarantee while Mrs Magana for the respondent submitted that it would be appropriate to have the respondent paid a reasonable portion of the decretal sum and the balance thereof being deposited in court. In ROSENGREN’S Case (Supra) at page 200, in considering more or less similar arguments as above it was stated that:-

“So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving that security. It may take many forms. Bank guarantee and payment into court are but two of them.....so long as it is adequate, then the form of it is a matter which is immaterial.” It is obvious that the mode of security which is least disadvantageous to the applicant in this case is provision of a banker’s guarantee.

I grant a stay of execution pending the appeal on the following terms:- 1. The applicant will pay to the respondent a sum of Kshs.1,000,000/- within the next 14 days from the date hereof. 2. The balance of the decretal sum will be secured by way of a banker’s guarantee within the same period. 3. The respondent shall give a written undertaking to reimburse the applicant in the event that the applicant succeeds fully in his appeal such that no money is payable to him or if the damages are reduced below the sum of Kshs.1,000,000/- the undertaking shall be provided to the applicant before the said sum is paid. 4. If the applicant shall not comply with conditions Nos.1 and 2 within the stipulated period of time the order of stay shall be deemed as lifted and the respondent shall be at liberty to execute the decree. 5. The applicant shall bear the costs of this application.

DATED, SIGNED & DELIVERED at Nakuru this 16th day of July, 2004.

DANIEL MUSINGA

AG. JUDGE

16/7/2004