



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 26 OF 2020

EQUATORIAL NUTS PROCESSORS LIMITED.....APPELLANT

VERSUS

CHARLES MWANGI GICHIMU.....RESPONDENT

RULING

1. The appellant prays for *stay of execution* of the decree pending the determination of this appeal.
2. The decree was passed on 10th August 2020 in *Murang'a Chief Magistrates Court Civil Case 83 of 2020*.
3. In that suit, the respondent was the legal representative of David Mwangi Gichimu (Deceased). He alleged that on 4th December 2019, the appellant's vehicle registration number KBW 842A was so negligently driven that it collided with the deceased's motor vehicle registration number KCK 627A. The deceased suffered grave injuries that led to his death.
4. The appellant did *not* enter an appearance or defence to the suit. The matter thus proceeded to formal proof. In a considered judgment, the learned trial magistrate found that the appellant was wholly to blame. She awarded general and special damages of Kshs 2,139,202 plus costs and interest.
5. When execution commenced, the appellant lodged in the lower court an application dated 11th August 2020 to set aside the decree. It was dismissed on 15th October 2020 precipitating the present appeal.
6. The appellant lodged a memorandum of appeal on 22nd October 2020. The main points taken are that the learned trial magistrate erred in dismissing its motion because the company was never served with the summons or plaint; and, it had an arguable defence disclosed in a draft annexed to the motion.
7. The present notice of motion is dated 22nd October 2020. The appellant contends it has an arguable appeal; and, that unless stay is granted, the appeal will be rendered nugatory. The appellant submitted that the respondent is a man of straw with no capacity to refund the decretal sums. The appellant is willing to provide security for the due performance of the decree.
8. The motion is contested. There is the replying affidavit sworn by the respondent on 12th November 2020.
9. The respondent's case is that the appellant was served and well aware of the suit. Reference was made to an affidavit of service sworn by the process server on 9th July 2020. Accordingly, the learned trial magistrate cannot be faulted for refusing to set aside the decree. He argued that the applicant has neither demonstrated that it will suffer substantial loss nor met the threshold for grant of the discretionary remedy of stay.
10. All the parties filed their submissions on 18th December 2020. On the same date, both learned counsel prayed that this ruling be delivered electronically to their respective email addresses.
11. The present motion is largely predicated upon Order 42 rules 6 of the **Civil Procedure Rules**. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.

12. The impugned order was made on 15th October 2020. The memorandum of appeal was filed on 22nd October 2020 contemporaneously with the present motion for stay. I thus find that the application was made timeously.

13. In **Butt v Rent Restriction Tribunal** [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Brett L.J. in **Wilson v Church** (No 2) 12 Ch. D [1879] 454 at 459-

I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory.

14. On the other hand, the respondent is *prejudiced* because he cannot reap the fruits of the decree. In ground 9 of the motion and paragraph 15 of the supporting affidavit, the appellant has *offered* to deposit the decretal sum in a joint account for the due performance of the decree.

15. Furthermore, the appellant has now deposited the sum of Kshs 2,139,202 in court pursuant to the *ex parte* order made on 26th October 2020.

16. The main appeal remains unheard. I resist the temptation to comment on its merits. But I find that there is an *arguable* appeal relating to the mode of service upon a company; and, whether the draft defence raises a *triable issue*. This does *not* mean that the appeal will succeed. Furthermore, the appellant cannot escape from the auctioneer's fees incurred before it challenged the decree.

17. I will thus grant a *conditional* stay as follows-

- a) That there shall be a stay of execution of the decree pending the hearing and determination of this appeal.
- b) That the stay is granted upon the *condition* that the appellant *maintains* the deposit of the decretal sum of Kshs 2,139,202 in court.
- c) That the appellant shall pay auctioneer's charges to be agreed upon within *thirty days* of today's date and in default to be taxed.
- d) That in the interests of justice, the appellant shall cause the record of appeal to be lodged not more than *ninety days* from today's date; and, shall ensure that the appeal is presented to the judge in chambers for admission or directions within a *further thirty days*.
- e) That costs shall be in the appeal. It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 4th day of February 2021.

KANYI KIMONDO

JUDGE

ORDER

Notice of delivery of this judgment was made in open court. Pursuant to the Practice Directions of 17th April 2020 in Gazette Notice No. 3137; and, the parties' consent dated 18th December 2020, this judgment has been delivered to the parties by electronic mail. Both parties have accordingly waived compliance with Order 21 Rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

KANYI KIMONDO

JUDGE

Ruling read in chambers in the presence of:

Ms. Dorcas Waichuhi, Court Assistant.