



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO E001 OF 2021

NICHOLAS MUTUKU MWASUNA.....APPELLANT/APPLICANT

-VERSUS-

MUSYIMU MULUNGYE (suing as the administrator of the estate of the

late JOSHUA MUTISO MUSYIMI).....**RESPONDENT**

RULING

1. Before me is an application brought by way of Notice of Motion dated 11th January 2021 filed by the appellant/applicant through counsel COOTOW & ASSOCIATES under section 1A, 1B, 3A, 63(e), 65(1)(b) and Order 51 Rule 1 of the Civil Procedure Act and Rules 2010.

2. The application seeks four (4) orders some of which have been spent as follows:

1. (spent)

2. (spent)

3. That pending the hearing and determination of this appeal, there be and is hereby granted a stay of execution of any ruling, judgment, decree, execution order or consequential order in Kilungu Civil Suit No. 145 of 2019 Musyimu Mulyunge (suing as the administrator of the estate of the late JOSHUA MUTISO MUSYIMI –VS- NICHOLAS MUTUKU MWASUNA.

4. That costs of this application and other costs incurred herein abide the outcome of the appeal.

3. The application has grounds on the face the Notice of Motion and was filed with a Supporting Affidavit sworn on 11/01/2021 by LINDA NJENGA, head of Legal of Britam General Insurance Company (Kenya) Ltd. It is contended by the applicant that judgment was entered on 11th December 2020 for an amount of award of Kshs.2,420,550/= and that thereafter Britam General Insurance Co. (Kenya) Ltd issued instructions to the advocates to file an appeal on 4th January 2021 thus necessitating the application herein.

4. The application is opposed through a Replying Affidavit sworn on 28th January 2021 by Musyimi Mulungye the Respondent in which it was deponed that the application has no reasonable grounds for grant of the orders sought and in case if it is allowed by the court then, half of the decretal amount should be released to the decree holder and the other half deposited in a joint interest earning account in the names of the advocates on record within 30 days.

5. The application proceeded by way of filing written submissions. Counsel on both sides filed their written submissions which I have perused and considered. In this regard, Waiganjo Wachira & Company for the respondent filed their submissions on 1st March 2021 and M/ COOTOW & ASSOCIATES for the applicants filed submissions on 17/3/2021.

6. This is an application for stay of execution of judgment or decree, which is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which is Rule 6(2) which states as follows –

91) 6(2) No order for stay of execution shall be made under subrule (1) unless –

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.

b. Such security as the court order for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.

7. The burden is on an applicant to demonstrate to the satisfaction of the court that he or she should be granted the stay orders sought as required under Rule 6(2) above.

8. Was the application herein filed without unreasonable delay? The application was filed less than a month after judgment was delivered. In my view therefore the application was filed without unreasonable delay.

9. Will the applicant suffer substantial loss if the stay orders are not granted? This is a matter that involves a money decree. The main ground of the applicant is that they will suffer substantial loss because the respondent will not be able to repay the amount if the appeal succeeds. In this regard, the respondent has not said that he is able to repay the amount, instead has said that he should be paid half of the decretal amount, if stay is granted. In my view the applicant has demonstrated that they are likely to suffer substantial loss if the stay sought is not granted.

10. Has the applicant offered to provide security? I note that the applicants have said in their Supporting Affidavit that they will abide by any conditions the court will impose. I am thus satisfied that they have fulfilled the requirement for providing security.

11. Consequently, I allow the application and grant stay of execution on the following conditions:

i. The applicant will pay the decree holder Kshs. 400,000/= of the decretal amount within 30 days from today.

ii. In default of payment of the above amount, to the Respondent, the stay of execution herein granted will automatically lapse.

iii. Costs of the application will follow the determination of the appeal.

DATED SIGNED & DELIVERED, THIS 11TH DAY OF MAY 2021, IN OPEN COURT AT MAKUENI

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GEORGE DULU

JUDGE