



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E232 OF 2021

BANK OF BARODA (KENYA).....1ST APPELLANT

JOYCE MWATHA KATHENGE

T/A REGENT AUCTIONEERS.....2ND APPELLANT

-VERSUS-

ELIJAH OKOYO MUTUBACHI

Suing as personal representatives of the estate of

DAVID ABAKALA OKOYO (Deceased).....RESPONDENT

RULING

The application dated 30th April, 2021 seeking the following orders:-

- 1. THAT this Honourable Court be pleased to order a stay of execution of the ruling delivered by the Honourable B. J. Ofisi, Resident Magistrate on the 16th of April 2021 pending the hearing and determination of this application**
- 2. THAT this Honourable Court be pleased to stay the execution of the ruling delivered by the Honourable B. J. Ofisi, Resident Magistrate on the 16th of April 2021 pending the hearing and determination of the Appellants/Applicants Appeal**
- 3. THAT the application be heard inter parties on such date and time as this Honourable Court may direct.**
- 4. THAT the costs of this application abide the outcome of the Appeal.**

Pauline Waruhiu swore an affidavit in support of the application on 30th April, 2021 while Elijah Okoyo Mutubachi swore a replying affidavit on 27th May, 2021 opposing the application.

Counsel for the applicant submits that the application is seeking stay of execution of the trial court's ruling which dismissed the defendant's application to set aside ex-parte judgment. It is argued that the appeal has high chances of success and the applicant is willing to provide security. Further, that the application has been brought without undue delay. No prejudice will be occasioned to the respondent. The plaintiff sought the leave of the court to file the suit out of time and some of the applicant's application before the trial court were filed in the wrong file.

Counsel for the respondent opposed the application and maintain that the applicant was accorded the opportunity to be heard by the trial court. The suit was filed in May, 2019 and summons were duly served. There is no dispute on service and what is alleged is that the applicants did not know what to do with the summons. The defendant entered appearance through the firm of Kairu & McCourt Advocates in March, 2019. Several applications were filed before the trial court. Some applications were filed in the wrong file. It is submitted that on 14th December 2020 counsel for the applicant was allowed to prosecute his application but failed to do so yet he was aware that judgment was to be delivered on 16th December 2020. Counsel requested to be heard on 14th January 2021.

It is further submitted for the respondent that the plaintiff was found 100% liable by the trial court. The respondent is 83 years old and sickly. The appeal is not arguable and no substantial loss will be suffered as there was insurance cover. Counsel for the respondent urged the court to order the release of half of the decretal sum to the respondent and the balance be deposited in an interest earning joint account.

The pleadings indicate that the impugned ruling dismissed the applicant's application to set aside an interlocutory judgment. The respondent was awarded Kshs.2,155,600 by the trial court. It is submitted that should the appeal succeed and execution is allowed to proceed, then the appeal will be rendered nugatory. The impugned ruling was delivered on 16th April, 2021 and this application was filed two weeks later on 30th April, 2021. I do find that the application was filed without undue delay.

The appellants contend that they were condemned unheard. The dispute involves a claim for general damages arising from an accident. The respondents contend that a statutory notice and demand letter were duly served. The appellant entered appearance but failed to defend the suit.

It is true that the appellants were served with the summons but failed to file a defence. The law allows a party who has defaulted to defend a suit the opportunity to have a default judgment set aside and allowed to be heard. The dispute involves a fatal accident which occurred in 2015. The fact that a motor vehicle is covered by an insurance policy does not mean that no substantial loss is suffered if the successful party is allowed to execute before an appeal is heard. The respondent is elderly and it is evident that he is not in a position to refund the decretal sum should the appeal succeed.

In the case of **BUTT – V- RENT RESTRICTION TRIBUNAL (1982) eKLR, 417**, the court held: -

- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

I am satisfied that the application herein has been filed without inordinate delay and that there is no attempt by the applicant to deny the respondent from enjoying the fruits of his judgment. The application dated 30th April, 2021 is hereby granted as prayed on condition that the applicants do provide a bank guarantee for the entire decretal sum within sixty (60) days hereof failing which the respondent shall be at liberty to execute. Costs shall follow the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY 2021.

.....

S. CHITEMBWE

JUDGE