



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO 29 OF 2020**

**PETER OSORO OMAGWA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**KEFA OKWARE.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**MERCY JELAGAT.....RESPONDENT**

**RULING**

1. The applicant in their Notice of Motion dated 7<sup>th</sup> April 2020 seeks stay of execution of the Judgment/Decree issued by the Honorable N.S Lutta on 10<sup>th</sup> March 2021 in Kisii CMCC No 714 of 2018 pending the hearing and determination of the application and the appeal lodged against the judgment.
2. Peter Osoro Omagwa in his supporting affidavit averred that a judgment was entered in favour of the respondent as against the applicants to a tune of Kshs 19,255,191.69/-. The applicants are apprehensive that the respondent may levy execution against the applicants which will render their appeal nugatory and cause them to suffer irreparable loss and damage. It was also averred that the respondent had not disclosed nor furnished the court with any documentary evidence to prove her financial standing. It was advanced that Directline Assurance Company Limited are ready to offer security in form of a bank guarantee from a reputable bank for the decretal sum up to a statutory limit of Kshs 3,000,000/-. He further averred that the bank guarantee should suffice as sufficient security.
3. In opposition to the application the respondent filed an affidavit dated 13<sup>th</sup> April 2021 claiming that the application is frivolous, scandalous, vexatious and a waste of the court's time. It was advanced that the applicant failed to demonstrate the loss or damage it stands to suffer in the event the decretal sum is paid. It was further averred that since the appeal is on quantum only, the applicants did not call any witness in support of their case before the trial court, it would only be fair and just that at least half or two thirds of the decretal sum be released to the respondent. The respondent stated she is now a paraplegic after sustaining injuries from the accident and she is confined to wheelchair forcing her to live with her parents and thereby spends money on medication and home care nurse, physiotherapy, indwelling catheter and pampers all of which are costly. In response to the proposed bank guarantee, she averred that the amount is not adequate for due performance of the decree. She averred that the application has thus been made in bad faith. She maintained that she is the successful party entitled to the fruits of the trial court's decision and that suspension of the enjoyment of the judgment can only be rendered in exceptional circumstances which have not been demonstrated by the applicants.
4. When the application came for hearing, I directed both parties to file written submissions.
5. The applicant in his application identified the following four issues:
  - i. *Whether stay of execution of the Judgment and/or Decree of the Honourable Nathan Shiundu Lutta (CM) delivered on 10<sup>th</sup> March, 2021 in Kisii CMCC No. 714 of 2019; Mercy Jelagat vs Peter Osoro Omagwa & Kefa Okware ought to be granted.*
  - ii. *Whether there is any nexus between the Applicant's insurer and Applicant in relation to this matter.*
  - iii. *Whether the Applicant intended appeal against the lower court's judgment to this Honourable Court is arguable.*
  - iv. *Whether the Applicants are ready and willing to furnish security.*
6. On the first issue the applicants urged the courts to grant stay of execution to preserve the subject matter so that the right of appeal is exercised without prejudicing the applicant. They cited the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** in support of their

argument.

7. On the second issue, it was submitted that the applicant's motor vehicle registration KCA 607K was at the time insured by Directline Assurance Company Limited and by the dint of the applicant's insurer right of subrogation under the relevant policy of insurance and at common law, the insurer has the right to defend, settle, prosecute any claims in the insured's name. The applicants further submitted that he has an arguable claim against the respondent. Finally, the applicants submitted that since they have proved that there is a nexus between the Applicant and his insurer in relation to this matter, they urged the court to consider provisions of section 5 (b) (iv) of the **Insurance (Motor Vehicle Third Party Risks) Act** which puts the limit to what an insurance company may settle out of a claim, Kshs 3,000,000/-.

8. The respondent in her submissions argued that she is not wholly opposed to the applicants' application but is praying that this court exercises its discretion to allow the application on the condition that  $\frac{1}{2}$  or  $\frac{3}{4}$  of the decretal sum be released to her pending the hearing and determination of the appeal. She urged the court to consider that she sustained severe injuries. In support of her case she cited the cases of **Mohan Meakin (K) Ltd v Mutunga Kiundi; Machakos HCCA No 82 of 2013 Ngirarious Mwangi v Washington Odhiambo Wanyang' (suing as Legal Representative of the Estate of Mary Okello)** and **Nairobi Misc Application No 983 of 2013 John Maina v Esther Njambi**.

9. On the bank guarantee, it was submitted that the bank guarantee offered by the 3<sup>rd</sup> party is not adequate security. She explained that in the guarantee the bank reserves the right to call up the facility at its discretion. Secondly she contends that the wording of paragraph one of the said letter provide that it is approved subject to the insurance meeting certain conditions which the respondent is not a party to and it would be difficult to know whether the insurance has complied. They argued that an application for stay of execution should not consider the applicant's insurer's statutory limit in terms of settlement of the decree. They argued that Onyancha J in **Kiambu High Court Civil Appeal No 2 of 2019 JMK v KK & Another** the court held that the clause in the insurance contract limiting the defendant's liability to third parties to Kshs 2,000,000/- was invalid, void and unenforceable.

#### **ANAYLSIS AND DETERMINATION**

10. The first issue that the applicant's raise is that by dint of section 5 (b) (iv) of the **Insurance (Motor Vehicle Third Party Risks) Act** then the applicant's insurer can only settle pay up to a maximum of Kshs 3,000,000/- towards the decretal sum. **The said section provides as follows;**

*"In order to comply with the requirements of section 4, the policy of insurance must be a policy which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:*

*Provided that a policy in terms of this section shall not be required to cover liability of any sum in excess of three million shillings, arising out of a claim by one person."*

11. **The applicant's argument that it's insured can only pay up to Kshs 3,000,000/- by virtue of 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act ('theAct') cannot stand when read with section 10 (1) of the Act. Section 10 (1) provides;**

*"If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."*

12. **I however agree with the holding of Onyancha J in Thomas Muoka Muthoka & Another v Insurance Company of East Africa Limited [2008] eKLR where the court held that the insurer is under mandatory statutory liability to first pay the full judgment sum to the person entitled to the benefit of the judgment and thereafter, the insurer may recover due sums so paid to the third party in the terms of the insurance contract, or statutory obligation or liability created against the insured under the Act.**

13. The only issue for determination is whether the applicant have proved that they are entitled to an order of stay of execution of the judgment. The guiding law governing stay of execution pending appeal falls under **Order 42 rule 6(2) of the Civil Procedure Rules** which provides as follows:

*"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; 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."*

14. In **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

*"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court*

*of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”*

15. There was no evidence that the respondent would be in a position to refund the decretal sum if it is to be paid to her as it has not been shown that she is employed or has a formal source of income. In fact, the respondent issue with the application was in regards to the amount which the respondent ought to deposit as the decretal sum. This court is aware of the principle that a successful party is entitled to the fruits of her judgment. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

*“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”*

16. In this case, I take cognizance that the appeal is largely on quantum. In order to **balance the rights of the parties by ensuring that the appeal is not rendered nugatory while at the same time ensuring that the respondent is not impeded from the enjoyment of the fruits of her judgment**, I hereby grant that there be stay of execution pending the hearing of this appeal on condition that the applicants pay a third of the decretal sum to the respondent and deposit the balance in a joint interest earning account in the name of the advocates of the respective parties within 30 days from the date of the delivery of this ruling. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF JULY, 2021.

A. K. NDUNG’U

JUDGE