



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPL. E108 OF 2021

SAGION CONTRACTORS LIMITED.....APPLICANT

VERSUS

SAMUEL MWANGI CHEGE

(suing as the dependant and Personal representatives of the estate of

BENSON CHEGE MWANGI (deceased).....RESPONDENT

RULING

1. The application dated 9th March 2021 seeks the following orders: -

1. THAT pending the hearing and determination of the appeal there be a stay of execution of the judgment and decree in Milimani CMCC No. 7677 of 2019; Samuel Mwangi Chege (suing as the dependant and personal representative of the estate of BENSON CHEGE MWANGI (deceased) vs Sagion Contractors Limited.

2. That costs of this application abide the outcome of the Appeal.

The applicant's affidavit sworn on the same date and Supplementary affidavit sworn on 9th April, 2021 by Samuel Peter Gioche supports the application. The respondent filed a replying affidavit sworn on 25th March, 2021. The application was determined by way of written submissions.

Counsel for the applicant submit that the respondent was awarded Kshs.2,610,000 as damages by the trial court. The applicant was held 100% liable. The applicant has appealed against the decision of the trial court and the appeal is meritorious. The applicant will suffer substantial loss if the order staying execution is not granted. The sum awarded to the respondent is quite exorbitant. Counsel referred to the case of **ZILLION FARM LIMITED & ANOTHER –V- JOSEPHINE MUKAI & ANOTHER (Nrb Misc. Application No. 687 of 2019)** where the court held:-

“The decretal sum herein was a sum of Kshs. 1,680,820/=. It was not a colossal amount of money. However, the Respondents did not file an Affidavit of Means to demonstrate their ability to refund the Applicants money in the event they were successful in the intended appeal. The difficulties in recovering the decretal sum that had been paid before an appeal is heard, which appeal has been successful, would in the mind of this court amount to substantial loss. ”

It is further submitted that the decretal sum or a portion thereof can be held in a joint account of counsel for both parties pending the determination of the appeal.

The application is vehemently opposed. It is submitted that the court should take judicial notice that appeals are generally preferred by appellants in order to frustrate successful litigants and many of them end up being dismissed for want of prosecution. Counsel for the respondent urged the court to order for the release of Kshs.1.5million to the respondent and the balance of the decretal sum, Kshs.1,110,000 deposited in court pending the determination of the appeal.

The dispute herein emanates from a fatal road traffic accident which occurred in 2018. The respondent was awarded damages by the trial court and the appellant was held 100% liable. The appeal is in relation to both liability and quantum. It is clear to me that the appeal is not frivolous and will be rendered nugatory if the decretal sum is paid to the respondent and the appeal succeeds.

The application was filed on 9th March 2021. The impugned judgment was delivered on 12th February 2021. The applicant was granted thirty (30) days stay of execution by the trial court. I do find that there has been no inordinate delay in filing of the application.

In the case of **BUTT –V- RENT RESTRICTIONS TRIBUNAL [1982] KLR 417** the court stated the principles to be considered in such an application and states as follows:-

“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.”

The applicant is willing to provide security. The respondent urged the court to order for the release of part of the decretal sum to the respondent. The dispute involves a deceased’s estate. There is no indication that the deceased’s estate is being affected by the non-payment of the decretal sum. The deceased was only 17 years old. I see no good reason as to why part of the decretal sum should be released to the respondent. The respondent is the deceased’s father and was not depending on the deceased financially during his lifetime.

The respondent is insisting on the issue of security being provided. The applicant is not against that proposal. The respondent’s interests will be well catered for if the decretal sum is secured pending the hearing and determination of the appeal.

The upshot is that the application dated 9th March 2021 is merited and is hereby granted on the following terms:-

1. Pending the hearing and determination of the appeal, the decree in **Milimani CMCC No. 7677 of 2019; Samuel Mwangi Chege (suing as he dependant and personal representatives of the estate of BENSON CHEGE MWANGI (deceased) vs Sagion Contractors Limited** is hereby stayed.
2. The applicant to deposit the entire decretal sum in a joint account of counsel for both parties within sixty (60) days hereof.
3. In default of depositing the decretal sum as hereinabove ordered, the orders staying execution shall stand vacated and the respondent shall be at liberty to execute.
4. Costs of the application shall abide by the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JULY, 2021.

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S. CHITEMBWE

JUDGE