



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. E017 OF 2021

PATRICK MWENDA.....1ST APPELLANT/APPLICANT

FAITH KAGHAMBI.....2ND APPELLANT/APPLICANT

VERSUS

BENSON MUTURI RWANDA.....RESPONDENT

RULING

1. Before the Court is an application dated 12th July 2021 seeking stay of execution of the Judgment delivered by Hon. D. W. Nyambu on 11th January 2021 in Meru Civil Case No. 149 of 2016. The Applicants also seek leave to appeal against the Ruling by the lower Court of 18th May 2021 on stay of execution and a variation of the said Ruling to require them to deposit a Bank Guarantee for the sum of Ksh 3,000,000/= as adequate security within the provisions of the Insurance (Motor Vehicle Third Party Risks) Act which limits liability to a sum of Ksh 3,000,000/= arising out of a claim by one person.

Applicant's Case

2. The application is premised on the grounds that the Applicants' appeal was lodged timely on 10th February 2021 before the lapse of the 30 days period. That they filed an application in the lower Court seeking stay of execution which on 18th May 2021, was allowed on the condition that they pay half the decretal amount to the Respondent and deposit the other half in Court with similar timelines. They urge that the said Ruling is in contravention of Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act which provides for a limit of Ksh 3,000,000/= per insurance claim. That the judgement is for a substantial amount (Ksh 8,829,050.85/=) and they are apprehensive that if the Respondent is paid the money, they might not be able to recover the same from the Respondent who is a man of straw. That the Respondent has not furnished the Court with any documentary evidence to prove his financial standing. That the Applicant is ready, willing and able to furnish such reasonable security to the Court within the provisions of the Insurance (Motor Vehicle Third Party Risks) Act and that the application has been made without unreasonable delay.

Respondent's Case

3. The application is opposed by the Respondent's replying affidavit sworn on 29th September 2021. They also filed submissions dated 12th October 2021. The Respondent's case is that the Applicant failed to comply with the orders of conditional stay that had been granted by the lower Court on 18th May 2021. He urges that the Applicant had 60 days to comply with the orders of the lower Court which period lapsed on 19th July 2021 and that it is only when the Respondent commenced execution proceedings that the Applicant made the instant application. He urges that the Applicants did not move the Court to review, vary or set aside the orders of the Court but only sat on the stay orders without complying with the conditions attached to it. He urges that the Applicants are not insurance companies and cannot seek to rely on the Insurance (Motor Vehicle Third Party Risks) Act. He further urges in his submissions that this is a suit between the parties involved in the accident and is not a declaratory suit. He further urges that there is no limitation on what a Court can award in a claim for damages in a road accident claim. He urges that the contractual terms between the Applicants and any 3rd party ought not to affect his rights as a decree holder and he is not privy to the said contract. He urges that he is not a man of straw as alleged by the Applicants and that he can refund any amount paid to him.

Determination

Stay of Execution

4. An applicant seeking for stay of execution is required under Order 42 Rule 6 of the Civil Procedure Code to demonstrate that he is likely

to suffer substantial loss should stay not be granted; that he is ready and willing to offer security for payment of any sums that may be found due to the other party after the appeal, and that he has come to Court without unreasonable delay.

5. Order 42 Rule 6 (1) of the Civil Procedure Rules contemplates a situation where an Applicant who was unsuccessful in his application for stay at the trial Court makes a similar application at the High Court where he intends to lodge his appeal. It is thus allowed for the Applicants to bring the instant application to the High Court, despite having made a similar one in the lower Court. What is however noticeable is that in the trial Court, the Applicants were not really unsuccessful as they were granted conditional stay. The Court ordered them to pay half of the decretal amount to the Respondent and to deposit the other half in a Court within 60 days.

6. It is clear that the Applicants failed to comply with the conditions granted. Although they are seeking leave to appeal against the Ruling granting him conditional stay, this Court observes that the memorandum of appeal annexed to their application is against the main judgment of the trial Court. The Court also observes that the Applicant waited until the period within which he was supposed to comply with the conditions for stay lapsed to file the instant application.

7. With respect to the assertion that he may not be able to refund the decretal sum should the appeal be successful, the Respondent has indicated that he is not a man of straw and he is able to refund any sums that may be due upon conclusion of the appeal. Although he has made a mere averment, this Court finds that he has indeed discharged the burden of refuting claims of inability to pay as is required of him. See *Equity Bank Limited v Japhet Kubai Ikiamba & Another* Meru HCCA No. E007A of 2020. See also *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR.

8. The Applicants have indicated their willingness to give any such reasonable security in as long as it is within the limits under the Insurance (Motor Vehicle Third Party Risks) Act. This Court has had a chance to peruse the Applicant's memorandum of appeal and has not seen a ground of appeal which touches in the issue of the purported limitation of Ksh 3,000,000/=. There would thus be no basis for the Applicant's to urge this ground in the instant application for stay. Nonetheless, this Court does not agree that the effect of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act is to limit the amount of damages that a Court can award in a claim for personal injury following a road traffic accident. Various decisions have held that the section only comes into effect post judgment and it does not, therefore, constitute legislative judgment. I dealt with this issue in the case of *Billow Hussein vs The Hon Attorney General & 3 Others* Meru High Court Petition No. E006 of 2021. See also *Law Society of Kenya vs the AG & 3 Others* Nairobi Constitutional Petition No. 148 of 2014 (2016) eKLR and *Justus Mutiga & 2 Others vs Law Society of Kenya & Another*, Civil Appeal No. 141 of 2016 (2018) eKLR.

9. With respect to delay, the Ruling by the lower Court granting conditional stay was delivered on 18th May 2021. The Applicant filed the instant application on 15th July 2021. This was almost two months later. The Court has already observed that at the lower Court, the Applicants were not unsuccessful as they were granted conditional stay. It appears that the Applicants sat on the stay orders and were not keen on complying with the conditions attached to the stay.

10. With respect to the prayer for leave to appeal the Ruling of 18th May 2021, this Court observes that the Applicants have not advanced any good reason for the delay in filing their appeal. A litigant is taken to know from the date of delivery of a decision whether or not he is satisfied with the same. They have also not annexed any memorandum of appeal against the Ruling of 18th May 2021. This Court finds no reason to grant the said leave. In any event, the instant Ruling is similarly one on stay and the Applicants will still be at liberty to appeal the same should they wish to appeal.

11. This Court finds that in view of the fact that the Respondent indicated his ability to settle the decretal amount, substantial loss has not been sufficiently proven. The Court however takes note of the fact that the Respondent is an individual and that the decretal amount was a substantial sum of Ksh 8,829,050.85/=. The Appeal is on both quantum and liability and if successful, this amount may be reduced. The Court also considers that the Respondent is said to have suffered some degree of permanent incapacity. A large portion of the decretal amount constituted damages for future medical expenses. It is thus clear the Respondent is in need of funds to cater for his medical expenses. This Court finds that the interests of justice demand that the Respondent be paid some amount. The Court will however reduce the sum to be paid from a half of the decretal amount to a third.

ORDERS

12. In the end, this Court makes the following orders: -

i) The court grants an order for stay of execution of the Judgement and Decree delivered on 11th January 2021 by Hon D. W. Nyambu in Meru Civil Case No. 303 of 2019 pending the hearing and determination of the appeal.

ii) The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 3,000,000/= being approximately a third of the decretal sum.

iii) The Applicant shall within Thirty (30) days deposit with the Court the balance of Ksh 5,829,050.85/=.

iv) In default of the payment and deposit as per orders ii) and iii) above, the stay of execution herein granted shall lapse and be of no effect.

v) The costs of this application shall abide the outcome of the appeal.

Order accordingly

DATED AND DELIVERED ON THIS 14TH DAY OF OCTOBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kimondo Gachoka & Co. Advocates for the Applicant

M/S Ngunjiri Michael & Co. Advocates for the Respondent