



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. E095 OF 2021

JOSEPH NDAU KYENGO.....APPELLANT/APPLICANT

-VERSUS-

PETER KIINDU NYALA.....RESPONDENT

RULING

1. This appeal was initially expressed to have been filed by **Peter Kiindu Nyala** against **Joseph Ndau Kyengo**. Together with the Appeal was filed a Motion on Notice dated 30th June, 2021 by which the applicant substantially sought stay of execution of the judgement and decree in Machakos Chief Magistrate's Court Civil Suit No. 272 of 2020 pending the hearing and determination of this appeal.
2. The said application was supported by the affidavit sworn by **Kelvin Ngure** on who deposed that he is the Defendant/Applicant and the owner of motor vehicle registration no. KCJ 532G at whose instance the suit before the trial court was defended. According to the deponent, on 27th May, 2021, judgement was delivered against the Applicants in favour of the Respondent in the sum of Kshs 2,000,000/- general damages and Kshs 5,150/- special damages making a total of Kshs 2,005,150/- plus costs and interests. Aggrieved by the said decision, it was averred by the deponent that the Applicants instructed their advocates to appeal against the judgement hence this appeal which the deponent contended is merited, arguable and raises pertinent points of law hence has overwhelming chance of success.
3. The deponent was apprehensive that the Respondent herein, being the decree holder, might proceed and levy distress against the Applicants and unless the stay sought is granted hence rendering this appeal nugatory and thus occasioning them irreparable loss and damage.
4. It was deposed that the judgement is of substantial amount and there was apprehension that if the Respondent is paid, he may deal with the same in a manner prejudicial to the applicants and in the event that the appeal succeeds, the applicants might not be able to recover he same from the Respondent who has not disclosed or furnished the Court with any documentary evidence in proof of his financial standing. The deponent deposed that their insurer was ready and willing to provide a Bank Guarantee as security for stay of execution during the pendency of tis appeal.
5. It was the Applicants' view that the application was made in good faith and that it will not occasion any prejudice to the Respondent. The Applicants indicated that the appeal is particularly against the quantum of damages which in their view is excessive.
6. On 12th July, 2021, a Notice of Withdrawal of the Appeal was filed herein signed by the alleged appellant. Upon realising the error, an amendment to the Memorandum of Appeal was filed reversing the roles of the parties. With the amended Appeal an amended Motion was filed and save for the fact that the said **Kevin Ngure** swore the affidavit as the Claims Manager at **Directline Assurance Company Limited** the insurers of the motor vehicle in question, the depositions were substantially the same.
7. In opposing the application, the Respondent swore an affidavit in which he deposed that the Application is bad in law as the Affidavit in support of the said Application has been brought by a non-party to the instant Application and the primary suit. It was averred that the Deponent of the Supporting Affidavit, **Kelvin Ngure**, is a serial liar who has on various matters before different courts committed perjury by swearing Affidavits on behalf of the Appellants purporting to be owner of various motor vehicles subject of various suits and therefore, inducing the Courts to issue orders in favour of **Directline Assurance Co. Limited**. Copies of the said affidavits were exhibited and it was averred that the Application is an abuse of the Court process and wont on unduly delaying the payment of the decretal sum.
8. It was further deposed that the Application has not discharged the duty imposed under Order 42 Rule 6 to wit;

a) It has not been demonstrated in the affidavit what or how substantial loss will result to the Applicant.

b) No sufficient cause for the stay has been demonstrated.

c) No security has been provided for grant of stay.

9. It was further averred that there are no sufficient grounds in the Memorandum of Appeal as the contemplated Appeal is illusory and only meant to delay the case. In the Respondent's view, the orders sought may not be granted since there is no regular and lawful appeal filed against the primary suit and that the Application is brought with undue delay. In the alternative, it was proposed that should the Court grant the stay, the same should be conditional on the Applicant paying half of the Decretal sum to the Respondent and the balance be secured by way of a Bank Guarantee.

Determination

10. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

11. As pointed out by the Respondent, the initial application and this appeal were filed in the name of **Jackline Mueni Wambua** as the Appellant. The appeal was, vide a Notice of Withdrawal, withdrawn. Instead of instituting a proper appeal, the Applicants purported to amend the application. Apart from that the initial application was sworn by one **Kevin Ngure** who has deposed that he is the Defendant/Applicant which was clearly incorrect. That affidavit is still on record as it was never withdrawn. To that extent, the said affidavit is incompetent and being incompetent and having not been withdrawn the effect is that we have on record two affidavits purporting to be by the same deponent whose contents are at variance.

12. Consequently, the application is incompetent and is hereby struck out with costs to the Respondents.

13. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 10TH DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ochoki for the Applicant

Mr Munyoki for the Respondent

CA Susan