REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. E094 OF 2021

JOSHUA MUTHAMA MUTUA.....1ST APPELLANT/APPLICANT

STARLINE GLOBAL LOGISTICS.....2ND APPELLANT/APPLICANT

-VERSUS-

JOSEPHINE NDULEVE MAINGI.....RESPONDENT

RULING

1. By a Motion on Notice dated 30th June, 2021, the applicants herein substantially seek stay of execution of the judgement and decree in Machakos Chief Magistrate's Court Civil Suit No. 202 of 2020 pending the hearing and determination of this appeal.

2. The said application is supported by the affidavit sworn by **Kelvin Ngure** who deposed that he is the Defendant/Applicant and the owner of motor vehicle registration no. KCL 950B at whose instance the suit before the trial court was defended. According to the deponent, on 20th May, 2021, judgement was delivered against the Applicants in favour of the Respondent in the total sum of Kshs 555,150/- plus costs and interests. Aggrieved by the said decision, the Applicants instructed their advocates to appeal against the said judgement hence this appeal which the Applicants contended is merited, arguable and raises pertinent points of law hence has overwhelming chance of success.

3. In the Applicants' view the said award was excessive in terms of the quantum awarded hence this appeal has high chances of success.

4. According to the deponent, there is a reasonable apprehension on the part of the applicants that the Respondent may proceed and levy execution against them unless the stay sought is granted hence rendering this appeal nugatory and thus occasioning them irreparable loss and damage.

5. 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 Applicants 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.

6. 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.

7. In opposing the application, the Respondent swore an affidavit in which he deposed that the supporting affidavit was sworn by stranger to the proceedings and ought to be struck out. It was further 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 affidavit in support of the application is sworn by one **Kevin Ngure** who has deposed that he is the Defendant/Applicant. However, the Applicants herein are indicated as **Joshua Muthama Mutua** and **Starline Global Logistics**. It is therefore unclear who the deponent is in these proceedings. To that extent, the said affidavit is incompetent and being incompetent it cannot be the basis upon which the application may be granted.

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 VIRTUALLY 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