



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. E007 OF 2021

JULIANAH MUNYIVA MUSYOKA.....1ST APPLICANT/APPELLANT

JOSEPH MUSYOKA MUTISYA.....2ND APPLICANT/APPELLANT

NASHON WAMBUA NCHWIRI.....3RD APPLICANT/APPELLANT

-VERSUS-

DM (A minor suing through mother and next friend) BKM.....RESPONDENT

RULING

1. Before me is an application dated 4th March 2021 brought by way of Notice of Motion under section 3A, 75G, and 95 of the Civil Procedure Act (cap.21) and Order 22 Rule 22, Order 42 Rule 4, 6, and 7, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010.

2. The application seeks five (5) prayers, three of which have been spent as follows –

1) (spent)

2) (spent)

3) That the honourable court be pleased to order a stay of execution of the judgment delivered by the trial court on 29th January 2021 in civil suit number 320 of 2018, Kilungu between the parties herein pending the hearing and determination of the appeal herein.

4) (spent)

5) The costs of the application abide the outcome of the appeal.

3. The application has grounds on the face of the Notice of Motion, and was filed with an affidavit sworn by Juliana Munyiva Musyoka one of the three applicants.

4. The application has been opposed through a replying affidavit sworn on 5th May 2021 by Beatrice Kamene Mutuvi the respondent.

5. Parties counsel M/s Kimondo Gachoka & Company for the applicants and Waiganjo Wachira & co. for the respondents filed written submissions.

6. This being an application for stay of execution of judgment or decree pending appeal, it is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Rule 6(2) provides as follows –

(2) 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.

7. In the present case, judgment was delivered on 29th January 2021 and this application filed on 4th March 2021, a period of one month and a few days. With the problems of the Corona epidemic, I am of the view that the delay was not unreasonable.

8. In the trial, no liability was admitted. The trial court made its findings on liability and quantum. Having perused the memorandum of appeal, I find that the appeal is an arguable appeal. In those circumstances, and since I note that an appeal has already been filed, I hold that if stay of execution is not granted the applicant may stand to suffer substantial loss. I will thus grant stay of execution.

9. The applicant has indicated willingness to provide security by bank guarantee. I will however not order such provision of security, as I find it not to be necessary in the circumstances of the case.

10. Consequently, I allow the application and grant prayer 3. The costs of the application will follow the decision in the appeal.

DELIVERED, SIGNED & DATED THIS 10TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge