



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL CASE NO. E0102 OF 2021**

**DOUGLAS M. NJOROGE.....1<sup>ST</sup> APPELLANT**

**CLIMAX COACHES LIMITED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARGARET SCOVIA & PETER LUBALE**

**(Suing as the Legal Representatives of MOSES SHIKOLI).....(Deceased)**

**(Being an appeal from the Judgment and Decree of Hon. Kigen (SRM) delivered**

**on the 6<sup>th</sup> day of August, 2021 in Eldoret CMCC No. 1083 of 2018)**

**Coram: Hon. R. Nyakundi, J**

**M/s. Kimondo Gachoka & Company Advocates for Applicants**

**M/s. Ombima & Company Advocates for the Respondent**

**RULING**

This is an application dated 22<sup>nd</sup> November, 2021 filed in court the same day for a stay of execution pending a preferred appeal against the Lower Court Judgment. In that court an assessment of Shs. 1,812,278/- was made by the Learned Trial Magistrate in which the intended Appellant is clearly aggrieved as demonstrated by the grounds in the Memorandum of appeal. The main grounds on which the stay of execution pending appeal sought is as follows: -

- a. That Learned Trial Magistrate erred in law and fact by holding that the Respondents proved their case on a balance of Probabilities.**
- b. That the Learned Trial Magistrate erred in law and in fact by holding the Appellants 100% liable for causing the accident contrary to the evidence on record and/or evidence adduced during trial.**
- c. That the Learned Trial Magistrate erred in law and in fact by failing to apportion liability on the part of the deceased in view of the evidence on record and/or evidence adduced during trial.**
- d. That the Learned Trial Magistrate misdirected herself by failing to take into account/consider long established principles while making an award on general damages under Fatal Accidents Act and the Law Reform Act thereby making an award of Kshs. 1,812,278/= which is manifestly excessive.**
- e. That the Learned Trial Magistrate erred in law and in fact by ignoring the Appellants' written submissions on quantum and thereby arriving at an award on quantum which is erroneous and/or manifestly excessive.**
- f. That the Learned Trial Magistrate erred in law and in fact by making an award of Kshs. 50,000/- for pain and suffering whereas the deceased died shortly after the accident occurred.**

**g. That That the Learned Trial Magistrate misdirected herself by awarding Kshs. 120,000/- for loss of expectation of life thereby deviating from the principle of *stare decisis* where a conventional award for loss of expectation of life is usually made.**

The Applicant further relied on the averments in the Affidavit sworn to support the application seeking stay of execution. Directions were taken for each party to file further relevant material and in any event brief submissions. However as at the time of preparing this ruling there was absolute non – compliance. I consider that no mistrial shall be occasioned for the sole reason that parties have not filed their respective submissions. As an obiter observations they are guilty of laches. I would therefore proceed to evaluate the merits of the application accompanied with the record of the lower court.

**RESOLUTION: -**

The statutory point is to refresh the letter of the Law Under Order 42 Rule 6(1) of the Civil Procedure Rule which provides generally that an appeal shall not operate as a stay of execution or of proceedings from the decision appealed from unless the court or the appellate court so orders, subject to such terms as it may impose. With specific reference to an appeal to be stated briefly at an appropriate time, the appellate court would be asked to consider both the questions of fact and law of what actually took place between the parties giving rise to the claim.

It is also trite from the Rule and the principles that flow from it that a stay of execution is a discretionary and equitable remedy only available to deserving cases. The following principles have stood the test of time: -

- 1. That the application has been filed without undue delay.**
- 2. That there is proof of subsistence loss which may result in absence of stay of execution.**
- 3. That if stay is not granted and the appeal happens to succeed, it would be rendered nugatory.**
- 4. That the intended appellant is willing to offer security for the due performance of the decree.**
- 5. That there is sufficient good cause for the application to be allowed.**

In this respect the above principles have been clearly articulated by the court in these authorities: - **(Chris Munga N. Bichage Vs Richard Nyagaka Tongi & 2 others, Kenya Shell Limited Vs. Kibiru & Another (CA No. 97 of 1986 Nairobi) Johnson Mwirunti Mburu Vs Samwel Macharia Ngure (HCCA No. 716 of 2003), Hassan Guyo Wakalo Vs. Straman E.A. Limited (2013) Stephen Wanjohi Vs. Cetral Glass Industries Limited (Nairobi HCC No. 6726 of 1991, Consolidated Marine Vs. Napija & Another CA No. 93 of 1989. In Chris Munga Case the court held that: -**

**“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”**

In the same context the court in **Stanley Karanja Wainaina & Another -Vs- Ridon Ayangu Mutubwa Nairobi HCCA 427/2015** it stated as follows: -

**“It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in National Industrial Credit Bank Limited -Vs- Aquinas Francis Wasike and Another (UR) C.A. 238/2005 stated: -**

**This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by the Respondent or lack of them. Once an Applicant expresses that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”**

More fundamental, however is for the court to strike a balance between the competing interest of the Applicant and the Respondent. The threshold issue is whether the scale of injustice would tilt more to the rights of the Applicant or Respondent given the specific facts of the case in **Hammond Suddard Solicitors -Vs- Agrichem International Holdings Limited [2001] EWCA Civil 2065** the court held that: -

**“...Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the Respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the Appellant being able to recover any monies paid from the Respondent?”**

I will now proceed to analyse the grounds as deductible from the notice of motion in respect of the relief on stay of execution premised under Order 42 Rule 6(1) of the Civil Procedure Rules and principles cited above. With regard to the condition with the application being made

without unreasonable delay there is evidence of compliance. From the record, the initial ruling on stay of execution was made on 22<sup>nd</sup> October, 2021. A cursory glance of the affidavit shows that the Applicant further approached this court on 22<sup>nd</sup> November, 2021. I can therefore state that the instant application in great detail was filed without undue delay on the part of the Applicant.

Secondly, on substantial loss, it is also to be borne in mind that this is a first appeal. As indicative of the affidavit the Appeals' Court would be concerned with mixed questions of fact and law on the memorandum of appeal. The pertinent question seems to focus on liability and assessment of damages in which the Applicant feels that the key factors were ignored by the trial court to arrive at an erroneous decision in favour of the Respondent. Of the two grievances by the Applicant, the ascertainment on assessment of damages is highlighted as critical ground on appeal. The allegation against the Respondent is that she will not be in a position to refund the decretal sum in the event it is paid out and the appeal succeeds, overturning the decision of the trial court. The intended Applicant depones that it will suffer substantial loss and prejudice which could not be sufficiently compensated in damages therefore rendering the appeal nugatory. There is no dispute that the present matter concerns a claim filed by the Respondent for damages in negligence against the Applicant. In fact the panoramic view of the evidence at the trial court shows that the Applicant submitted on damages under the Fatal Accidents Act and Law Reform Miscellaneous Act. Those facts at the trial and submissions on proposals of damages being payable to the Respondent must be a factor not to be ignored by the court when considering an application for stay of the impugned judgment. That in the exercise of judicial discretion, the learned trial magistrate did not conclusively rule in consonance with the submission by the Applicant, itself might be an accurate guide to determine whether to grant or refuse an application on its entirety. An important factor is that there is no indication that part payment of the judgment sum could jeopardize the Applicant's financial position. Whereas it's true that the appeal in respect of assessment of damages may decide either way it is not a ground to state that the real prospect of success may be on the whole judgment of the trial court. It is recognized that bearing in mind the memorandum of appeal there is no such invitation by the Applicant. In my view it cannot be ignored that in our legal system victims for traffic accident claims suffer prejudice and even injustice due to the long delays in having their cases resolved within a reasonable time. The legal system which provides for appeal processes compounds further delay in a manner which deprives them the fruits of judgment accorded in the lower court. Therefore in my considered judgment justice of the case requires that the Applicant should duly satisfy part of the decretal sum assessed at Kshs. 600,000/- to the Respondent as a condition for the stay of execution. I am persuaded the judgment being challenged is something of value and the Applicant cannot argue strongly that it would suffer substantial loss not remediable in damages. As it were the overriding principle is that in determining the interest of justice there is no evidence that the appeal will prove abortive if the Respondent accedes partial award of damages in the primary judgment. Simply stopping or freezing the entire decree is to admonish the discretion exercised by the trial court on the merits of the case. This court must consider the balance of convenience as between the parties, the issues at stake on appeal and the likely risk of injustice in respect of the Respondent being deprived the fruits of the judgment. It is neither the case that the Applicant would suffer financial ruin for settling partial decree of a valid judgment of the court on damages. There are no special circumstances which speak to this fact.

As well as the above it is settled principle that to furnish security for due performance of the decree is mandatory. During the course of considering this application the effect of this condition is to exercise discretion to order the Applicant to deposit the balance of the decretal sum of the judgment in the joint earning interest of both counsels within forty five days of today's declaration. Sadly I reject the alternative security in the form of bank guarantee as submitted by the Applicant.

It follows that the notice of motion dated 22<sup>nd</sup> November, 2021 partially succeeds with costs to abide the determination of the appeal.

**DATED, SIGNED AND DISPATCHED VIA THE EMAILS AT ELDORET THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**R. NYAKUNDI**

**JUDGE**