



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. 70 OF 2019**

**ABDUL MUGAMBI.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JULIUS NJOROGE GICHIA.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**MARY MUTHONI KANG'RI & PETER MWANGI GATHERI**

(suing as the legal representatives of the estate of

**ALICE WACHINGA GATHERU.....RESPONDENTS**

**AND**

**KYALO GREGORY.....RESPONDENT**

**IRENE MUMBI.....RESPONDENT**

**RULING**

1. The application for determination is dated 04/10/2019. It was filed under certificate of urgency and is brought under sections 1A, 1B, 3A & 79G of the Civil Procedure Act, Order 42 Rule 6, (1), Order 50 Rule 5 and 6 and Order 51 Rules 1,3 & 10(1) & (2) of the Civil Procedure Rules,2010 and all other enabling provisions of the law. It seeks the following orders;

a) **That** this Honorable court be pleased to order a stay of execution of proceedings in Makindu Civil Suit No. 111 of 2015 pending hearing and determination of Makueni High Court Civil Appeal No. 70 of 2019.

b) **That** costs of this application abide the outcome of the Appeal.

2. A temporary order of stay of execution was granted on 7<sup>th</sup> October, 2019. The application is supported by the grounds on its face and the supporting affidavit sworn on 18/09/2019 by Isabella Nyambura, the claims director at Directline Assurance Co. Ltd who are the insurers of motor vehicle registration no. KBM 688 the subject herein.

3. She deposes that the Applicants stand to suffer irreparable loss as there is likelihood that they will be unable to recover the decretal sum from the Respondents. She has also deposed that the delay in filing the application was not inadvertent as the Applicants' advocates were not in a position to advise their clients accordingly without a copy of the judgment. It's also her deposition that the Applicants are ready and willing to comply with such reasonable conditions that this court may impose.

4. The application is opposed through a replying affidavit sworn by counsel Geoffrey Kilonzo on 23/10/2019. He deposed that the Applicants do not deserve the discretion of the court because despite filing the application on 07/10/2019, they served him on 22/10/2019. It's also his deposition that after perusing the memorandum of appeal, his conclusion is that it has no chance of success as no triable issues are raised. He has also deposed that substantial loss has not been proved and the application was filed after inordinate delay.

5. The application was canvassed by way of written submissions.

6. The Applicants submitted extensively on why they should be allowed to appeal out of time yet there is no such prayer in the application. In any case, the lower court judgment was delivered on 28/08/2019 and memorandum of appeal filed on 24/09/2019. Accordingly, the appeal was filed within the statutory period of 30 days.

7. With regard to the prayer for stay of execution, they submit that they are ready, able and willing to furnish the court with such reasonable security as this Honorable court may deem fit.

8. They also submit that the decretal award of Kshs.6,379,600/= is substantial and the Respondents' means are unknown hence highly unlikely to be in a position to refund the amount if the appeal succeeds. They contend that the Respondents did not furnish the court with any documentary evidence to prove their financial standing. They rely *inter alia* on **Edward Kamau & Anor. -vs- Hannah Mukui Gichuki & Anor (2015) eKLR** where the Court stated as follows;

*“I am in agreement with the Applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.”*

9. It's also their submission that the application was filed without unreasonable delay.

10. In the response, the Respondents submit that proof of substantial loss is the cornerstone for an application of stay pending appeal and that the affidavit in support of the application does not state anywhere that substantial loss will occur if stay is not granted. They contend that it is the Applicants' duty to prove how the appeal will be rendered nugatory if stay is not granted. They also submit that the claims director who swore the supporting affidavit did not indicate whether she is conversant with the financial status of the Applicants.

### **Analysis and determination**

11. Having considered the application, the supporting affidavit, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether the Applicants have met the threshold for grant of stay of execution orders.

12. Under Order 42 Rule 6 (2) of the Civil Procedure Rules, the conditions which should guide the court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.

13. Judgment in the case appealed from was delivered on 28/08/2019, the appeal was filed on 24<sup>th</sup> September, 2019 while this application was filed on 04/10/2019 which is slightly over a month since delivery of the judgment. In my view, the delay is not unreasonable.

14. As for substantial loss, I agree with the Applicants that the decretal award of Kshs.6,379,600/= is quite substantial and it was imperative for the Respondents to demonstrate that they are in a position to refund it if the appeal succeeds. Indeed, there is no deposition in the replying affidavit about the Respondents' financial standing. Having to file a suit for recovery will, in my view, occasion substantial hardship in terms of the man hours spent in pursuing the same and filing fees. There is also the question of a Resident Magistrate's pecuniary jurisdiction *vis-a-vis* the award, which needs to be addressed before the whole decretal award can be released. Accordingly, I am of the view that substantial loss will result if stay orders are not granted.

15. On the issue of security, the court should balance the two competing interests i.e that a successful litigant should enjoy the fruits of the judgment and at the same time allow an aggrieved party to exercise his right of appeal. In the trial court, the Appellants had submitted Kshs.800,000/= for loss of dependency and Kshs.100,000/= for loss of expectation of life. They had also urged the learned trial Magistrate to award only the special damages specifically pleaded and proved. In the judgment, an award of Kshs.79,000/= was made as special damages. It is therefore my considered view that Kshs.979,000/= should be released to the Respondents.

16. I have noted that the lower court file and proceedings have already been forwarded to this court. Let the appeal be processed as soon as possible for an early disposal of the same.

17. The upshot is that the application succeeds and there shall be stay of execution on the following conditions: -

i. The Appellants/Applicants to pay the Respondents the sum of Kshs.979,000/= (Nine hundred and seventy nine thousand shillings) through their advocates within 21 days.

ii. The balance of the decretal sum to be secured through a bank guarantee to be deposited with the Respondents' advocates within 30 days.

iii. Costs in cause.

Orders accordingly

**Delivered, signed & dated this 12<sup>th</sup> day of February 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**