



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 65 OF 2019

GREGORY ONUNGA OSORO.....1ST APPELLANT

EMILY MUYONI MWANGANGI.....2ND APPELLANT

UNILEVER KENYA LIMITED.....3RD APPELLANT

VERSUS

DIANAH WINNIE MSANGO & Dominica Wanjala Righa (Suing as Legal Representatives

of the estate of NICHOLAS BROWN MWANGEMI (deceased).....RESPONDENT

(Being an appeal from the judgement of Hon J. A. Agonda (S.R.M) in Mavoko PMCC 250 of 2016 delivered on 19.3. 2019)

RULING

1. The Appellants approached the court with the instant application vide certificate of urgency as well as a notice of motion dated 29.4.2019 where they primarily seek an order for a stay of execution of the judgement and decree arising from a judgement rendered between the parties in the lower court on 29.3.2019. The appeal is against the said judgement. The Application is supported by an affidavit by Jacqueline Ndirangu, who is the legal officer of the insurers of the appellants at the material time of the accident. She averred that the applicants have filed an appeal against the judgement of the trial court and that sufficient cause has been shown why the orders should be granted. It was therefore her averment that if the orders sought are not granted then the appeal will be rendered nugatory. She annexed a copy of the memorandum of appeal as well as a copy of the judgement of the trial court. The deponent averred that no loss will be occasioned to the respondent if the application is allowed.

2. The Application is opposed. In opposition, Dianah Winnie Musango deponed on 27.5.2019 a replying affidavit wherein she averred that the application is not in good faith. She averred that the application is intended to deny her the fruits of judgement and in the alternative indicated willingness to accept half of the decretal amount and that the remaining half be deposited in a joint interest earning account.

3. The application was canvassed by way of written submissions. Learned counsel for the applicants filed submissions on 19.9.2019 whereas the respondent's submissions were filed on 14.10.2019.

4. Learned counsel for the applicant submitted that the applicant came to court with the application without inordinate delay; that the decretal amount is substantial and there is an appeal in respect of the decision that led to the decree. Counsel submitted that the applicant is willing to abide by security terms imposed by the court. Reliance was placed on the case of **G. N. Muema P/A Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another (2018) eKLR**.

5. According to the Respondent, there are conditions for grant of stay. In that regard counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicants have not satisfied the grounds for grant of the stay order and therefore the same should be dismissed. However if the court is inclined to grant the application, then it should order that half of the decretal amount be paid to the respondent while the balance be deposited in a joint interest earning account. Reliance was placed on the case of **Masisi Mwita v Damaris Wanjiku Njeri (2016) eKLR**.

6. The issue for determination is whether the Appellants should be granted an order for stay of execution pending the hearing and determination of the appeal.

7. This application is brought under Order 42 Rule 6, 22 Rule 22, 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Section 3A preserves the applicants' right to approach this court to realize their cherished right of appeal and Order 42 Rule 6

provides for stay of execution pending appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

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

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.

8. The applicants have to satisfy a four-part test as was highlighted in the case of **UAP Provincial Insurance Company Limited v Michael John Bectret, Civil Application Number 204 of 2004**. They must demonstrate that:

a. The appeal they have filed is arguable;

b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. The application was made without unreasonable delay; and

d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.

9. I have perused the filed Memorandum of Appeal in this case as annexed to the application. I am unable to say that the grounds of appeal enumerated are not arguable and thus at this stage I find that the applicants have demonstrated that indeed they have lodged an appeal. One of the grounds therein is that the issue of liability was not dealt with by the trial court. I find that is an arguable issue.

10. But what is the substantial loss that the Applicants are likely to suffer if the order is not granted? The appellants have claimed that they will lose their right to be heard on appeal.

11. From the affidavit in support of the application, I am not convinced that there may be loss occasioned to the applicant if the orders sought are not granted save for the right to be heard on appeal. The applicant maintains that the decretal sums are colossal and that the respondent is not a person of means and might not refund the same if the appeal succeeds in the end. The respondent on the other hand maintains that she is a businesswoman and will afford to refund the monies in the event of success of the appeal. The respondent however did not furnish evidence of income from her business. Indeed the amount involved is a tidy sum which can cause a dent on one's finances especially during these hard economic times. I am satisfied that substantial loss is likely to occur if stay pending appeal is not granted.

12. The Application was brought without inordinate delay as it was brought within 32 days from the date of delivery of the judgement.

13. On the issue of security the applicants have indicated their willingness to deposit security for the due performance of the decree. The respondent has proposed that half of the sums be paid while the balance thereof be deposited into a joint account. A perusal of the memorandum of appeal reveals that the appellants are appealing against both liability and quantum. The Appellants have trained their guns on the head of damages namely loss of dependency as they claim it is excessive. That seems to be the bulk of the decretal sums and I would imagine that the appellants will be seeking to have it interfered with in the end. Again a perusal of the copy of the judgement which gave a summary of the respondent's case leaves no doubt that the respondent is not likely to leave the court empty handed at the conclusion of the appeal. In order to strike a balance I find an order that a third (1/3) of the sums be paid to the respondent while the balance be deposited into a joint interest earning account in names of Advocates for the parties. That will take care of the rival concerns.

14. In the result it is my finding that the appellant's application dated 29.4.2019 has merit. The same is allowed in the following terms:

a. An order of stay of execution of the decree in Mavoko PMCC No. 250 of 2016 is hereby granted pending the hearing and determination of the appeal on condition that the appellants pay a third (1/3) of the decretal sums to the respondent and the balance be deposited into a joint interest earning account in the names of both Advocates within thirty (30) days from the date hereof failing which the stay shall lapse.

b. The costs hereof shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 4th day of February, 2020.

D. K. Kemei

Judge