



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 154 OF 2018

FR. NICHOLAS KIBET KEMBOI.....1ST APPELLANT

CATHOLIC DIOCESE OF ELDORET.....2ND APPELLANT

-VERSUS-

LILLIAN KEMUNTO MOKUA (suing on behalf of the estate of the late

SAMUEL ORENGE NYAKUNDI, DECEASED.....1ST RESPONDENT

TOM NYANDIEKA ONGIRI.....2ND RESPONDENT

FAHARI CARS LIMITED.....3RD RESPONDENT

RULING

[1] The Notice of Motion for determination is dated **20 February 2019**. It was filed herein by the firm of **M/s Magare Musundi & Company Advocates**, on behalf of the Appellants pursuant to **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** as well as **Order 42 Rule 6 and Order 51 Rule 1(1)** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] There be stay of execution of the judgment dated **13 November 2018** and the decree against the Appellants in Eldoret **CMCC No. 22 of 2013: Lilian Kemunto (suing on behalf of Samuel Orange Nyakundu) vs. Tom Nyandieka Ongiri & Others** and **Eldoret CMCC No. 422 of 2013: Agnes Muguri Wanjiku (suing as the administrator of the estate of David Ng'ang'a Ngesho (Deceased) vs. Tom Nyandieka Ongiri & Others** pending the hearing and determination of the application *inter partes* and thereafter the hearing and determination of the appeal.

[c] That there be stay of proceedings and execution as against the Appellants pending the hearing and determination of this application, and thereafter pending the hearing and determination of the appeal in matters for which **Eldoret CMCC No. 22 of 2013** is a test suit, namely:

[i] **Eldoret CMCC No. 172 of 2013: Florence Atieno vs. Tom Nyandieka Ongiri & Others;**

[ii] **Eldoret CMCC No. 332 of 2013: Francis Kimani Kariuki vs. Tom Nyandieka Ongiri & Others;**

[iii] **Eldoret CMCC No. 353 of 2013: Yegon Kipkorir Wilson vs. Tom Nyandieka Ongiri & Others;**

[iv] **Eldoret CMCC No. 422 of 2013: Agnes Muguri Wanjiku (suing as the Administrator of the estate of David Ngega Ngesho (Deceased) vs. Tom Nyandieka Ongiri & Others;**

[v] **Eldoret CMCC No. 1262 of 2016: Mathew Ogada vs. Tom Nyandieka Ongiri & Others.**

[d] In the alternative to **[c]** above, that the order finding liability against the Third Parties be stayed pending the hearing and determination of the appeal herein.

[e] That costs do abide the appeal.

[2] The application was premised on the grounds that this matter arose from an accident that occurred on **1 April 2013**; and that several suits were filed in which the Appellants were enjoined as Third Parties. It was further the contention of the Appellants that, since the 1st Defendant did not tender any evidence against them as Third Parties, there was no basis for them to be held 40% liable; and hence the appeal. It was further the contention of the Appellants that the Respondents will suffer no prejudice as there is already a judgment in favour of the 1st Respondent at 60% in respect of which no appeal has been filed.

[3] The application is supported by the affidavits of the 1st Appellant, **Fr. Nicholas Kibet Kemboi**, sworn on **20 February 2019**, and the affidavit of **Rev. Fr. Jonas Kiplimo Kimeli**, also sworn on the **20 February 2019**. In his affidavit, the 1st Appellant deposed that a determination having been made in **Eldoret CMCC No. 22 of 2013** on liability and quantum, attributing 40% liability to the Appellants, an application was filed for execution **Eldoret CMCC No. 22 of 2013** and that, unless the orders sought are granted, the Appellants stand to suffer substantial loss.

[4] **Rev. Kimeli**, on his part averred that he is the Insurance and Property Manager for the 2nd Appellant; and therefore confirmed that the 2nd Appellant was sued as a third party in a series of cases, including **Eldoret CMCC No. 22 of 2013**, which was selected as the test suit. He further confirmed that, upon Judgment being entered in **Eldoret CMCC No. 22 of 2013**, the Plaintiff in **Eldoret CMCC No. 422 of 2013** levied execution against the 2nd Appellant by way of proclamation; and yet they 2nd Appellant has filed an appeal that has overwhelming chances of success. He consequently averred that it would be in the interest of justice for the appeal to be heard and determined before execution is levied as the Plaintiffs are people of straw and will not be in a position to refund any monies paid to them in execution. He further averred that the insurers of the 2nd Appellant are prepared to issue an insurance bond as security; adding that the church was established in AD 33 and therefore that it is unlikely to go under.

[5] The Respondents opposed the application, terming it frivolous, vexatious and an abuse of the process of the court. They relied on the Replied Affidavit sworn by the 1st Respondent, **Lillian Kemunto Mokua**, filed on **26 February 2019**, wherein it was averred that the intended appeal has no chances of success; and that, in any case, she is not a woman of straw as alleged, and is well capable of repaying the decretal sum in the unlikely event that the appeal succeeds.

[6] Counsel were in agreement that the application be canvassed by way of written submissions. Accordingly, following directions to that effect, Counsel for the Appellants filed their written submissions on **8 March 2019** reiterating their contention that the 1st Respondent is a woman of straw and may not be in a position to refund the decretal amount in case the appeal is allowed. It was further pointed out that, since the greater liability was attributed to the 2nd Respondent, the 1st Respondent stands to suffer no prejudice. Counsel relied on **Nairobi Civil Appeal No. 238 of 2005: National Industrial Credit Bank Limited vs. Aquinas Francis Wasike** and **Malindi HCCA No. 18 of 2017: Amal Haulers Limited vs. Abdulnasir Abukar Hassan** for the proposition that the onus was on the 1st Respondent to demonstrate that she is indeed in a position to refund any sums that may be paid to her in execution of the decree; which has not been done herein.

[7] Counsel for the Appellants also urged the Court to note the readiness of the Appellants to furnish security; and to comply with any such conditions and terms as the Court may deem fit to give for the due performance of the decree. He relied on **Butt vs. Rent Restriction Tribunal** [1982] KLR 417 in urging the Court to find that all the conditions for the grant of stay pending appeal have been met by the Appellants.

[8] Counsel for the 1st Respondent, **M/s Rioba Omboto & Company Advocates**, relied on their written submissions dated **10 June 2019** and proposed the following issues for determination:

[a] Whether the 1st Respondent proved her case against the Appellants and the 2nd Respondent;

[b] Whether the Appellants have met the threshold for the grant of the order for stay of execution;

[c] Whether the Appellants will suffer substantial loss if the orders sought are not granted;

[d] Whether the 1st Respondent is a person of means or straw; and whether she is in a position to refund the decretal sum in the event of the appeal succeeding.

[9] Counsel defended the Judgment and Decree passed by the lower court, submitting that it is not in dispute that the 1st Respondent's husband succumbed to the injuries sustained in the subject road accident, involving the 2nd Respondent's **Motor Vehicle Registration No. KBN 264M Toyota Hiace Matatu** and the Appellant's **Motor Vehicle Registration No. KAS 615B Toyota RAV 4**; and hence the apportionment of liability. Counsel was of the view that the lower court's Judgment is meticulous and watertight and is in no way impeachable. He relied on **Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited** [2014] eKLR in submitting that it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Appellants to do what the Judgment requires, they will become "...pious explorers in the judicial process..."

[10] **Order 42 Rule 6(1)** of the **Civil Procedure Rules**, pursuant to which the instant application has been brought, provides that:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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..."

[11] In the light of that provision, I have given due consideration to the application, the affidavits filed in respect thereof by the protagonists and the written submissions filed by their counsel. It is manifest from the record that, following the Judgment of the lower court on **13 November 2018**, this appeal was filed on **29 November 2018**; and that the need for stay of execution did not arise until **19 February 2019** when attachment was proclaimed by **Saddabri Auctioneers** over the movable property of the Appellants in respect of **Eldoret CMCC No. 422 of 2012**. It was thereupon that the instant application was promptly filed on **20 February 2019**. Hence, I entertain no doubt that both the appeal and the instant application were filed without undue delay.

[12] In paragraphs 14 and 16 of the affidavit of **Rev. Kimeli**, it was deposed, on behalf of the 2nd Appellant, that its insurers are willing to issue an insurance bond as security for the due performance of the decree; and that the 2nd Appellant is willing to abide by any such reasonable conditions as may be given by the Court along with an undertaking as to the costs of the appeal. Thus, from the prism of **Order 42 Rule 6** aforementioned, the only outstanding issue to consider is whether the Appellants have demonstrated that they stand to suffer substantial loss.

[13] In the ordinary course of events, a successful litigant is entitled to the fruits of his litigation. Thus, it was aptly stated in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63 that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[14] That right can only be delayed by an order of stay of execution, in the event of an appeal, if it is demonstrated that the applicant stands to suffer substantial loss. In this case, it has been demonstrated, vide Annexures 6a-d that the Decree Holder in **Eldoret CMCC No. 422 of 2013** had moved the Court for execution to recover a decretal sum of **Kshs. 820,528/=** inclusive of costs. Thus, in **Butt vs. Rent Restriction Tribunal** [1982] KLR 417 that was relied on by Counsel for the Appellants, the Court of Appeal gave guidance on the applicable principles that guide the exercise of discretion in such matters thus:

- "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."**

[15] It must be appreciated that, for purposes of Order 42 Rule 6 of the Civil Procedure Rules, the merits of the appeal is not a pertinent consideration. For that reason, I find little, if any, relevance in the submissions by Counsel for the Appellants that touch on the merits of the appeal. Thus, the only central factor herein is the question whether the 1st Respondent would be in a position to refund the decretal amount, should the appeal turn out successful. In this respect we have a simple assertion from the 1st Respondent at paragraph 11 of her Replying Affidavit that she is not a woman of straw as alleged by the Appellants; and that she is a businesswoman making reasonable income and therefore capable of refunding any amount paid to her. She also asserted that she is in a position of securing a loan from her employer if need be. She annexed no documents to demonstrate the nature of her business or employment or the income therefrom.

[16] In this connection, it was held by the Court of Appeal in **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another** [2006] eKLR, the Court of Appeal held that:

"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 a respondent or the lack of them. Once an applicant expresses a reasonable fear 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."

[17] Consequently, the Appellants' apprehensions are not altogether baseless. Thus, having weighed the competing interests of the parties,

the orders that commend themselves to me are as hereunder:

[a] That the application dated **20 February 2019** be and is hereby allowed;

[b] That execution of the judgment dated **13 November 2018** and the decree issued against the Appellants in Eldoret **CMCC No. 22 of 2013: Lilian Kemunto (suing on behalf of Samuel Orenge Nyakundu) vs. Tom Nyandieka Ongiri & Others** and **Eldoret CMCC No. 422 of 2013: Agnes Muguri Wanjiku (suing as the administrator of the estate of David Ng'ang'a Ngesho (Deceased) vs. Tom Nyandieka Ongiri & Others** be and is hereby stayed pending the hearing and determination of the appeal on condition that 40% of the decretal sum in each of the two cases be deposited in a joint interest earning account in the names of counsel on record for the parties within a period of 60 days from the date hereof.

[c] That there be stay of proceedings and execution in the other matters for which **Eldoret CMCC No. 22 of 2013** is a test suit, namely:

[i] **Eldoret CMCC No. 172 of 2013: Florence Atieno vs. Tom Nyandieka Ongiri & Others;**

[ii] **Eldoret CMCC No. 332 of 2013: Francis Kimani Kariuki vs. Tom Nyandieka Ongiri & Others;**

[iii] **Eldoret CMCC No. 353 of 2013: Yegon Kipkorir Wilson vs. Tom Nyandieka Ongiri & Others;**

[iv] **Eldoret CMCC No. 1262 of 2016: Mathew Ogada vs. Tom Nyandieka Ongiri & Others.**

[d] That costs of the application shall abide the appeal.

It is so ordered.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY 2020

OLGA SEWE

JUDGE