



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL CASE NO. 33 OF 2020

BASTA LOGISTICS LIMITED.....APPELLANT/APPLICANT

VERSUS

FRANCISCA MUENI KIMAE (*Suing as an administratrix ad litem of the estate of*

***PATRICK MWANIA SUA* (deceased).....RESPONDENT**

RULING

1. This ruling is in respect to the application by the Appellant/Applicant dated 3rd September 2020 seeking the following orders:

a) That, this application be certified as urgent and be heard *ex parte* in the first instance.

b) That, there be a stay of execution of this judgment delivered against the Applicant on 28/07/2020 in PMCC No. 320 of 2017 Makindu pending the hearing and determination of this application.

c) That, there be a stay of execution of the judgment delivered against the Defendant/Applicant on 28/07/2020 in PMCC No. 320 of 2017 Makindu pending the hearing and determination of the appeal

d) That, the costs of this application be provided for

The 1st and 2nd prayers are already spent.

2. The application is supported by the grounds on the face of the application plus the supporting affidavit of one Geoffrey Kilonzo counsel for the Appellant /Applicant. He attributes their delay in taking action in good time on the failure by the court to send them a copy of judgment through email. The impugned judgment was delivered on 28th July 2020 but they were only notified on 26th August 2020 after sending an inquiry email to the court at Makindu.

3. The Applicant is challenging the entire judgment and says there is a threat by the Respondent to execute the judgment (*annexture GK3*). The Applicant is therefore fearful that without a stay of execution being granted the Respondent will proceed to execute the judgment and it will suffer substantial loss.

4. A replying affidavit sworn on 1st October 2020 was filed by Francisca Mueni Kimae the Respondent. In it she explains her frustration in the length of time (5years) this matter has taken in the lower court. It is her desire that the matter be disposed off within the shortest time possible.

5. She also asks this court to direct the Applicant to deposit the decretal sum in a joint interest earning account between her advocates and the Applicant's advocates. The deceased in this matter was the Respondent's husband.

6. Mr. Ojwang for the Respondent has submitted before this court that the respondent has no objection to the grant of stay of execution as long as 70% of the decretal sum is deposited in the agreed account.

7. Mr. Mutinda Kimeu holding brief for Mr. Wambua Kilonzo for the Applicant has submitted his client's willingness and readiness to deposit only 50% of the decretal sum in the agreed account.

8. The Memorandum of appeal confirms that the Appellant/Applicant is challenging the whole judgment by the lower court. i.e. liability and quantum. The accident the subject of this appeal occurred on 13th April 2015 and the case was only finalized on 28th July 2020. The anxiety by the Respondent is therefore real but the Appellant's/Applicant's right of appeal cannot be ignored.

9. Order 42 Rule 6(1) and Rule 6(2) of the Civil procedure Rules states:

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 leave such order set aside.

(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 orders as may ultimately be binding on him has been given by the Applicant.

10. In this case the Respondent is not opposed to the grant of stay of execution. She has however averred that the stay must be conditional. In view of the above provision the issue for determination is *how much the Applicant should be directed to deposit*. The Applicant has floated 50% while the Respondent has floated 70%.

11. I have considered the circumstances of the case, the judgment by the trial court and the Appellant/Applicant's prayer (b) of the appeal. I am satisfied that a deposit of part of the decretal sum should be made. Since the parties are unable to agree and they have given their proposals, I will share them equally between them

i.e. 70+50 = 60

2

12. I therefore grant stay of execution on condition that the Applicant deposits 60% of the decretal sum in an interest earning account within 21 days. The account shall be in the joint names of the advocates for the Applicant and Respondent. Non-compliance will automatically vacate the order of stay of execution.

13. The Deputy Registrar to make a follow up on her letter of 27th August 2020 requesting for the lower court record from Makindu law courts for purposes of processing the appeal.

Delivered, signed & dated this 8th day of October 2020, in open court at Makueni.

.....

H. I. Ong'udi

Judge