



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 516 OF 2019**

**BHARVIN MOTORS LIMITED.....1<sup>ST</sup> APPELLANT**

**JOSEPH WACHIRA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**PATRICK WAWERU.....RESPONDENT**

**RULING**

1) The appellants herein took out the motion dated 7<sup>th</sup> May 2020 in which they sought for the following orders:

*i. THAT this application be certified as urgent and service of the same be dispensed with in the first instance.*

*ii. THAT pending the inter parties hearing of this application, there do issue an interim order of stay of execution of the judgment delivered on 7<sup>th</sup> August 2019 and the resultant decree in Milimani CMCC No. 6707/2017.*

*iii. THAT there do issue an order of stay of execution of the judgment and the resultant decree given in Milimani CMCC No. 7607/17 pending the hearing and determination of this appeal.*

*iv. In the alternative, this honourable court be pleased to vary or alter the stay conditions issued by the lower court and grant a stay on the condition that the appellants provide a bank guarantee for performance of the decree or deposit part of the decretal amount in a joint interest earning account in the name of both advocates until the determination of this appeal.*

*v. THAT the costs be in the appeal.*

2) The aforesaid motion is supported by the affidavit of Catherine Njogu sworn on 7th May 2020. When served with the application, the respondent filed the replying affidavit he swore to oppose the same.

3) When the motion came up for interpartes hearing, this court gave directions to have the application disposed of by written submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the written submissions and the authorities filed by the respondent.

5) The main order sought by the appellants is that for stay of execution of the decree pending appeal. The appellants have also asked this court to in the alternative issue an order varying the order issued by the trial court directing the appellants to pay half the decretal sum to the respondent and further directing them to deposit the other half in an interest earning account and substitute it with an order requiring them to instead provide a bank guarantee as security for the due performance of the decree.

6) The appellants have argued that if the respondent is paid half the judgment sum he will not be in apposition to refund

the same should the appeal turn successful. It is pointed out that the respondent's source of income is unknown, therefore the appellants may suffer substantial loss.

7) In response, the respondent urged this court to dismiss the appellant's application stating that the appellants' delay in filing the current application is unreasonable and unexplained. It is also stated that the appellants have failed to show the substantial loss they would suffer if the order for stay is denied. The appellants pointed out that the appeal is solely on quantum and not liability hence at the end of the day the respondent will not go home empty handed.

8) The appellants were accused of approaching this court with unclean hands having failed to comply with the orders issued by the trial on 19th December, 2019.

9) The background of this dispute is largely straightforward. The respondent filed a compensatory suit against the appellants before the Chief Magistrate's Court, Nairobi for the injuries he sustained. Hon. M. W. Murage, learned Senior Resident Magistrate heard the suit and in the end she entered judgment in favour of the respondent whereof she awarded him a sum of ksh.1,000,000/=.

10) The appellants have now approached this court on appeal to challenge the award on quantum. It is not disputed that on 19th December 2019 the trial court issued an order for stay of execution of the decree pending appeal on condition that half the judgment sum i.e. ksh.500,000/= is paid to the respondent while the remaining balance would be deposited in an interest earning account pending appeal.

11) It is also not in dispute that the appellants have not complied with the above conditions. The appellants are now before this court seeking for variation of the aforesaid orders. The question is whether the appellants have convinced this court to exercise its discretion in their favour?

12) The appellants have argued that they are dissatisfied with the conditions set by the trial court for the grant of the order for stay. They argue that unless the aforesaid orders are set aside, it will amount to compromise of the appellants' right of appeal as payment of half the decretal amount without security for it will amount to substantial satisfaction of the decree.

13) The appellants filed before the trial court, the motion dated 26<sup>th</sup> August 2019 whereof they sought for *interalia*, an order for stay of execution of the decree pending appeal. That motion gave rise to the orders issued on 19th December 2019. In the aforesaid motion the appellants stated that they were ready to deposit security in court in form of a bank guarantee or any other measures that the court may direct. It is apparent that the appellants were ready to abide by any directives given by the court on the provision for security.

14) The respondent has urged this court to dismiss the motion on the basis that the delay in filing the current motion was inordinate. One of the principles which must be considered in determining an application for stay of execution is that the same must be filed without unreasonable delay.

15) The motion which gave rise to the orders issued on 19.12.2019 was filed on 4th September 2019 about 30 days from the date of judgment by the trial court. The appellants waited until 10th June 2020 before filing the current application.

16) The appellants aver that they filed the application without unreasonable delay. The respondent has expressly complained that the motion was filed after unreasonable delay. It is apparent that the respondent took more than six months before filing the application seeking to vary the orders issued by the trial court. The appellants have not offered any explanation for the delay. In my humble view, I find the delay in filing the application to be unreasonable and unjustified.

17) The appellants have stated that the respondent may not be in a position to refund half of the decretal amount should the appeal turn successful. The respondent averred that he is in a position to refund the decretal sum since the amount ordered to be released to him is half the decretal sum.

18) It is apparent from the application that the appellants are basically appealing against the award on quantum. With respect and in the circumstances of this case, I am convinced that the respondent will be in a position to refund the amount ordered to be paid to him should the appeal turn out to be successful. I find that the appellants have failed to show the actual substantial loss they would suffer if the order for stay is denied.

19) In the end and on the basis of the above reasons, I find no merit in the appellants' motion dated 7th May 2020. The same is dismissed with costs to the respondent.

**Dated, signed and delivered online via Microsoft Teams at Nairobi this 2<sup>nd</sup> day of October, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent