



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 23 OF 2019**

**MALIK BOEKI COMPANY LTD.....1<sup>ST</sup> APPELLANT/APPLICANT**

**BERNARD GACHUNGUI NDUNGU.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**MICHAEL M. PETER.....RESPONDENT**

**RULING**

1. Pursuant to the provisions of order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1 of the 2010 Civil Procedure Rules and sections 1A (1) (2) (3), 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law, the applicants have applied for the following major orders

1. *spent*

2. an order of stay of execution of the judgement/decree pending the hearing and determination of this application.

3. an order of stay of execution of the judgement and decree pending the hearing and determination of the appeal.

2. The application is supported by nine grounds that are set out on the face of the notice motion. The major grounds are as follows. After entry of judgement in the sum shs 750,000/- in favour of the respondent/plaintiff by the lower court on 30/7/2019, the applicants applied for stay of execution in that court pending appeal in the High Court. The applicants were granted stay of execution for three months, which lapsed on 14<sup>th</sup> July 2020. Unless an order of stay of execution is granted, the applicants will suffer irreparable loss and their appeal will be rendered nugatory, as the respondent may proceed to execute. The respondent physical address and means are unknown to the applicants and the applicants are apprehensive that if the decretal sum is paid to the respondent, he may not be in a position to refund the same in the event the appeal is successful.

3. Furthermore, the applicants are ready, willing, and able to furnish the court any such reasonable security and no prejudice will be suffered if the orders sought are granted.

4. In the addition to the grounds in support of the application, the application is supported by a fifteen paragraphs (15) supporting affidavit of Isabella Nyambura, who is a claims director of Direct Line Assurance Co. Ltd. She has deposed to the following major averments. It is this insurance company that has insured motor vehicle registration number KBX 870N, which gave rise to the instant subject claim through a motor vehicular accident. She also has deposed that the applicants have lodged an appeal which appeal is meritorious and unless an order of stay of execution is granted it will be rendered nugatory. She also has deposed that the application has been made without any unreasonable delay.

5. The other averments appear on the face of the notice of motion, which I find is unnecessary to set out here.

6. Counsel for the applicants (Messrs Kimondo Gachoka, Advocates) have filed written submissions in support of the application. They have submitted based on *Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365*, in which it was held that the discretion of the High Court to grant stay of execution is fettered by three conditions. First, the applicant must establish a sufficient cause. Secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay of execution. Third, the applicant must furnish security and the application must be made without unreasonable delay.

7. Counsel have in the light of the foregoing authority submitted that the respondent may levy execution against the applicants which will render the appeal nugatory. As a result, the applicants will suffer substantial loss if stay of execution is not granted.

8. Counsel have further submitted the application has been made without unreasonable delay. They have submitted that the judgement of the

lower court was delivered on 30/07/2019 and their application in this court was filed on 7/8/2019. The instant application was filed on 2/7/2020. The applicants were granted stay of execution for three months by the trial court which lapsed on 14<sup>th</sup> July 2020.

9. Counsel have also submitted that they are ready and willing to furnish reasonable security and that the applicants have a meritorious and arguable appeal.

10. The applicants have therefore urged the court to allow their applications.

### **The case for the respondent**

11. The respondent has filed a 15 paragraphs replying affidavit in opposition to the application. He has deposed to the following major averments. He deposed that the application is another ploy by the applicants to frustrate him from enjoying the fruits of his judgement. He has further deposed that the applicants have met the required conditions for the grant of an order of stay of execution pending appeal.

12. The respondent has further deposed based on the advice of his advocates that should stay be granted, it is in the interests of justice that half of the decretal amount plus costs of the lower court should be released to him while the other half is held in a joint interest earning account pending the outcome of the determination of the appeal.

13. The respondent has also deposed that he is not a man of straw and is ready to refund the decretal sum in the unlikely event that the appeal is successful.

14. He has therefore urged the court to dismiss the application with costs.

15. Counsel for the respondent (Waiganjo Wachira & Advocates), have submitted that the applicants have not satisfied the requirements for the grant of an order of stay of execution as required of them by Order 42 Rule 6 of the 2010 Civil Procedure Rules. Counsel cited *Musisi Mwita v Damaris Wanjiku Njeri [2016] e-KLR*, in which it was held that the act of execution or the risk of it does not amount to substantial loss.

16. Counsel further cited *Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] e-KLR*, in which the court in part stated that:

*“.....the applicant should place cogent evidence before the court which shows that the Respondent cannot refund the money, and it is in face of such limitation that the Respondent should discharge the evidential burden that she is of sufficient means to make a refund of the decretal sum....”*

17. Furthermore, counsel have submitted that the application was made without unreasonable delay; because judgement was delivered on 7/8/2019 and the appeal was filed on 7/8/2019.

18. Finally, counsel has submitted that the applicants should offer security when seeking for stay.

### **Issues for determination**

19. I have considered the affidavits of both parties, the submissions of their counsel and the authorities cited. As a result, I find the following to be the issues for determination.

- 1) whether or not the applicants will suffer substantial loss unless an order of stay of execution is granted.
- 2) whether or not the applicants have an arguable appeal.
- 3) whether or not the applicants should offer security.
- 4) whether or not there has been unreasonable delay in prosecuting this application.

#### **Issue 1**

20. On the affidavit evidence of both parties I find that unless an order of stay of execution is granted the respondent is likely to execute with the result that the appeal filed by the applicants will be rendered nugatory. It therefore follows that the right of appeal that is conferred upon the applicants by section 79G of the Civil Procedure Act (Cap 21) Laws of Kenya, will be lost. It is the duty of the court to strike a balance to ensure that they enjoy the benefits conferred by that statute; while preserving the right of the respondent to enjoy the fruits of his judgement. In striking a balance between these conflicting interests, the right of the respondent to enjoy the fruits of his judgement will of necessity be suspended pending the hearing determination of the appeal. I therefore find in favour of the applicants in respect of issue 1.

#### **Issue 2**

21. I find that the applicants have an arguable appeal. Unless an order of stay of execution is granted, their appeal will be rendered nugatory.

#### **Issue 3**

22. It is a requirement of the law that the applicants are required to offer security for the due performance of the obligations that the court might find to be binding upon them.

23. I find as credible their affidavit evidence that the applicants are able, willing and ready to deposit security for the due performance of the obligations, which the court might eventually find to be binding upon them.

**Issue 4**

24. I find that the judgement of the lower court was delivered on 30/07/2019 and the appeal was filed on 7/8/2019. I also find that the instant application was filed on 2/7/2019. It is clear that the applicants have prosecuted their application without undue delay.

25. In the premises, I find that the applicants application succeeds with the result that it is hereby allowed; but on condition that they deposit the decretal sum of money in an interest earning joint account in the names of their counsel on record with a reputable bank or financial institution within 30 days failing which this order will lapse.

**Ruling signed, dated and delivered by sending it through their email address at Narok this 7<sup>th</sup> day of October 2020 in the absence of both parties.**

**J. M. BWONWONG'A**

**JUDGE**

**7/10/2020**