



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 26 OF 2019**

**TIMOTHY WAMBUA MUTISO *alias***

**TIMOTHY GIDEON WAMBUA MUTISO.....APPELLANT/APPLICANT**

**VERSUS**

**EUNICE MWENDE KIMUYU *alias* RUKIA MUTINDI....RESPONDENT**

**RULING**

1. The Applicant who was the Defendant in the lower court has appealed against the judgment rendered on 11<sup>th</sup> March 2019. He is challenging the award of Kshs. 464,992.50 plus costs and interest claiming it is manifestly high.

2. He filed the Notice of Motion dated 23<sup>rd</sup> April 2019 under Sections 1A, 1B & 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

*i. **THAT** there be a stay of execution of the judgment and decree of the Senior Resident Magistrate's court delivered on March 11, 2019 in TAWA SRMCC NO. 99 OF 2018, EUNICE MWENDE KIMUYU *alias* RUKIA MUTINDI (Suing as legal representative to the estate of NDANU MUTINDA – (Deceased) – VS- TIMOTHY WAMBUA MUTISO *alias* TIMOTHY GIDEON WAMBUA MUTISO (Sued as the legal representative to the estate of CONSOLATA MUENI WAMBUA – Deceased).*

*ii. **THAT** the Costs of this application be in the cause.*

3. The same is supported by the grounds on the face of the application plus the supporting affidavit of one Erastus Mbaka a legal officer at CIC General Insurance Ltd who are the Applicant's insurers.

4. The main ground to this application is that the Applicant being dissatisfied with the judgment has preferred an appeal against the said judgment. Further that the Respondent has started the process of execution in respect of the decree in Tawa SRMCC No. 99 of 2018 (EMI). It is his fear that if execution is left to proceed he will suffer substantial loss in the likely event of a successful appeal.

5. The Applicant has expressed his willingness to abide by any conditions that the court will give for purposes of stay of execution.

6. When the application came for hearing, Mr. Atonga for the Applicant argued that unless the orders of stay of execution sought by the Applicant were issued, he would suffer. He also stated that the process of execution had already begun.

7. Counsel submitted that there had been no delay in filing the application, and the Applicant is ready to deposit the entire amount in court pending the hearing and determination of the Appeal.

8. The application was opposed by the Respondent who filed a replying affidavit through his counsel Mr. S. M. Makau. He deponed that in the lower court matter the parties had entered into a consent on liability and the only issue for determination was on quantum.

9. That the Appeal was only on a part of the award amounting to Kshs. 140,000/= out of the judgment sum of Kshs. 457,057.50. He therefore sought for the release of Kshs. 407,057.50 as the Appellant contests the sum of Kshs. 140,000/= plus costs of Kshs. 97,680/=.

10. He also deponed that the Respondent had failed to demonstrate what prejudice he would suffer in case the application is not allowed. That he had failed to fulfill the mandatory requirements of Order 42 Rule 6 Civil Procedure Rules.

11. During the hearing of the application in Mr. S. M. Makau expounded on his replying affidavit and submitted that from the Appeal it was clear that the Applicant was only contesting the award of expectation of life. He therefore proposed that since the other awards were not

contested the amount should be released to the Applicant. He prayed for costs.

12. In a rejoinder, Mr. Atonga submitted that the Appeal is against the whole award. He added that since they had failed to agree, the entire amount should be deposited in court.

**DETERMINATION**

13. I have had a chance of looking at the Appeal filed herein and it is clear that the Appeal is against the entire award. It is however not disputed that as a result of the accident the minor Consolata Mueni Wambua died. There is also no dispute that there was a consent on liability in the ratio of 85:15 in favour of the Plaintiff.

14. It follows that there must be compensation for the loss of the life involved. The only issue is how much the award should be.

15. The Appeal has been filed and should be processed within the shortest time. The application was promptly filed so the Applicant cannot be accused of any delay. The Applicant is ready and willing to deposit security as provided for under Order 42 Rule 6 Civil Procedure Rules.

16. After considering the application, affidavits and submissions, I find that the Applicant has fulfilled the requirements of Order 42 Rule 6 Civil Procedure Rules. I therefore find the application to be merited and I grant stay of execution on the following conditions.

- (i) The Applicant should pay the Respondent through her Advocates Kshs. 200,000/= within 10 days.**
- (ii) The balance of the decretal sum to be deposited in court within 10 days.**
- (iii) Failure to comply with any of the conditions will lead to automatic discharge of the stay of execution.**

17. Costs to be in the cause.

Orders accordingly.

**DELIVERED, SIGNED AND DATED THIS 6<sup>TH</sup> DAY OF JUNE, 2019 IN OPEN COURT AT MAKUENI.**

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**HON. H. I. ONG'UDI**

**JUDGE**