



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 27 OF 2019

AWADH OMAR BAYUSUF & SONS LTD.....1ST APPELLANT

ERNEST KARIUKI NJUGUNA.....2ND APPELLANT

-VERSUS-

VIOLET WANJALA BWONDA & BRAMWEL

WASIKE WEKUL (Suing as the legal rep. of the estate of

JOINA WAWIREWAKHUNGU.....RESPONDENTS

(Being an appeal from Judgment/Decree of Hon. R. Amwayi, Senior Principal Magistrate, Molo,

delivered on 23rd January, 2019 in Molo CMCC No.103 of 2017)

RULING

1. This is a ruling on application dated 18th June 2019. It seeks to stay execution of judgment/decree in Molo CMCC No.103 of 2017. The applicant further seeks that this court vary or alter stay conditions issued by the trial court on 12th June 2019 and grant stay on condition that the entire decretal amount be deposited in a joint interest earning account.
2. Grounds on the face of the application are that, the appeal filed has high chances of success and if stay is not granted, the appeal will be rendered nugatory and substantial loss will be occasioned to the appellant.
3. The application is supported by affidavit sworn by the appellant's counsel. She averred that the appellant is dissatisfied with the lower court judgment and has preferred appeal, which she believes, has high chances of success.
4. She further averred that the respondent has not indicated any source of income or availed any evidence to show that she has financial ability to reimburse the judgment sum should the appeal succeed.
5. She stated that the lower court granted stay on condition that half the decretal sum be paid to the respondent and half to be deposited in court. She averred that the appellant is challenging award on quantum and half the decretal amount is way above awards in comparable cases.
6. Counsel further averred that, the appeal has been lodged expeditiously and the respondent will suffer no prejudice if the application is allowed.
7. In response, the respondent filed replying affidavit sworn on 25th June 2019. She stated that, the trial court did not err by setting the stay conditions pending appeal. She averred that the applicant did not seek leave to appeal against the ruling of the trial court and that she will suffer more prejudice if the application is allowed; that the court exercised its discretion judiciously. She added that the correct approach is to file appeal if the applicant is not satisfied with stay condition.
8. In her submissions, Counsel for the applicant stated that the appellant is not challenging liability. She stated that, the decretal amount is kshs.3,330,300 and the applicant is willing to deposit kshs.450,000 and the remainder in a joint interest earning account. She submitted that, half the decretal amount is way above the awards granted in similar cases.

9. In response Counsel for the respondent submitted that the applicant/appellant failed to annex anything other than the ruling to this application. He submitted that, it is mandatory for the proceedings to be availed if a party want court to issue orders other than the orders issued by the trial court. He argued that, the only issue being raised is that the respondent is a person of unknown means; that evidence has not been availed to confirm if the respondent is a person of unknown means; and in the absence of such evidence, there is no reason to disturb the conditions given.

ANALYSIS AND DETERMINATION

10. I have considered arguments by counsels herein. Liability is not being challenged. The appellant's argument is that the award is high and half of the decretal amount is higher than what should have been awarded to the respondent. On perusal of the file, I have not seen judgment or any proceedings from the lower court. It is difficult therefore for me to establish what informed the trial magistrate's assessment of damages.

11. If judgment or proceedings were attached, they would have served as a guide in determining whether to interfere with the amount to be paid to the plaintiff awaiting appeal.

12. From the foregoing, I decline orders sought and direct that the appellant comply with the conditions set by the trial magistrate. I will however extend time for compliance.

13. FINAL ORDERS

1. Application dated 18th June 2018 is hereby dismissed.
2. Costs of the application to the respondent.
3. Time for compliance with conditions set by the trial court is extended for 21 days from the date of this ruling.

Judgment dated, signed and delivered at Nakuru this 11th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mutai holding brief for Bett Counsel for Appellant

N/A Counsel for Respondent