



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 216 OF 2019

WINROSE N. MAHINDA & CAROLINE MUTHONI GITIMU (Suing for and on behalf of the estate of GEORGE GITIMU KARIUKI-Deceased).....APPELLANTS/RESPONDENTS

VERSUS

SAMUEL KINYANJUI MUENDIA.....RESPONDENT/APPLICANT

RULING

1. This ruling was triggered by the Notice of Motion dated 26th April, 2019 brought by the respondent/applicant (“*the applicant*”) in this instance. The same is supported by the grounds set out on its body and the affidavit sworn by *Gibson Kamau*. The applicant herein is seeking the substantive order for a stay of execution of the decree pending the hearing and determination of the appeal filed against the judgment delivered by Honourable E.K. Usui (Ms.) (Senior Principal Magistrate) on 18th March, 2019 in CMCC NO. 6120 OF 2012 as well as an order to the effect that the applicant deposits the decretal amount of Kshs.668,940/= in court or in a joint interest earning account.

2. Gibson Kamau, Legal Manager for Heritage Insurance Co. Ltd (“*the company*”) deponed that the appellants/respondents (“*the respondents*”) herein lodged a suit against the applicant following a fatal accident involving the deceased and applicant’s motor vehicle registration number KBK 812K insured by the company, further deponing that upon conclusion of the hearing, the trial court proceeded to hold the applicant 100% liable and awarded the respondents the total sum of Kshs.668,940/= as damages, together with costs and interest on the suit.

3. The deponent asserted that the respondents have since challenged the award on quantum by way of the current appeal, whereas the applicant has filed a cross appeal in respect to liability.

4. At the behest of the company, the deponent avers that the said company is apprehensive that should the appeal fail and the cross appeal succeed, it will be impossible to recover the decretal amount from the respondents, given that their whereabouts and assets remain unknown, thus exposing the applicant to run the risk of suffering substantial and irreparable loss.

5. Despite there being evidence of service of the Motion upon the respondents through their firm of advocates, no documents have been filed in reply thereto. As it stands therefore, the Motion remains unopposed.

6. The said respondents equally did not attend the hearing of the aforesaid application despite having been served. *Mr. Muchane* learned advocate for the applicant urged this court to grant the orders sought.

7. I have duly considered the facts as presented on the body of the Motion and its supporting affidavit. *Order 42, Rule 6 (1)* of the Civil Procedure Rules establishes the germane principles encompassing a stay of execution thus:

a) The application must be brought without unreasonable delay;

b) The applicant must demonstrate that substantial loss may result; and

c) Provision ought to be made for security.

8. In respect to the first principle, it is apparent that no copy of the impugned judgment has been availed to this court as of yet. Nevertheless, going by the record it would appear the same was delivered on 18th March, 2019, while the present application was filed close to two (2) months later on 10th May, 2019. This, in my reasoned view, does not constitute unreasonable delay.

9. The second principle concerns the subject of substantial loss which is deemed to be the cornerstone of any application for a stay of execution. The applicant’s version of substantial loss is the apprehension that the decretal sum may not be recoverable from the respondents in the event that the appeal fails and the cross appeal simultaneously succeeds. I took note of the averments made in the supporting affidavit

as to the deceased's wife's testimony at trial that she is unemployed and the deceased was the breadwinner. In response, I must reiterate that the proceedings at trial are yet to be availed to this court for its reference. Suffice it to say that the respondents have not filed any reply or provided any evidence to indicate their ability to refund the decretal amount once the same is released to them, especially considering the fact that the amount involved is fairly large. I therefore find merit in the applicant's application.

10. The third principle needs no detailed discussion given that the applicant has indicated his readiness and willingness to provide the requisite security.

11. In the premises, I will exercise my discretion in allowing the Motion as prayed and order the applicant to deposit the entire decretal amount in court within 30 days from this day, failure to which the order for a stay shall lapse. Costs to abide the outcome of appeal.

Dated, Signed and Delivered at Nairobi this **11TH** day of **July, 2019**.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants/Respondents

..... for the Respondent/Applicant