



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 13 OF 2018**

**AINU SHAMSI HAULIERS LTD.....APPELLANT/APPLICANT**

**-VERSUS-**

**ANASTACIA NDINDA MWANZIA (Suing as the administrator of the  
estate of Harisson Mwendwa Kavili) .....RESPONDENT**

**RULING**

1. The application for determination is dated 17/07/2019 and was filed under certificate of urgency. It is brought under Sections 3A and 3B of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010. It seeks.

a) Spent

b) **THAT** this honorable court do issue an order of stay of execution of the judgment of 16<sup>th</sup> May 2019 pending the hearing and determination of this application.

c) **THAT** this honorable court do issue an order of stay of execution of the judgment of 16<sup>th</sup> May 2019 pending the hearing and determination of the appeal.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Mr. Seth Ojienda sworn on the same day. Counsel deposes that he has filed a notice of appeal, that the application was filed without unreasonable delay and that the appeal will be rendered nugatory if stay of execution is not granted.

3. The application is opposed through a replying affidavit sworn on 26/07/2019 by the Respondent. The gist of the opposition is that the Appellant has no second right of appeal to the Court of Appeal and has not shown what prejudice it will suffer if the orders are not granted.

4. Directions were given that the application be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

**The Applicant's Submissions**

5. The Appellant/Applicant submits that the appeal is meritorious, arguable and raises pertinent issues of law. It says that the appeal will be rendered nugatory if stay is not granted and cites the case of **Chris Munga N. Bichange –vs- Richard Nyagaka Tongi & 2 others, eKLR** where the learned Judges of the Court of Appeal held that;

*“...the law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated...”*

6. The Appellant/Applicant submits that the Respondent wants to execute the decree yet it does not know her physical and financial means. It contends that the decretal amount is substantial and is apprehensive that the Respondent will not be in a position to refund if appeal is successful. It relies *inter alia* on **Esther Wanjiru –vs- Jackline Arege (2014) eKLR** where the court asserted that an order of stay of execution will be granted where the court is satisfied that substantial loss may result to the Applicant.

7. With regard to security, the Appellant/Applicant prays that the security in Kilungu CMCC No. 254/2016 (*primary suit*) be retained for the

purpose of stay and appeal. He relies *inter alia* on the case of **Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 others (2012) eKLR** where it was held that;

*“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”*

8. The Appellant/Applicant also submits that it has established the existence of exceptional circumstances that would invoke the court’s discretionary powers to grant the powers sought.

#### **The Respondent’s Submissions**

9. In opposing the appeal, the Respondent briefly submits that the appeal challenging the primary suit (*HCCA 259/2017*) was heard and dismissed by this court and there has been no further appeal. She also submits that a second appeal (*current matter-HCCA 13/2018*) which emanated from a dismissal order in the primary suit has also been heard and dismissed. She contends that there cannot be a second appeal where the first appeal was based on an application.

10. Having looked at the application, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether the application is merited.

11. Before delving into whether the conditions for stay have been satisfied, it is imperative to highlight the different phases of this matter.

12. The Respondent filed the primary suit seeking compensation on behalf of the deceased’s estate following a fatal road accident at Ngokomi area along the Nairobi-Mombasa highway on 23/11/2013. The learned trial magistrate apportioned liability in the ratio of 80:20 and awarded Kshs.510,420/= as damages.

13. The Appellant/Applicant challenged the primary suit *via* HCCA 259/2017 which was heard and dismissed by this court on 11/07/2019. As rightly submitted by the Respondent, there was no further appeal.

14. Meanwhile, the Appellant/Applicant had filed an application dated 28/09/2017 in the trial court seeking to have the judgment on liability reviewed to 70:30 to align it with the finding in Makindu PMCC No. 117 of 2014 (*the accident had birthed various cases which were filed in different courts within Makueni region*). The learned trial magistrate dismissed the application and opined that, the mere fact that another court had decided differently in the same issue could not be a ground for review.

15. The Appellant/Applicant appealed against the dismissal through this appeal (*HCCA 13/2018*) but the same was declined *via* a judgment delivered on 16/05/2019. This court observed that any interference with the findings on liability in any of the cases could only be done through an appeal and not review as the Applicant had attempted to do.

16. Now, the Appellant/Applicant wants to challenge the judgment of 16/05/2019 in the Court of Appeal and is using that as a reason to justify non execution of the judgment in the primary suit. Assuming the Court of Appeal agrees with the Appellant/Applicant, the trickledown effect would be to interfere with the findings on liability in the various cases. This court has already explained the difficulty with such a scenario in the sense that, some of those findings were arrived at by consent of the parties and some were determined by the trial courts.

17. Further, I note that ground 3 of appeal in HCCA 259/2017 was challenging the apportionment of liability but during the hearing thereof, the Appellant/Applicant abandoned it and agreed that the issue had been determined in HCCA 13/2018. Accordingly, the appeal proceeded purely on quantum. The Appellant/Applicant has now turned around and wants to have another shot at the liability issue through what seems like a back door.

18. It is also noteworthy that the Appellant/Applicant has had too many bites at the cherry as the Respondent waits patiently to enjoy the fruits of her judgment. The Appellant/Applicant is going round in circles and is, for lack of a better word, abusing the court process. In my view, the Respondent’s interest is as paramount as that of the Appellant/Applicant and must be safeguarded.

19. **I find no merit in this application which I dismiss with costs.**

**DELIVERED, SIGNED & DATED THIS 15<sup>TH</sup> DAY OF OCTOBER 2019, IN OPEN COURT AT MAKUENI.**

**H. I. ONG’UDI**

**JUDGE**