



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 250 OF 2018**

**BIOMEDICAL LABORATORIES LIMITED.....APPELLANT**

**VERSUS**

**MARGARET MERCY ACHIENG ONYANGO**

**GEORGE ONYANGO OKUMU**

**(Suing as the Administrators of the Estate of**

**FELIX HEALON OMONDI (DECEASED).....1<sup>ST</sup> RESPONDENT**

**GEORGE ONYANGO RADIDO (Sued as the**

**Administrators of the Estate of**

**STEIN ARAFINA ONYANGO (DECEASED) .....2<sup>ND</sup> RESPONDENT**

**ALI MWANAISHA.....3<sup>RD</sup> RESPONDENT**

**MICHAEL MWANGI MUTHEE.....4<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellants' Notice of Motion application dated 19<sup>th</sup> December 2018 and filed on 20<sup>th</sup> December 2018 was filed under Section 1A, 3A and 63e of the Civil Procedure Act Cap 21 of the Laws of Kenya and Order 42 read together with Order 43 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. Prayer Nos (1), (2), (3) and (5) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. Spent.

4. THAT this Honourable Court be pleased to set aside and/or vary the default judgment entered against the 3<sup>rd</sup> Defendant/applicant on 28<sup>th</sup> October 2012 and the subsequent orders issued by the trial court.

5. Spent

6. THAT this Honourable Court do order that the consent judgment on liability entered on 14<sup>th</sup> October 2015 between the Plaintiffs/1<sup>st</sup> Respondent and the 1<sup>st</sup> Defendant/2<sup>nd</sup> Respondent is valid and the decretal sum and ensuring decree be enforced as against the 2<sup>nd</sup> Respondent.

**7. THAT this Honourable Court do order that the 3<sup>rd</sup> Defendant/Appellant is discharged from the suit by virtue of the consent judgment entered into the primary suit.**

2. Its Written Submissions were dated 28<sup>th</sup> March 2019 and filed on 8<sup>th</sup> April 2019 while those of the 1<sup>st</sup> Respondent were dated and filed on 24<sup>th</sup> April 2019.

3. The 2<sup>nd</sup> Respondent did not participate in the proceedings herein despite having been served with the said application and order of 21<sup>st</sup> January 2019 to file Written Submissions. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents were removed from the primary suit and hence had no interest in the application herein.

4. The Appellant and the 1<sup>st</sup> Respondent requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

5. The present application was supported by the Affidavit of the Legal Manager of APA Insurance, Judith Onyango that was sworn on 19<sup>th</sup> December 2018. Her Supplementary Affidavit was sworn on 15<sup>th</sup> December 2019 and filed on 18<sup>th</sup> February 2019.

6. The Appellant stated that the 2<sup>nd</sup> Respondent was sued in his capacity as the Legal administrator of the driver/beneficial owner of Motor Vehicle registration Number KBH 847L (hereinafter referred to as "the 1<sup>st</sup> subject motor vehicle") while the 3<sup>rd</sup> Respondent was sued as the registered owner of Motor vehicle registration number KAU 100L (hereinafter referred to as "the 2<sup>nd</sup> subject motor vehicle") in which the 1<sup>st</sup> Respondent's son died following an accident that involved the two (2) subject motor vehicles. The 4<sup>th</sup> Respondent had been sued as the driver of the 2<sup>nd</sup> subject motor vehicle.

7. The deponent pointed out that it instructed its advocates to enter appearance for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents but not for the Appellant herein because the name in the original Plaintiff appeared as "**Bromedical Laboratories Ltd**" which was not indicated in the Police Abstract Report and the search records. She stated that the suit was subsequently amended and the name now appeared as "**Biomedical Laboratories Ltd.**"

8. She contended that interlocutory judgment was entered against the Appellant because no appearance was filed, which omission it attributed to a wrong spelling of the name of the Appellant. She added that when suit was withdrawn against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, they assumed that the claim against the 2<sup>nd</sup> subject motor vehicle had also been withdrawn against the Appellant herein.

9. She further averred that on 14<sup>th</sup> October 2015, a consent judgment was recorded between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents at 95%-5% in favour of the 1<sup>st</sup> Respondent herein and the matter proceeded for assessment of damages.

10. She said that they were shocked when on 29<sup>th</sup> February 2016, judgment was delivered in favour of the 1<sup>st</sup> Respondent jointly and severally against it and the 2<sup>nd</sup> Respondent for the sum of Ksh 5,424,000/=.

11. She asserted that their application for review of the judgment was declined, as a result of which on 15<sup>th</sup> September 2017, the 1<sup>st</sup> Respondent executed against the Appellant herein. It was the Appellant's contention that the attachment was in bad faith because the claim was against the 3<sup>rd</sup> Respondent's 2<sup>nd</sup> subject motor vehicle, the same capacity in which it had been sued.

12. The Appellant's contention was that it was willing to deposit the decretal sum in court pending the hearing and determination of the Appeal herein because if a stay of execution of the judgment was not granted, its goods which had been attached by the auctioneers would be sold.

13. It therefore urged this court to allow the present application as it was just and equitable to give him an opportunity to ventilate its case.

**THE 1<sup>ST</sup> RESPONDENT'S CASE**

14. In opposition to the said application, Rev Margaret Mercy Achieng Onyango, one of the personal administrators of Felix Healon Omondi (hereinafter referred to as "the deceased") swore the Replying Affidavit on 4<sup>th</sup> February 2019. It was filed on 7<sup>th</sup> February 2019.

15. She stated that the consent on liability between the deceased's estate and the 2<sup>nd</sup> Respondent was done against the knowledge that interlocutory judgment had already been entered against the Appellant herein. It was her contention that they withdrew the suit against the 3<sup>rd</sup> Respondent who was the former owner of the 2<sup>nd</sup> subject motor vehicle and the 4<sup>th</sup> Respondent who was the driver of the said 2<sup>nd</sup> subject motor vehicle at the material time but retained the suit against the Appellant who was the actual owner of the 2<sup>nd</sup> subject motor vehicle.

16. She was adamant that they never abandoned the claim against the Appellant and that the same could not be done by innuendo, speculation presumption, supposition, inference or impliedly.

17. It was her contention that the Appellant's application was dismissed because it was guilty of laches and that it did not demonstrate any of the grounds for being granted a review.

18. She pointed out that the Appellant also filed the application for stay of execution seven (7) months after the expiry of the fourteen (14) days stay of execution was granted on 15<sup>th</sup> May 2018 at its counsel's instance.

19. She was emphatic that the Appellant was served with the Amended Plaintiff showing its correct name and fresh summons and hence it was not candid in its present application and proposed appeal.

20. She stated that together with George Onyango Okumu, her co-administrator of the deceased's estate, they were able to fully reconstitute the Appellant in the event it succeeded in its intended Appeal.

21. She further averred that the Appellant's application was incompetent and could not lie, that it had failed to meet the legal threshold for the grant of the orders it had sought and that Prayer Nos (4), (6) and (7) were incompetent as they would be subject to the main Appeal.

22. It was her contention that in the event that this court were minded to grant the Appellant the application herein, then the same ought to be conditioned upon:-

**1. Payment of at least half of the sum of Ksh 6,876,230.86 shown in the warrants and the other half deposited in a joint-interest earning escrow account in the names of their advocates and those of the Appellant.**

**2. Payment of the auctioneers' fees.**

**3. Filing of the Record of Appeal within thirty (30) days.**

### **LEGAL ANALYSIS**

23. The Appellant submitted that the attachment of its tools of trade thus causing it substantial loss and that the 1<sup>st</sup> Respondent was only executing against it after the 1<sup>st</sup> Respondent had established that the 2<sup>nd</sup> Respondent had no attachable assets.

24. It relied on the case of **G N Muema P/A (sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR** where this very court held that the hardship of recovering the decretal sum in case of a successful appeal would amount to substantial loss.

25. It also relied on the case of **Focin Motorcycle Vo Ltd vs Ann Wambui Wangui & Another [2018] eKLR** which cited the case of **National Industry Credit Bank Ltd vs Acquinas Francis Wasike & Another (UR) CA 238 of 2005** where the Court of Appeal stipulated that:-

**“ . . .once an applicant expresses that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter that is particularly within his knowledge.”**

26. It pointed out that the judgment in the lower court was delivered on 29<sup>th</sup> February 2016 and that the 1<sup>st</sup> Respondent did not execute until 14<sup>th</sup> September 2017 when its goods were attached. It stated that its application for review was determined on 15<sup>th</sup> May 2018 whereupon it filed its Memorandum of Appeal on 4<sup>th</sup> August 2018. It averred that its application seeking a stay of execution which was not granted leading to the attachment of its goods on 14<sup>th</sup> December 2018. It was therefore its contention that its present application was filed timeously on 19<sup>th</sup> December 2018.

27. It further averred that it obtained the certified copies of the proceedings and filed its Record of Appeal on 14<sup>th</sup> December 2018 and hence, it was not guilty of any delay. It also contended that it was ready and willing to furnish the security.

28. It placed reliance on the case of **Ujagar Singh vs Runda Coffee Estates Ltd [1968] EA 263** where the court therein granted a *status quo* order pending the hearing and determination of the Appeal on the ground that whereas it is not normal to grant a stay of execution in monetary decrees, it can be granted where the Plaintiff has no known assets.

29. On the other hand, the 1<sup>st</sup> Respondent relied on the cases of **Jumilla Attarwalla & Another vs Hussein Abdulaziz & Another [2015] eKLR** and **Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema [2012] eKLR** which both cited the case of **Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1986] KLR 410** where the holding was that without evidence that an appellant will suffer any substantial loss, a respondent ought not to be kept out of his money.

30. They argued that a sum of Kshs 6,676,230.86 was negligible for APA Insurance Limited and that the accident having occurred seven and a half (7 ½) years ago, they ought not to be kept from the fruits of their judgment. In this regard, they relied on the case of **Machira t/a Machira & Co Advocates vs East African Standard (No 2) [2002] KLR 63.**

31. In support of their argument that the Appellant had not filed the present application timeously, they placed reliance on the case of **Kiambu County Council vs Coffee Board of Kenya & Others [2011] eKLR** and Jaber **Mohan Ali & Another vs Priscillah Boit & Another [2014] eKLR** where in the latter case it was held that even one day after judgment could be unreasonable delay.

32. On the issue of security for due performance, they were categorical that if the court were to grant the Appellant's application, then the

decretal sum ought to be deposited in the aforesaid account and not in court.

33. Indeed, as was pointed out by the 1<sup>st</sup> Respondent, the Appellant's prayers that the interlocutory judgment that had been entered against it be set aside, that the consent judgment on liability between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be enforced against them and that it be discharged from the suit by virtue of the consent judgment were all issues that were to be determined on appeal. They were not orders that could be granted on an interlocutory stage.

34. After carefully considering the parties' respective Written Submissions, it was clear to this court that the only issue that it could determine at this stage was whether or not the Appellant ought to be granted an order for stay of execution pending appeal.

35. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

**“No order for stay of execution shall be made under subrule (1) unless- the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

36. An applicant seeking a stay of execution must demonstrate:-

1. **That he will suffer substantive loss if the order for stay is not granted;**
2. **That he had filed his application for a stay of execution timeously; and**
3. **That he was willing to provide security.**

37. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

38. This court took the view that although there was delay in filing the present application, noting that the Appellant's application for a stay of execution pending appeal was dismissed on 15<sup>th</sup> May 2018, the said delay could not be said to have been so inordinate as to have caused the 1<sup>st</sup> Respondent any prejudice.

39. If they suffered any prejudice, they did not demonstrate what prejudice they suffered. There was delay in them enjoying the fruits of their judgment but not inordinate delay in filing of the present application. The Appellant thus satisfied one (1) condition for being granted an order for stay of execution pending appeal.

40. Turning to the second condition of substantial loss, this court noted the Appellant's apprehension of releasing the decretal sum to the 1<sup>st</sup> Respondent emanated from the fact that it might not recover the same in the event it was successful in its Appeal.

41. As was held in the case of **National Industry Credit Ltd vs Aquinas Finance Wasike & Another** when an applicant asserts that there is a possibility that it might not be able to recover the decretal sum in the event it was successful, it is incumbent upon the Respondent to rebut such assertions.

42. In paragraph 20 of the Replying Affidavit, Margaret Mercy Achieng Onyango contended that she was an Evangelist with the Anglican Church of Kenya (ACK) and the founder of Margaret Mercy Ministries and that her Co-Respondent, George Onyango, who was her husband was a Senior Engineer with the Kenya Pipeline Corporation (KPC) and that they were able to reconstitute the Appellant in the event its Appeal was successful.

43. Notably, the Respondents did not attach any Affidavit of Means to demonstrate that if they were paid the decretal sum as they had proposed and the Appellant succeeded in its Appeal, they would be able to refund the same.

44. It was the considered view of this court that any difficulties in recovering decretal sum upon an appeal succeeding could be deemed to amount to substantial loss. As this court held in the case of **G.N. Muema t/a (sic) Mt. View Maternity & Nursing Home & Miriam Maalim Bishar & Another** (Supra), difficulties of a successful appellant in recovering the decretal sum would be equated to suffering substantial loss. The Appellant also satisfied the second condition of being granted an order for stay of execution pending appeal.

45. In respect of the third condition, the Appellant submitted that it was ready and willing to abide by any conditions given by the court. The Respondents did not appear averse to this proposal only emphasising that it ought to release half of the decretal sum to them and the other half deposited in an interest earning account in the name of their advocates and those of the Appellant.

46. This court was thus satisfied that the Appellant had satisfied the three (3) conditions under Order 42 Rule 6(2) of the Civil Procedure Rules and ought not to be shut out from accessing court. It is also important to point out that the Appellant had already filed its Appeal and all that was pending was for it to be admitted if at all and directions on its hearing as provided for by the law.

47. Having said so, this court found itself in a predicament. The Appellant had not prayed for an order for a stay of execution pending appeal. It had only prayed for a stay of execution pending hearing of the application. A court should only grant what had been sought. It cannot assume and grant orders that have not been prayed for. Indeed, it cannot and should not enter the fray and purport to prosecute an

application of one party. It is a neutral arbiter. As the court had found and held that Prayer No (4), (6) and (7) could only be interrogated during the main Appeal, it was left with no other prayer to grant all the other prayers having been sought pending the hearing and determination of the application herein.

**DISPOSITION**

48. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 19<sup>th</sup> December 2018 and filed on 20<sup>th</sup> December 2018 was not merited and the same is hereby dismissed with costs to the 1<sup>st</sup> Respondent. The interim orders that were issued on 21<sup>st</sup> December 2018 and subsequently extended are hereby vacated and/or set aside.

49. It is so ordered.

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> day of October 2019**

**J. KAMAU**

**JUDGE**