



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 20 OF 2019

MULTIPLE HAULIERS E. A LTD.....APPELLANT/APPLICANT

-VERSUS-

DAMARIS MUTHINI DAVID & ESTHER MUTHEO

MUTUKU (*Suing as Legal Representatives and Administrators of the*

***Estate of ALEXANDER MULE MUTETI – Deceased*).....RESPONDENT**

RULING

1. This is the application dated 29th April filed by the Appellant seeking the following orders: -

1) ***That this honourable court be pleased to order a stay of execution and all consequential orders arising therefrom pending the hearing and determination of the lodged appeal.***

2) ***That the costs of this application be in the cause.***

2. The application is supported by the grounds on its face plus the affidavit of Winnie A. Paul, the legal manager with Kenindia assurance company limited who are the Insurers of the Appellant/Applicant. The main grounds are that the Applicant has filed an appeal which is arguable as it raises serious triable issues. Further that if not stopped the Respondent will proceed to execute the decree which will cause the Applicant's appeal to be rendered nugatory. That the Respondent will suffer no prejudice if the orders are granted.

3. **Winnie A. Paul** has averred that the award of Kshs.4,496,448/60 for dependency for a 32 year old is excessive hence the appeal. It is feared that without the grant of a stay of execution the Respondents are most likely to execute against them anytime.

4. She depones that the Applicant is willing to deposit a security as a condition for stay of execution pending the appeal.

5. **Vincent Muia** for the Respondent swore a replying affidavit stating that liability had been agreed on at 90%:10% and the amount of Kshs.4,496,448/60 was arrived at after the 10% contribution. He depones that the Applicant has not complied with the conditions set out in Order 42 Rule (6) Civil Procedure Rules for granting of stay pending appeal. He supports the judgment of the lower court on both the multiplicand and multiplier.

6. He faults the Applicant for filing this application when he had filed a similar application in the lower court. To him the appeal has no chances of success and both the appeal and application are bent on delaying the Respondent's enjoyment of the fruits of the judgment.

7. M/s Ngulli & Co. advocates for the Applicant submitted that the application that was filed at Makindu law courts has never been prosecuted nor any orders issued. That the Applicant elected to pursue the present application since there is a pending appeal.

8. It is counsel's submission that the merits of the appeal at this stage is not a ground for consideration for granting of an application for stay of execution. That the stay was only meant to preserve the subject matter as the Appellant pursues the appeal which should not be rendered nugatory.

9. He further submitted that the Applicant has complied with the provisions of order 42 Rule 6 Civil Procedure Rule in that the application herein was filed within reasonable time. Further that the Applicant stands to suffer substantial loss if stay is not granted as the decretal sum is quite substantial. To add on that the Respondent's financial means are not known and in the event of a successful appeal, repayment may be

an issue if the amount is paid now.

10. He contends that the Respondents have not mentioned anything in their replying affidavit in relation to their financial standing. He relies on the case of **Nairobi Supa Hauliers Ltd –vs- David Masinde Musengu Nairobi HCCC Misc. No. 381 of 2015** where the court dealt with a similar application.

11. Muia and Co. advocates for the Respondents in their submissions state that the application served on them is undated and unsigned hence inconsequential. Further that the application has no supporting affidavit since the affidavit annexed to it is not of Fedelis Mueke Ngulli as stated in the application. He submits that the Applicant filed a similar application in the lower court which has yet to be heard.

12. Its contended on behalf of the Respondent's that the conditions under Order 42 rule 6 Civil procedure Rule have not been met. Firstly, that there are no grounds shown for the attack on the lower court's judgment. That there are no triable issues for adjudication before this court. On the issue of the age of the deceased it is submitted that this is a non-issue as all the relevant documents were produced.

13. It is counsel's submission that the trial court used all that was placed before him to arrive at the judgment he did. That there was nothing in the grounds to make this court to fault the said judgment. On the issue of the multiplier he submitted that nothing weighty had been raised about it.

Determination

14. I have considered the application, affidavits and the submissions by both parties and the authorities cited by the Applicant. The main issue for determination is whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal.

15. Counsel for the Respondents submitted on the state of the application. The application (*Notice of Motion*) before me is dated 29th April, 2019. This is also confirmed by the proceedings of 29th April, 2019 which refer to the application dated 29th April 2019. Had it been undated and unsigned the court would have taken note of that. It is therefore unfortunate if the one served on the Respondent's counsel was not dated.

16. On the face of the application it is indicated that the affidavit in support is by one Fedillis Mueke Ngulli which is not the case. The supporting affidavit is by Winnie A. Paul who is a legal manager of the Applicant's Insurers and has rightfully sworn an affidavit. The Applicant's counsel erroneously put his name in place of that of Winnie. I find that to be an error which can be resolved under Article 159(2) (d) of the Constitution.

17. Order 42 Rule 6 Civil Procedure Rule on stay of execution pending appeal provides as follows: -

6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule(1) unless –

a) 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

b) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

18. The judgment appealed against was delivered on 19th March 2019 and the appeal herein was filed on 4th April, 2019. The application dated 29th April was filed on even date. It has been admitted that a similar application had been filed in the lower court. None of the parties has mentioned when the application before the lower court was filed and if it was ever heard on 28th May, 2019. Be it as it may, since an appeal had been filed, it was only prudent that this court hears the application for stay of execution. The Appellant/Applicant should however have the application in the lower court withdrawn.

19. The said application was filed within five (5) weeks of delivery of the trial court's judgment. There is no indication that the execution process had commenced. I find that the application was filed within reasonable time, as the 1st condition.

20. The second condition is that it must be shown that the Applicant will suffer substantial loss if the stay of execution is not granted. This burden lies on the Applicant for he who alleges a fact must prove it Section 107 Evidence Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

21. It is only after the Applicant has established its case that the Respondent can be called upon to rebut it. The court in the case of **Mukuma –vs- Abuogen (1988) KLR 645** defined substantial loss as follows:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

22. I have carefully read the affidavit of Winnie A. Paul and it is nowhere indicated that besides the decretal amount being substantial the Respondents are persons of no means and would not make a refund in the event of a successful appeal.

Counsel for the Applicant has faulted the Respondents for not stating their financial status in the replying affidavit.

23. I have read through the said replying affidavit and found no averment on the Respondent’s financial status. My take on this is that the Respondents in their replying affidavit were responding to what the Applicant has stated in the supporting affidavit and grounds in support of the application. They could not start explaining about their financial status when it had not been questioned by the Applicant.

24. All that the Applicant is decrying is the colossal sum of the award. It has not said it cannot raise the payment. The decretal sum is Kshs.4,645,784/= which is not little money but which the Respondents are entitled to according to the judgment being challenged. Counsel for the Respondents has submitted so much on the grounds of the appeal saying how they are not merited. What is before this court now is an application for stay of execution and not the appeal itself.

25. In a matter of this nature, it is always important to weigh both sides of the coin or the competing interests in order to ensure that the appeal is not rendered nugatory and the successful party is not unfairly denied his/her its fruits of the judgment. In this case it is not lost to this court that liability was agreed on and the deceased’s dependants are entitled to a compensation. The only issue is the amount, to be paid.

26. The Applicant has clearly indicated its willingness to deposit security for the due performance of the decree. Owing to the substantial decretal sum and the uncertainty of the Respondent’s ability to refund the sum if paid in the event of a successful appeal, this court must consider what will serve the interests of both parties.

27. From the above exposition it is clear that the application for stay of execution pending appeal is merited and is allowed on the following conditions: -

- i. The Applicant to pay Kshs.1,500,000/= to the Respondents through their advocate within 21 days from today.
- ii. A bank guarantee to be executed for the balance of the decretal sum within 30 days from today.
- iii. In the event of non-compliance, the order of stay of execution shall lapse.
- iv. Parties at liberty to apply.
- v. The Appellant/Applicant to fast track the appeal for purposes of admission and subsequent hearing.
- vi. Costs of the application to the Respondents.

DELIVERED, SIGNED AND DATED THIS 9TH DAY OF OCTOBER, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG’UDI

JUDGE