



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 422 OF 2018

THUITA MARGARET.....APPELLANT/APPLICANT

VERSUS

JOSEPH KIBE GIKERIA.....1ST RESPONDENT

INTERVEG EXPORT LIMITED.....2ND RESPONDENT

RULING

1. The appellant/applicant took out the Motion dated 24th September, 2018 which is supported by the grounds laid out on its body as well as the facts deponed in the affidavit of *Regina Ireri*. The applicant is seeking for an order for stay of execution of the judgment and decree of Honourable E. Wanjala, learned Senior Resident Magistrate delivered on 9th August, 2018 pending appeal.

2. Joseph Kibe Gikeira and Interveg Export Ltd, the 1st and 2nd respondents respectively, filed two replying affidavits to oppose the motion.

3. I have considered of the grounds laid out on the body of the Motion and the facts deponed in the affidavits filed in support and in opposition of the motion.

4. The background of this matter is that the 1st respondent had instituted the suit no. CMCC No. 5833 of 2012 against the applicant by way of the amended plaint dated 10th June, 2016 seeking for general and special damages for the injuries sustained as a result of an accident involving the applicant's motor vehicle.

5. The suit proceeded for hearing before the trial court and upon conclusion thereof, the trial court on 9th August, 2018 found the applicant 100% vicariously liable for the accident and awarded the 1st respondent the total sum of Kshs.2,369,633/ plus 28,245 GBP (British Sterling Pounds) together with costs of the suit and interest thereon. The trial court also dismissed the applicant's case against the 2nd respondent who was the 3rd party in the trial proceedings.

6. Being dissatisfied with the aforesaid decision, the applicant preferred this appeal.

7. ***Under Order 42, Rule 6(2)*** of the ***Civil Procedure Rules*** the principles to be considered in determining an application for stay are set out as follows:

a. The application must be brought without unreasonable delay;

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

c. Provision should be made for security.

8. It is the submission of the applicant that the motion for stay was filed without unreasonable delay. This assertion was quickly refuted by the 1st respondent, who stated that there has been an inordinate and inexplicable delay in bringing the application.

9. I have perused the copy of the judgment annexed to the application and find that the same was delivered on 9th August, 2018. The Motion; though dated 24th September, 2018; was filed on 6th February, 2019. The applicant has not explained why she took close to six (6) months to bring the Motion. However, I do not find the delay to be so inordinate or unreasonable as to form the basis for disregarding the Motion.

10. On the question as to whether or not substantial loss has been established as the second condition, the Court of Appeal in ***Kenya Shell***

Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018 emphasized the central nature of substantial loss in this manner:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

11. In her affidavit supporting the application, Regina Ireri asserted that the applicant is highly suffer substantial loss since the 1st respondent, who sustained an amputation to his right hand and subsequently lost his job, is unlikely to engage in gainful employment. She went on to state that there is a high chance that the 1st respondent will not refund the decretal sum once the same is paid to him.

12. The 1st respondent averred that substantial loss has not been established. He stated that he does income-generating activities and that he is a man of means and hence he is capable of refunding the decretal sum should the requirement arise.

13. The 1st respondent also pointed out that he continues to be prejudiced since he is prevented from enjoying the fruits of his judgment.

14. It is appreciated that the 1st respondent is entitled to enjoy the fruits of his judgment and ought not to be hindered from proceeding with execution. On the other part, the applicant is apprehensive that she may not be able to recover the decretal amount from the 1st respondent should he succeed on appeal, thereby rendering the appeal nugatory.

15. It is trite law that once an apprehension of inability to refund the decretal amount is raised, the burden shifts to the decree holder to satisfy the court that he or she is in a position to refund the decretal sum.

16. In the present scenario, the 1st respondent has not filed any affidavit of means to satisfy this court as to his ability to repay the decretal sum. As it stands therefore, his financial ability remain unexplained. Consequently, I am persuaded that the applicant has shown that she stands to suffer substantial loss in the circumstances.

17. The final condition is the provision of security for the due performance of the decree. The deponent in the supporting affidavit stated that the applicant is ready and willing to deposit the decretal amount in a joint interest earning account, whereas the 1st respondent proposed that half of the decretal sum be released to his advocates and the remaining half be deposited in a joint interest earning account. I think the proposal to make payments of half the decretal to the respondents is not justified in the circumstances of this case.

18. In the end, I am convinced that the Motion has merit. Thesame is allowed. Consequently the order for stay of execution pending appeal on condition the appellant deposits the decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this matter within 30 days from today, failing which the order for stay shall lapse. Costs of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 23rd day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent