



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISCELLANEOUS APPLICATION NO. 247 OF 2019

BAJABER SALIM ALI.....1ST APPELLANT/APPLICANT

MULEI STEPHEN.....2ND APPELLANT/APPLICANT

MULI KILONZO WAITO.....3RD APPELLANT/APPLICANT

VERSUS

PHILIP MBATHARESPONDENT

RULING

1. The Applicants filed a Notice of Motion brought under Section 3A, 79G and 95 of the Civil Procedure Act Order 22 Rule, Order 42 Rule 6 order 50 Rule 6 and order 57 Rules 1 and 3 of the Civil Procedure Rules and seeks the following reliefs:-

(1) Spent

(2) Spent

(3) That this Honourable court be pleased to stay proceedings of the following matters Machakos CMCC Nos.539/2009, 542/2009, 543/2009, 540/2009, 541/2009, 544/2009, 545/2009, 546/2009 and 547/2009 pending the hearing and determination of the appeal filed in Machakos High Court vide Memorandum of Appeal dated 6/04/2019.

(4) That this Honourable Court be pleased to stay execution of the judgment and decree by the court on 20/03/2019 pending the determination of the Applicants Appeal rightly filed.

(5) That the costs of the application abide the outcome of the appeal.

2. The Application is supported by the annexed Affidavits of **Kelvin Ngure** the Claims Director of the Appellant's insurers sworn on even date. The application is also supported by grounds on the face thereof. The Applicants have raised several reasons in support of their application *inter alia*: that all the cited cases arise from the same traffic accident involving motor vehicles KBC 668D and KAH 256 Z and it is thus prudent for the cases to be consolidated and stayed until the determination of the appeal; that the Applicants have already lodged their appeal against the judgement; that the Applicants are apprehensive that the Respondent might levy execution against them thereby jeopardizing their right of appeal; that they are ready and willing to furnish such reasonable security as dictated by the court; that the Respondent will not be prejudiced; that the application has been filed timeously and that the Applicants stand to suffer substantial loss as the Respondent who is a person of straw might not refund the money in the event of success of the Appeal; that the appeal is arguable and has high chances of success.

3. The Application was opposed by the Respondent who swore a replying affidavit dated 8/5/2019 in which he raised several grounds of opposition *inter alia*: that there was no test suit touching on this matter or other matters listed in the application and hence no reason to stay execution or proceedings; that the appellants offered no evidence in defence and hence they were found 100% liable in damages; that substantial loss has not been established and that he is a man of means and capable of refunding the monies in the event of success of the appeal; that the application is an afterthought, misconceived and is an abuse of the process of the court.

4. Parties agreed to canvass the matter by way of written submissions. It was submitted for the Applicants that time to lodge the appeal be enlarged so as to enable the Appellants rights on appeal actualized and reliance was placed in Section 79G and 95 of the Civil Procedure Act as well as Section 3A of the said Act. It was submitted that the Applicants merit an order of stay of execution of decree pending appeal as they have fully satisfied the conditions imposed in Order 42 Rule 6 of the Civil Procedure Rules.

It was submitted for the Respondent that the Applicants have failed to establish that they stand to suffer substantial loss in the event the stay

order is not granted. Reliance was placed in the case of Kenya **Shell Ltd –v- Kibiru – Court of Appeal No. 197 of 1996 at Nairobi**. It was also submitted that the applicants have not complied with the conditions imposed by order 42 Rule 6 of the Civil procedure Rules and hence the Application should be dismissed.

5. I have considered the application and the rival affidavits plus the submissions filed. The issues necessary for determination are as follows:-

(a) Whether this court should grant leave to file appeal out of time.

(b) Whether the applicants have satisfied the conditions imposed by order 42 Rule 6 of the Civil Procedure Rules.

(c) Whether an order of stay of proceedings in related matters before the trial court can be granted.

6. As regards the first issue, the Civil Procedure Act provides for circumstances when a party can approach the court to allow for the filing of appeal out of time. Section 79G of the said Act allows the court to admit appeal out of time if a good and sufficient reason is furnished for not having lodged the appeal on time. Again Section 95 of the said Act allows for extension of time even though the period originally fixed or granted may have expired. Looking at the Applicants prayers in the Notice of motion, I note that the above provisions have been cited in support of the Application. However there is no prayer for extension of time to lodge an appeal out of time. A perusal of the Applicant's affidavit in support reveals that the applicants had filed the Memorandum of Appeal on the 6/4/2019. There is a copy of the said memorandum of appeal which is dated 6/4/2019 and filed on the 15/04/2019 and Civil Appeal Number 52 of 2019 duly allocated by the relevant High Court registry. The impugned judgement was delivered on the 20/03/2019 and hence the appeal ought to be lodged within 30 days implying that the same ought to have been filed by close of business on the 20/04/2019. Since the Memorandum of Appeal was filed on the 15/04/2019 I find it was still within the time provided for lodging appeal. There was no delay at all and therefore, I find the memorandum of Appeal is validly on record and there is no need for leave to file the same and that the Applicants are under no obligation to address the court on matters of delay as none have arisen.

7. As regards the second issue, Order 42 Rule 6 of the Civil Procedure Rules provides three conditions to be met before an order of stay of execution can be granted to an Applicant. The conditions are: that the application must be filed without unreasonable delay; that the applicant stands to suffer substantial loss if stay is not granted; that the Applicant must furnish security for the due performance of the decree which might ultimately be binding upon him or her. The present application was filed on the 27/04/2019 seven days after the period for lodging appeal had lapsed. I find there was no inordinate delay as contended by the Respondent.

As to whether the Applicants will suffer substantial loss, I note from the supporting affidavit that there is some likelihood that they will not recover the decretal amount from the Respondent whose means are unknown in the event of success of the appeal. This assertion by the Applicants shifted the burden on to the Respondent to show that he will be in a position to refund the monies back in the event of success of the appeal. The Respondent vide paragraph 6 of his replying affidavit deponed that he is a man of means and capable of refunding the decretal sums in the event of success of the appeal. There is therefore a competing interest in that on the one hand the Appellants are worried of losing the sum indicated in the decree if the same is handed over before the appeal is determined while on the other hand the Respondent should not be unduly kept away from the fruits of the judgement. Hence I find the issue of substantial loss seems to cut both ways. The issue of substantial loss was discussed by the court of Appeal in the case of Kenya Shell Ltd –v- Kibiru [1986] KLR 410 as follows:-

“Substantial loss in its various forms is the cornerstone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

From the point of view of the Applicants a release of the decretal sum to the Respondent will render the appeal nugatory and an academic exercise while on the other hand the Respondent laments that he has been in the court corridors for over ten years seeking elusive justice and is desirous of enjoying the fruits of the judgement. A balancing act is now necessary. From the rival affidavits it has emerged that the Appellants did not tender evidence and that the trial court considered the uncontroverted evidence of the Respondent and arrived at the impugned judgement. The Appellants appear to challenge the quantum of damages and therefore I do not see the possibility that the respondent will go home empty handed at the conclusion of the appeal. An order for payment of half the decretal sums to the Respondent while the other half be deposited into a joint interest earning account seems to be the best bet for the parties in the circumstances.

As the Applicants have agreed to furnish security for the due performance of the decree, I am satisfied that they have met the conditions imposed by order 42 Rule 6 of the Civil Procedure Rules to merit an order of stay of execution of decree.

8. As regards the third issue, I note that the Appellants seek for stay of proceedings in nine other matters pending before the trial court. Ordinarily several suits in which claims arise from the same cause of action could be consolidated and heard together in order to achieve a faster determination and also convenient to parties concerned. At times one of the matters could be taken as a test suit and its determination will then apply to the rest of the suits. In the present circumstances, the Appellants seek for an order of stay of proceedings in several other suits but they have failed to present evidence of the existence of such suits. No copies of plaints or proceedings have been availed so as to enable this court address the issue appropriately. The Respondent has indicated that there was no test suit touching on this matter or the other cases. Even if the Appellants wished to obtain an order of stay of proceedings, they were under a duty to enjoin the parties in those other cases into the present proceedings so as to enable them respond as to whether or not they agree with the request for consolidation and/or having one of them taken as a test suit. It seems the Appellants are out to condemn the parties in those suits from being heard and thus it would be unfair to grant the order sought. I find that any direction as to whether one suit is to be made a test suit for the rest must be made before the trial court in those matters. The Appellants request herein appears in my view to be untenable and hence prayer Number 3 in the application lacks merit and is rejected.

9. In view of the foregoing observations the Appellants application dated 27/04/2019 is allowed in the following terms.

(a) An order of stay of execution of decree in Machakos CMCC No. 447 of 2009 is hereby granted pending the hearing and determination of the appeal on condition that half the decretal sums be paid to the Respondent while the rest be deposited into a joint interest earning account in the names of both parties within thirty (30) days from the date of this ruling failing which the stay shall lapse.

(b) The costs shall abide in the appeal.

Orders accordingly.

Dated and delivered in open court at Machakos this 19th day of November, 2019.

D. K. Kemei

Judge