



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL DIVISION

CIVIL APPEAL NO. 11 OF 2018

BETWEEN

JUMA AZINGOAPPELLANT

AND

ROSE ATEMBA.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. F.N. Nyakundi R.M. delivered on 29.1.2018 in Mumias PMCC No. 117 of 2015 between Rose Walala Atemba – Vs – Juma Weliko Azingo)

RULING

Introduction

1.The applicant/Appellant was the defendant in Mumias PMCC No.117 of 2015 wherein he had been sued by the Respondent seeking both general and special damages plus costs and interest of the suit. The respondent's claim arose out of a road traffic accident involving a motorcycle Reg. No. KMCT 947 M and motor vehicle Reg. No. KAZ 380G a Mitsubishi lorry. The accident took place along the Mumias Bungoma road at Panyako area.

2. At the conclusion of the case, the trial court apportioned liability in the ratio of 90%:10% in favour of the respondent. The trial court proceeded to award general damages in the sum of Kshs.450, 000/=, special of Kshs.17,300/= plus costs and interest thereon. Judgement was delivered on 29th January, 2018.

The Application

3. The appellant, being dissatisfied with the entire judgment filed appeal on 6th February, 2018 and on 27th March, 2018 he filed the instant application under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act as well as Order 51 rule 1 of the Civil Procedure Rules.

4. The applicant prays for stay of execution pending hearing and determination of the appeal. The application is premised on 10 grounds set out on the face thereof and is also supported by applicant's sworn affidavit dated 26th March, 2018. The gist of the grounds of the application is that the respondent whose financial ability is unknown is unlikely to refund the decretal sum should the appeal succeed when the amount has already been released to her. The applicant also says that the application is made in good faith in addition to the application having been made promptly and without delay.

5. The application though duly served is not opposed. The same therefore proceeded exparte when it came up for hearing on 7th May, 2018.

Analysis and Determination

6. The success or failure of this application depends on whether or not the applicant has complied with the provisions of Order 42 Rule 6(2) of the CPR. The rule reads as follows;-

“6(2) No order for stay of execution shall be made under sub rule (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.

7. In a nutshell, an applicant seeking stay of execution must prove to the court first that he will suffer substantial loss unless the order sought is granted and secondly that he application for stay has been made without undue delay. He must also prove that he will give security for the due performance of the order sought. It is to be noted that all the three conditions must be met if the application is to succeed.

8. Let me now examine whether the applicant has met the three conditions for the granting of the orders sought. Regarding the condition of substantial loss, the applicant averred that the respondent herein is a person of straw and that she has no means of refunding the decretal sum should the appeal herein succeed after payment has been made to her. This fact was not controverted by the respondent as no replying affidavit was filed. I therefore accept as a fact that the respondent does not have the ability to refund the sum of kshs.420,570/= plus costs and interest thereon if the appeal is successful after the amount has already been released to her. I am fully aware of the fact that this is a money decree and that ordinarily an appeal would not be rendered nugatory if the decretal sum is paid out before the appeal is heard and determined because money can be refunded. However, in the circumstances of this case, the applicant would be highly prejudiced if it cannot recover monies that may be paid to the respondent whose financial ability is unknown while the appeal is pending.

9. The second condition is whether the application for stay was made without undue delay. In my considered view, the applicant has satisfied this condition. From the record, judgement was delivered on 29th January, 2018 while the appeal was filed on 6th February, 2018. The applicant then made an application for stay before the trial court. Ruling in the said application was delivered on 26th March, 2018 dismissing the application. The instant application was filed on 19th April, 2018, which in my considered view was done timeously.

10. The third condition is whether the applicant has provided security for the due performance of the order sought. At paragraph 9 of the grounds in support of the application, it is stated that the applicant is ready and willing to deposit the entire decretal sum into an interest earning account in the names of both advocates on record. I am satisfied that the third condition has also been satisfied.

Conclusion

11. The applicant having satisfied all the three conditions prescribed by Order 42 Rule 6(2) of the Civil Procedure rules, I find that the application dated 26th March, 2018 has merit. I accordingly make the following orders:-

- 1) The Notice of Motion dated 26th March, 2018 be and is hereby allowed in terms of prayer 4 thereof
- 2) As a condition precedent for the stay, the applicant shall deposit the decretal sum of Kshs. 420,570/= (for Hundred twenty thousand five hundred seventy) only into a joint interest earning account with respondent's counsel within fourteen (14) days from the date of this order.
- 3) In the event that there is a delay on the part of counsel for the respondent in opening the joint account, the decretal sum as above stated shall be deposited into court within the same time frame of 14 days from the date of this ruling
- 4) In default of either 2 or 3 above, the order of stay granted herein shall lapse in its entirety
- 5) Meantime and to avoid any undue delays, the applicant shall compile file and serve the Record of Appeal within sixty (60) days from the date hereof.
- 6) Costs of this application shall abide the outcome of the appeal.

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this9th ...day of ...May....2018

RUTH N. SITATI

JUDGE

In the presence of:

Mr. Samba for Onyinkwa (present).....for Appellant

N/a for Mwebi & Co Advocates.....for Respondent

Polycap Mukabwa.....Court Assistant