



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 288 OF 2012

KENYA BUS SERVICE LIMITED 1ST APPELLANT

KARANJA KABAGE 2ND APPELLANT

SAMUEL KIMUCHU GICHURU 3RD APPELLANT

EDWINS MUKABANA MASSIMBA 4TH APPELLANT

JOHN PETER MBOGUA 5TH APPELLANT

VERSUS

P K K 1ST RESPONDENT

J K (Minor suing by her next Friend

and mother P K K) 2ND RESPONDENT

RULING

1. The application dated 9th March, 2017 seeks orders that this Honourable court be pleased to stay execution of the orders given on 25th May, 2012 and the Judgment and Decree given on 20th September 2007 in Milimani chief Magistrates Court (Milimani) Civil case Number 3851 of 2004, P K K and J K (minor suing through her next friend and mother) vs Kenya Bus Services Ltd, against the Directors of the 1st Appellant, pending the hearing and determination of the Appellants' Appeal against this court's Judgment and Orders of 31st January 2017.

2. The application is predicated on the grounds stated therein and is supported by the two affidavits sworn by Edwins Massimba Mukabana, a Director of Kenya Bus Service, the 1st Applicant. It is stated that judgment was entered by the Lower Court against the 1st Applicant on 20th September, 2007 for the sum of Ksh.907,520/= plus costs and interest. Vide a ruling dated 25th May, 2012, the Lower Court ordered the Directors of the 1st Applicant to be held personally liable for the payment of the decretal sum. The Company's (1st Applicant's) insurers paid the said sum of Ksh.907,520/= but the costs and interest were left unpaid. The Company's Directors appealed against the said ruling. The sum of Ksh.573,886/= was deposited as security for interest and costs in the Lower Court pending the hearing and determination of the Appeal. However, that Appeal was dismissed on 21st January, 2017.

3. The Applicants are aggrieved by the said ruling and have filed a Notice of Appeal. The Directors are threatened by execution process, hence the instant application. The Directors are also apprehensive that the Respondents may not be in a position to refund the money in the event that the Appeal succeeds thereby causing substantial loss to the Directors and rendering the Appeal nugatory. It is the Applicants contention that their Appeal has high chances of success.

4. The application is opposed. It is stated in the replying affidavit that the principal sum was paid out by the Applicants insurers, leaving out the costs and accrued interest. That no explanation has been given why the entire decretal sum has not been paid. That the Applicants have not provided evidence to confirm that the Respondents are not capable of refunding the decretal sum and that in any event, this court is now *functus officio* as this court has already delivered it's judgment.

5. I have considered the application, the reply to the same and the submissions made by the respective counsels for the parties.

6. Order 42 rule 6 provides for stay pending appeal and specifically provides in subrule (1) that the court appealed from may for sufficient cause order stay of execution of the decree or order.

7. This court is therefore not *functus officio* (see for example **Kenneth Kipkemboi Settim & anor v NSSF Board of Trustees [2014] eKLR**)

8. Order 42 rule 6(2) stipulates the conditions to be met in an application for stay as follows:

“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.”

9. The application at hand was filed in court on 14th March, 2017. The judgment being appealed from was delivered on 31st January, 2017. No explanation has been given for the delay. It seems the Applicants were awakened by the execution process. However, the delay of about six weeks is not unreasonable.

10. On substantial loss, although the Respondents have not shown that they are able to refund the interest and costs if paid, it is noted that the principal sum of Ksh.907,520/= has already been paid and is not the subject of the Appeal herein. Consequently, the issue of costs and interest is a matter between the Company and its insurers. Whether or not the Applicants pay the outstanding amount or not, the issue of any refund from the Respondents will not arise. It will be an issue between the insurer, the Company and its Directors as to who is to make the refund. I therefore hold that the question of substantial loss due to the Respondents' financial position will not arise.

11. With the foregoing, I find no merits in the application and dismiss the same with costs.

Date, signed and delivered at Nairobi this 17th day of May, 2018

B. THURANIRA JADEN

JUDGE