



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA A KAKAMEGA**

**CIVIL DIVISION**

**CIVIL APPEAL NO 15 OF 2018**

**BETWEEN**

**STENSILES KIPRONO KETER.....1<sup>ST</sup> APPELLANT/APPLICANT**

**ELDORET EXPRESS LIMITED.....2<sup>ND</sup> APPELLANT/APPLICANT**

**AND**

**STEPHEN OTIENO OKUKU (SUING AS THE**

**LEGAL REPRESENTATIVE OF JOEL**

**PHANUEL OBWAKA (DECEASED).....RESPONDENT**

**(Being an appeal from the Judgment/decree of the Honourable F. Nyakundi (Resident Magistrate) Mumias delivered on the 22<sup>nd</sup> January, 2018 in Mumias CMCC No. 261 of 2016)**

**RULING**

**Introduction**

1. The appellants were the defendants in Mumias CMCC No. 261 of 2016 in which they were sued by the Respondent herein for both general and special damages in respect of a motor accident involving motor vehicle KBB 235M and the deceased herein Judgment in the case was rendered on 22<sup>nd</sup> January, 2018 wherein the appellants were held liable and ordered to pay kshs.2,402,495/= plus costs and interest thereon. The appellants being aggrieved by the said judgment brought this appeal on 19<sup>th</sup> February, 2018. The appeal is premised on five grounds set out in the Memorandum of Appeal dated 16<sup>th</sup> February, 2018. The appellants pray that the appeal be allowed with costs, and that the judgment of the trial court as far as the question of using a multiplicand of Kshs.20,000/= be discharged and set aside with costs. The appellants also pray that this Honourable Court be pleased to re-assess the award on quantum, with use of kshs.20,000/= as the multiplicand.

**The Application**

2. On 4<sup>th</sup> April, 2018, the appellants filed the Notice of Motion of even date seeking stay of execution of the judgment and decree issued on 22<sup>nd</sup> January, 2018 pending hearing and determination of the appeal. The application which is brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules (CPR) is premised on grounds set out on its face and in the supporting affidavit sworn by Pauline Waruhiu, the Deputy claims Director at Direct Line Assurance Company Limited who are the insurers of the subject motor vehicle. In the main, the appellants contend that if the orders sought are not granted, and the decretal sum paid out to the respondent, they would suffer substantial loss if the appeal succeeds as it would be near impossible to get a fund of the said monies from the respondent. The appellants also contend that their appeal has overwhelming chances of success.

3. The application is opposed vide the grounds of opposition dated 11<sup>th</sup> April, 2018 and filed in court on 13<sup>th</sup> April, 2018. The respondent's case is that the appeal as filed is incompetent, deficient, wanting in substance and not up to scratch. The respondent also avers that the application is misconceived as it does not satisfy the prerequisites for the grant of the orders sought

**Submissions**

4. During the hearing of the application counsel relied on their respective pleadings. I have carefully scanned the rival submissions.

## **Parameters to be taken into account**

5. Order 42 Rule 6 of CPR requires a party seeking stay of execution of judgment/decreed to satisfy all of the following parameters:-

*a) That substantial loss will be suffered by the applicant if the orders sought are not granted.*

*b) That the application for stay has been made timeously and*

*c) That the applicant has provided security for the due performance of the orders sought*

## **Analysis and Determination**

6. I shall now proceed to determine whether the applicant has satisfied the conditions required of it by rule 6 of order 42 so as to warrant the grant of the orders sought.

### **Question of substantial loss**

7. The applicant averred at paragraph (e) of the grounds in support of the application that “*if the said judgment is carried out, the applicant shall suffer irreparable loss and damage in that the plaintiff/Respondent’s financial means is unknown and the defendants may not be able to recover the decretal sum which is a substantial amount in the event that the same is paid to the plaintiff and the appeal succeeds.*” It is worth noting that the question of substantial loss is the most critical of all the three parameters to be considered by the court, although the applicant is under a duty to comply with all the three parameters before the orders sought can be granted.

8. From the record, the respondent did not respond to the issue of the respondent’s uncreditworthiness and therefore his inability to refund the decretal sum to the applicant in case the appeal succeeds after the money has been paid out to him. It is accepted by courts that failure to refund certain monies paid out to impecuniary persons can constitute substantial loss to the party who has paid out such moneys.

9. I am satisfied in the circumstances of this case that the respondent does not have the means to refund the decretal sum of kshs.2,402,495/= should the need to do so arise, because he did not controvert the factual statement by the applicant that he (respondent) is a man of straw.

### **Timeliness in filing of the application**

10. The record shows that after delivery of Judgment on 22<sup>nd</sup> January, 2018, the applicant filed the Memorandum of Appeal on 19<sup>th</sup> February, 2018, which was within the stipulated period for filing of an appeal. In the meantime, the applicant was granted a temporary stay of execution for 30 days. That period expired on 21<sup>st</sup> February, 2018. Thereafter the applicant filed an application dated 26<sup>th</sup> February, 2018 in the trial court seeking stay but the said application was dismissed hence the present application.

11. It is my considered view that the applicant acted timeously in filing this application after delivery of the ruling by the subordinate court on 26<sup>th</sup> March, 2018 dismissing the application dated 26<sup>th</sup> February, 2018.

### **Provision of Security**

12. At paragraph 8 of the applicant’s supporting affidavit dated 4<sup>th</sup> March, 2018, the deponent therein avers. “*That the defendant applicant is ready and willing to furnish such reasonable Security to be deposited in this Honourable Court which sum this court may deem fit.*” During submissions counsel for the applicant affirmed this fact. There was no response from the respondent on this issue. In the circumstances, I am satisfied that the applicant is compliant as far as the group of security is concerned.

## **Conclusion**

In light of all the above, I am satisfied that the Notice of Motion dated 4<sup>th</sup> April, 2018 has merit, and the same is allowed. I now make the following orders:-

*1. The Notice of Motion dated 4<sup>th</sup> April, 2018 be and is hereby allowed as prayed.*

*2. The applicant shall deposit into this court the sum of kshs. Two million four hundred and two thousand four hundred ninety five (Kshs.2,402,495/-) within seven (7) days from the date of this ruling that is on or before 10<sup>th</sup> May, 2018 in default the stay order shall lapse.*

*3. The applicant/Appellant shall compile file and serve the Record of Appeal within sixty(60) days from the date of this ruling*

*4. Costs of this application shall abide the outcome of the appeal.*

Orders accordingly

**Ruling delivered dated and signed in open court at Kakamega this 3<sup>rd</sup> day of May 2018**

**RUTH N. SITATI**

**JUDGE.**

In the presence of :-

M/S Kairu MCourt & Co. Advocate for Appellants

Miss Simiyu for Omondi (present) for Respondent

Polycap Mukabwa court Assistant