



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 43 OF 2015

BONIFACE NZIOKA MALUNDU.....APPELLANT/RESPONDENT

V E R S U S

JEREMIAH KARIUKI MWANIKI.....RESPONDENT/APPLICANT

R U L I N G

1. This is an application dated 28/05/2018 seeking for review of orders made by Bwonwonga J. in his ruling delivered on 6/06/2016 in terms that an order issues that Kshs.985,096.87 cts of the monies held in court be released to the applicant to enable him undergo a bone transport.
2. The ruling delivered on 6/06/2016 was for an application for stay pending hearing and determination of this appeal. The honourable judge allowed the application in the following terms:-

...that the applicant should deposit in court a sum of Kshs.1,500,000/= as a condition of granting stay of execution.... within two months failing which the order will lapse automatically.
3. The grounds supporting the application are that the applicant has a health challenge with injuries that have not healed which he sustained in the road traffic accident that gave rise to the civil suit resulting in this appeal. He is scheduled for a bone transport operation which requires funds which he cannot afford.
4. Other grounds relied on are that the parties entered a consent judgment on liability and that this appeal is only on quantum. The applicant is of the view that it is unlikely that the total damages awarded of over Kshs.,000,000/= could be reduced on appeal to below the figure of Kshs.985,096.87 cts that he is asking for. In his submissions before the magistrate court, the appellant proposed this figure as damages. The applicant considers this figure as unlikely to change on determination of this appeal.
5. The application was opposed by the respondent on grounds that the application is misconceived and does not meet the requirements of Order 45 of the Civil Procedure Rules. Further that the submissions on the proposal for damages is not binding on the court but only serves as an opinion.
6. The applicant has failed to annex any medical records to proof that he is scheduled for an operation. The letter from Kijabe hospital does not show the cost of the operation. The respondent further argues that his appeal has good chances of success and in the event that the orders are granted, he is likely to suffer substantial loss.
7. The parties filed submissions in support of their arguments. Mr. G.N. Mugo appears for the respondent while the appellant was represented by Khan & Associates.
8. I have perused the submissions and considered them accordingly in preparing this ruling.
9. The relevant law is Order 45 of the Civil Procedure Act which provides for review of decree or order. It provides that such an application may be brought upon "discovery of new and important evidence, which after exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree or order was passed". It also covers situation where "the decree or order was made on account of some mistake or error apparent on the face of he record, or for any other sufficient cause".
10. The respondent's fear is that he applicant has not sworn an affidavit of means to show that he is capable of refunding the amount if it is paid to him at this stage. This may lead to the respondent suffering substantial loss in the event that his appeal succeeds.
11. The respondent had made some effort of explaining the delay of not preparing the appeal for hearing. He states that he made a request

for proceedings and judgment in his letter dated 4/11/2015 which were not supplied and therefore filing of the record was not possible.

12. As far as compliance with Order 45 is concerned, the applicant argues that he has annexed the necessary documents. These receipts for payment of several medical bills for treatment amounting to Kshs.238,255/= showing the admission date as 14/11/2016. The applicant was admitted in hospital for a total of 39 days. The said bill was cleared in several installments.

13. In his discharge summary dated 4/10/2017 the notes indicate that the applicant is due for repeat bone transport of the right tibia. Other documents are prescriptions for various medications from the same hospital.

14. The report by Dr. AM. Maina dated 27/04/2018 states that the applicant "has a history of open tibia fibula fracture from an injury one year and two months prior which had required surgeries elsewhere including a flap reconstruction and sequestrectomy three months prior".

15. The report states that bone transport was done in 2013 and 2014. Thereafter he continued with further treatment and theatre procedures some of which resulted in complications.

16. He was reviewed on 4/10/2017 and still had a non-union docking site with limb length discrepancy of 4 cm.

17. The doctor states that the applicant is due for bone transport using a tailor spartial frame/ring external fixator.

18. I have perused all the medical records attached and there is evidence to show that the appellant who had sustained severe injuries during the accident is still undergoing treatment more theatre operations and procedures. He demonstrated that he has paid several bills at Kijabe hospital since the order of 6/06/2016 was made to deposit the money in court. The recent review by Dr. Maina which has not been controverted by other expert evidence shows that the applicant is due for a bone transport.

19. The judgment on liability was by consent and I agree with the applicant that in the event of a review of quantum on appeal, the applicant will still have some amount payable to him that will be sufficient to cover the funds he needs for medical treatment. In view of this projection, the applicant does not need to swear an affidavit of means to demonstrate that he is capable of refunding the amount of Kshs.985,096.87 cts should the court rule in his favour and in the event of a successful appeal.

20. The medical reports, receipts and discharge summaries produced herein are indeed "new and important evidence" that was not available for presentation to the court at the time the application for stay pending appeal was heard. The poor health state of the applicant and the want for medical fees that are likely to be incurred in the repeat bone transport are a "sufficient cause" that calls for review of the orders made on 6/06/2016.

21. The power of this court to grant review orders under Order 45 is discretionary. I cite the case of **MOHAMED ALI MURSAL VS SAADIA MHAMMED & OTHERS [2013] eKLR** which cited the case of **NUR NASSIR ABDI ALI VS ALI WARIO & 2 OTHERS [2013] eKLR** where Odunga, J. observed:-

A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose....

22. I am of the considered view that the exercise of this court's discretion will serve a useful purpose.

23. I wish to state that there is no limits or restrictions on the judge's discretion, provided the orders for review granted are so made in the interests of justice that cuts across the board. I am satisfied that no prejudice will be caused to the appellant if the orders sought are granted.

24. The appellant/respondent has not shown good cause why he has not filed the record of appeal. He only sent one letter of request of proceedings which was not followed by a reminder or a follow up with the Deputy Registrar. This is over two years ago. The applicant continues to be denied the fruits of his judgment by an indolent litigant who is comfortable enjoying the order for stay of execution. Litigation must come to an end and the respondent must wake up from slumber or have the orders for stay vacated.

25. Having considered all the issues involved in this application, I hereby find merit in the application and allow it as follows:-

(a) That out of the amount of Kshs.1,500,000/= deposited in court, Kshs.985,096.87 cts be paid to the applicant/respondent pending the determination of the appeal.

(b) That the appellant file and serve the record of appeal and have directions taken within 45 days in default of which the stay order shall stand vacated.

(c) That the costs of this application shall be costs in the cause.

26. It is hereby so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mbogo for G. N. Mugo for Respondent

Ms. Njeru for Ogweno for Applicant