



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 88 OF 2018**

**JOHNSON NGISHU KANYIRI.....1<sup>ST</sup> APPELLANT**

**PHILISILAH KIMANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**FLORENCE WAUSI MUTISO.....RESPONDENT**

**RULING**

1. The Appellants seek orders for a stay of execution of the judgment and decree rendered between the parties in the lower Court as well as to be allowed to pay the decretal sum vide an insurance bond to be deposited in court. The intended appeal is from a judgment delivered in Kithimani PMCC No. 188 of 2015 on 27/06/2018. The Application is supported by a Supporting Affidavit by Caroline Kimeto, the Head of Legal Department at Britam General Insurance Company, the insurer of the Applicants' motor vehicle which was involved in a road traffic accident which was the subject of the suit in the lower Court.

2. The Application is opposed. In opposition, the Respondent's advocates filed Grounds of Opposition. It lists four grounds of opposition as follows:

***a. That the Application is an abuse of the court process, an afterthought, vexatious and frivolous.***

***b. That the Application is bad in law, incompetent and misconceived***

***c. That the applicants have not offered any security for costs and should be ordered to release half of the principal sum and costs amounting to Kshs 175,415 within 14 days.***

***d. That the applicants have not given good reasons why the application should be allowed.***

3. The facts are as follows: Judgment in the lower court matter was delivered on 27/06/18. The Appellants' Advocates state, and it is not denied, that they have applied for typed proceedings to enable them prepare appeal bundles but the same was not ready at the time of filing the application in the High Court. They say that the respondent may execute the decree any time and that the intended appeal will be rendered nugatory if stay is not granted for they have appealed against the quantum that was awarded for they feel it is manifestly excessive, they have annexed a copy of the memorandum of appeal. The Appellants further say that they are ready and willing to deposit in court an insurance bond as security pending determination of the appeal.

4. The Application was canvassed by way of written submissions. I have considered the said submissions.

5. The issue for determination is whether the Appellant is entitled to an order for stay of execution.

6. The first point taken up by the Respondent is that the Application is incompetent and has not given any basis for the application. The Respondent complains that this Application is an abuse of the Court process but however no basis for this complaint is given. She further complains that this Application is an afterthought. I note that the Application was brought within 30 days. This application is brought under Order 22 rule 22, Order 42 Rule 6 and 7 and Order 51 rule 1 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act. Upon reading of the said provisions I find that the appellant has not breached any law and procedure in bringing this application, and either way, Section 3A preserves their right to approach this court to realized their cherished right of appeal. Looking at all the factors in totality, I am unable to agree with the Respondent that this Application is an abuse of the Court's process and has been brought as an afterthought.

7. Having concluded that the Application is not incompetently before the Court, I will now consider the Application on its substance. Our case law has now provided guidelines on what material should be presented before the court to persuade the Court that the discretion should

be exercised on its behalf and in their favour.

8. The Application for stay of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

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

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. Granting a stay in the High Court is governed by Order 42 rule 6(2), the questions to be decided being

— (a) *Whether substantial loss may result unless the stay is granted and the application is made without delay; and*

*(b) the applicant has given security.*

10. Applicants have to satisfy a four-part test. They must demonstrate that:

a. ***The appeal they have filed is arguable;***

b. ***They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;***

c. ***The application was made without unreasonable delay; and***

d. ***They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.***

11. I have perused the Draft Memorandum of Appeal filed in this case as annexed to the application. I am unable to say that the grounds of appeal enumerated are in-arguable. As stated above, to earn a stay of execution, one is **not** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard.

12. But what is the substantial loss that the Applicants are likely to suffer if the order is not granted" Here is all the Applicants have said in this regard – and it bears verbatim recitation:

“if stay of execution is not granted, the appeal will be rendered nugatory... as we are apprehensive that the respondent may not be financially able to refund the decretal amount if the same is paid out to him This was the Court’s finding in **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002**

13. Here, the Applicants have indicated the willingness to deposit security, however the respondent has not expressed any apprehension at all that they will be able to refund any decretal sums paid to them. The assumption is impermissible. The Applicants have raised the issue of lack of means by the respondent to refund decretal amounts, hence the evidential burden is shifted to the Respondent to demonstrate that she has the resources to repay any amounts paid to her. She has not done so yet the issue of her financial means is one only known to her and she ought to have disclosed.

14. On the other hand, the Applicants have showed this court what substantial loss they would suffer if stay of execution is not granted. They have, managed to satisfy this mandatory requirement for the grant of stay.

15. Similarly, Application was brought without inordinate delay, and the Applicants have offered to demonstrate that they are willing to furnish security for the due performance of any decree which might ultimately be binding on them.

16. It is, therefore, my conclusion that the Applicants have satisfied the conditions placed by Order 42 Rule 6.

17. As the Applicants in their Memorandum of Appeal appear to challenge only the quantum of damages, I find an order that half of the

decretal sums be paid to the Respondent would be reasonable in the circumstances so as to take care of the Respondent's concerns who already has a judgement in her favour as the appeal is canvassed.

18. In the result, the Appellants' Application dated 30/07/2018 is allowed in the following terms:-

*(a) An order of stay of execution of decree in Kithimani PMCC No.188 of 2015 is granted on condition that half the decretal sums are paid by the Applicants to Respondent within the next thirty days and the balance be deposited into an interest earning account in the joint names of the Advocates for the parties failing which stay shall lapse.*

*(b) The costs of the Application shall abide in the appeal.*

Orders accordingly.

Dated and delivered at **Machakos** this 5<sup>th</sup> day of **December, 2018**

**D.K KEMEI**

**JUDGE**