



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 39 OF 2016

FAIRMILE SCHOOL LIMITED1ST APPLICANT

CHARLES MUSALIMA.....2ND APPLICANT

VERSUS

LUCY W NJOROGE.....RESPONDENT

RULING

1. The application dated 17th March, 2016 seeks orders that there be a stay of execution of the decree herein pending the hearing and determination of this appeal against the judgment and order of the Honourable Magistrate against the applicant/appellant.

2. The application is based on the grounds stated on the face of the application and is supported by the affidavit sworn by Paul Kibara, a legal officer with the Applicants insurer. It is deposed that the lower court entered judgment in favour of the Respondent for the sum of Ksh.327,005/= as general damages. According to the Applicants the said award was excessive, hence the appeal herein. That negotiations with the Respondent failed and the Applicant is apprehensive that the Respondent may execute the decree. It is further stated that the appeal is arguable and has high chances of success and if the decree is executed the appeal will be rendered nugatory. That in the event that the appeal succeeds, the Respondent may not be able to refund the decretal sum. That the Applicants stand to suffer substantial loss. The Applicant has expressed their willingness to deposit security for the decretal sum in the form of a bank guarantee or performance bond from a reputable insurance company .

3. The application is opposed. According to the replying affidavit sworn by the Respondent, Lucy Njoroge, the judgment for the sum of Ksh.327,500/= was entered on 15th January, 2016. That the application at hand was filed on 18th March, 2016, over two months after the delivery of the judgement. That the loss the Applicant stands to suffer has not been demonstrated. That it has also not been demonstrated that the Respondent is not able to compensate the Applicant if the Appeal is successful. The Respondent stated that she should be allowed to reap the fruits of her judgment and if stay is granted, then the sum of Ksh.280,000/= offered by the Respondents during the negotiations be paid to her.

4. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides 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.”

5. The Appeal herein was filed on 10th February, 2016. The application under consideration was filed on 18th March, 2016. The judgment of the lower court was delivered on 15th January, 2016. That’s a period of about two months delay. The delay has been explained. According to the Applicants the parties were negotiating. That has not been denied.

6. The Applicant goods have been proclaimed by the auctioneers in a bid to satisfy the decree herein. The Applicants therefore stand to suffer substantial loss. There is no evidence by the Respondent to demonstrate that she is capable of refunding the decretal sum if the appeal is successful. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

7. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR:**

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

8. It is noted that the appeal is on the question of the quantum of damages. My view is that the interest of the parties herein will be served by the payment of 50% of the decretal sum to the Respondent and the deposit of the other 50% in a joint interest earning account of the parties herein or in court within 30 days from the date hereof. In default execution to issue. Costs in the cause.

Dated, signed and delivered at Nairobi this 2nd day of Feb., 2017

B.THURANIRA JADEN

JUDGE