



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 1085OF 2006

BOLI FESTUS ANDREW SIO.....PLAINTIFF

VERSUS

BOARD OF GOVERNORS, ST. MARY'S SCHOOL.....DEFENDANT

RULING

1. The application dated 21st December, 2016 seeks orders that there be a stay of execution of the judgment entered on 14th September 2016 pending the hearing and determination of the Appeal against the said judgment.
2. It is deponed that the judgment herein for the sum of Kshs.11,813,314/= was delivered on 14th September, 2016. The Applicant is dissatisfied with the said judgment and has appealed. It is that the typed copy of the judgment was availed to the Applicant on 14th November 2016 following several requests for the same. That the Respondent has already extracted the decree herein, albeit without following the laid down procedures and has now threatened the Applicant with execution. It is further stated that the appeal is arguable with high chances of success. That the Applicant's attachable assets are learning equipments and therefore execution will interfere with the running of the institution and the welfare of the students and thereby occasion substantial loss. It is further stated that the Respondent may not be able to refund the decretal sum in the event that the appeal is successful. The Respondent is described as a person who is currently not employed. The Applicant is willing to deposit the decretal sum as security for the due performance of the decree.
3. The application is opposed as per the replying affidavit. According to the Respondent, the application is meant to deny him the enjoyment of the fruits of his judgement. It is stated by the Respondent that he has suffered a lot and has been unable to work since the time of the accident. That the Respondent's family has incurred a lot of expenses in his treatment and has depleted all his life savings. It is stated that the decree was obtained in a procedural manner. The Respondent prayed that at least a sum of Ksh.3,000,000/= be paid to him in order to cater for his medical expenses and alleviate his pain.
4. The application was canvassed by way of written submissions which I have considered.
5. 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.”

6. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

7. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR**, **Wachira Karani v Bildad Wachira [2016] eKLR**).

8. The judgment herein was delivered on 14th September, 2016. The Application under consideration was filed on 21st December, 2016. The Notice of appeal was filed on 15th September, 2016. The appeal was filed within time and the application was filed without delay.

9. The Applicant is apprehensive that the Respondent who is currently not employed may not be able to refund the decretal sum, thereby rendering the appeal nugatory in the event that the appeal is successful. 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.”

10. On the other hand the Respondent has stated that the injuries he sustained in the accident the subject matter of this suit has depleted his resources as he has been unable to work for the past sixteen (16) years and also requires medical treatment. Thus the Respondent has alluded to his inability to refund the decretal sum in the event that the appeal is successful.

11. I have perused the court file, the judgment and the memorandum of appeal which is annexed to the further affidavit. The undisputed facts are that the Respondent sustained debilitating injuries in the accident; that the Respondent was employed by the Applicant at the material time as the Deputy Head Teacher, Junior School; that the Respondent was accompanying the Applicant’s teachers and students on a school trip when the accident occurred and that the motor vehicle for the trip was hired by the Applicant. It is also noted that the Respondent’s case was predicated on *inter alia*, the breach of contractual duty of care. I am convinced that even if one was very optimistic about the chances of the appeal succeeding, it’s unlikely to succeed on a 100% basis.

12. Whether to allow an application for stay pending appeal is a discretionary remedy. The discretion has to be exercised judiciously in a manner that will not render the appeal nugatory. Each case however depends on it’s own circumstances. In the instant case, the Respondent requires medication and has been rendered jobless. I think the interests of justice would be served by paying some portion of the decretal sum to the Respondent.

13. The Applicant has offered security for the due performance of the decree by depositing the decretal sum in an interest earning joint account held by the respective counsels for the parties herein pending the hearing of the appeal.

14. With the foregoing, I allow the application on condition that the Respondent do pay 25% of the decretal sum to the Respondent and deposit the balance in a joint interest earning bank account held by

the counsels for the parties herein within 30 days from date hereof. In default the application stands dismissed.

Dated, signed and delivered at Nairobi this 5th day of April, 2017

B.THURANIRA JADEN

JUDGE