



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 570 OF 2016**

**PAMIGO LIMITED.....APPLICANT/APPELLANT**

**V E R S U S**

**PHELESTUS HOKA LIBULELE (Suing as legal representative**

**of the estate of ALEX OLINDI OPANDE(DECESED).....RESPONDENT**

**RULING**

1. Pamigo Ltd, the appellant herein, took out the motion dated 29.3.2017 in which it sought for an order for stay of execution of the decree in Nairobi C.M.C.C. no. 3389 of 2011 pending appeal. The motion is supported by the affidavit of Winnie Awuor Paul. When served, Phelestus Hoka Libulele, the respondent herein filed the replying affidavit of Ichaura Wachira to oppose the application. When the motion came up for interpartes hearing learned counsels appearing in this matter made oral submissions.

2. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. The facts giving rise to this motion are short and straightforward. The respondent in her capacity as the legal representative of the estate of Alex Ohindi Opande, deceased, filed a compensatory suit against the appellant for the fatal injuries the deceased sustained before the Chief Magistrate's Court, Milimani Commercial Court, Nairobi. Judgement was eventually delivered in favour of the respondent on 5<sup>th</sup> August 2016 for ksh.2,530,000/= less 30% contribution making the net award of ksh.1,771,000/= plus costs and interest. The appellant being dissatisfied with the aforesaid decision preferred this appeal. The trial court granted the appellant an order for stay of execution pending appeal on condition that it pays the respondent's advocate ksh.1,011,700/= within 14 days and the balance of the decretal sum to be deposited in an interest earning account in the joint names of the firms of advocates appearing in the matter within 14 days also. The appellant is now admitting that due to administrative bureaucracy at the appellant's insurer's office there was delay in releasing the funds as proposed herein by twelve (12) days. As a consequence, the respondent took steps to have the decree executed by extracting the decree and obtaining warrants of attachment. This turn of events prompted the appellant to rush to this court for protection vide the motion dated 29.3.2017.

3. It is the submission of the appellant that it has now fully complied with the conditions given by the trial court hence this court should grant it an order for stay. The appellant claimed that it forwarded to the respondent's advocate the joint account opening forms but the advocate has declined to return the forms hence the cheque drawn in the joint names cannot be banked. This court was consequently urged to grant the order sought.

4. It is the respondent's submission that the appellant is abusing the court process since the trial court had given similar orders now being sought by the appellant but the condition imposed was not complied with. The respondent aver that she moved to attach the appellant's goods when the appellant failed to fulfil the conditions for stay.

5. Having considered the material and the submissions presented to this court, it is clear to me that the respondent's submission to the effect that the appellant's motion is an abuse of the court process because the orders being sought in the current motion are similar with those already sought and granted by the trial is correct. The appellant purported to comply with the conditions set by the trial court out of time. It was not open for the appellant to file a fresh application before this court. The appellant should instead have applied for extension of time to fulfil the conditions. I uphold respondent's objection by striking out

the appellant's motion with costs since the same is untenable.

6. There is no dispute that the appellant has complied with the conditions set to sustain the order for stay of execution given the trial court. However compliance was done after the time fixed had lapsed and after the execution process had been commenced. The appellant has explained the cause of the delay in complying with the conditions. It is said it is due to the administrative bureaucracies of the appellant's insurer. There was no evidence of connivance nor collusion to delay on the part of the appellant. In the circumstances, I will *ex debito justitiae* exercise this court's inherent power by granting the appellant an extension of time of 15 days to comply with the conditions for stay given by the trial court.

7. Therefore the warrants of attachment are set aside but the appellant should meet the costs of attachment. Such costs to be agreed upon by the parties or in default to be taxed.

Dated, Signed and Delivered in open court this 10<sup>th</sup> day of April, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent