



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 215 OF 2009

ANALIK WEKESA1ST APPELLANT

DIOCESE OF LODWAR(THROUGH ITS REGISTERED TRUSTEES.....2ND APPELLANT

VERSUS

HELLEN WAIRIMU

MWANGI

SIMON NJOROGE MWANGI (SUING AS THE ADMINISTRATORS OF ESTATE OF

JAMES KAMAU (DECEASED).....RESPONDENTS

*(Being an appeal from the Judgment and Decree of the Honourable Tanui, Resident Magistrate
delivered on the 30th July 2009)*

RULING

1. Judgment in the trial court was delivered on the 27th October 2016.

By an application dated 21st November 2016 the Appellants approached the court under **Order 42 rule 6(1) and 6(6) and Order 51 of Civil Procedure Rules, and Sections 1A, 1B and 3A of the Act** seeking:

(1) - *Spent*

(2) - *Spent*

(2) *That the court be pleased to stay the execution of the judgment and order issued on the 27th October 2016 pending hearing and determination of the appeal.*

On the grounds that the appellants have lodged an appeal vide a Notice of Appeal filed on the 8th November 2016 and that the appeal has high chances of success.

2. It is submitted that the decretal sum awarded in the trial court is already deposited in court since 2009 and that if paid out, the appellants may never recover the same should the appeal be successful on grounds that the appellant has no known means of income. It is deponed that the appellants insurers Messrs Phoenix of East Africa Limited is a reputable insurance company and would be able to pay the decretal sum if the appeal is finally found to be without merit, and that the said sum is sufficient security

for the due performance of the decree.

3. I have considered the supporting affidavit sworn on the 21st November 2016 by one Lilian Simiyu, Deputy Legal Manager of the Insurer aforesaid, and the Respondents grounds of opposition filed on the 19th January 2017 stating that there was unreasonable delay in bringing the application and that it is an afterthought and an abuse of court process made to deny the respondent enjoyment of the decretal sum.

4. The respondent has not filed written submissions.

In their written submissions, the applicants have urged that they have complied with the provisions of **Order 42 of the Civil Procedure Rules** and have provoked the courts discretion to grant an order of stay.

The present application was brought to court timetiously, judgment having been delivered on the 27th October 2016.

The cornerstone upon which an order of stay of execution ought to be granted is the issue of substantial loss to an applicant if the decree is executed, because such loss, if proved, would render the appeal nugatory.

See **Order 42 rule 7(2) of Civil Procedure Rules and Tarbo Transporters Ltd -vs- Absalom Dora Lumbasi (2012) e KLR.**

5. In the case **Mukuma -vs- Abuoga**, the Court of Appeal reiterated the centrality of substantial loss as the cornerstone of the discretion by the High Court in granting orders of stay of execution, thus the court should not only base its discretion on the chances of an appeal being successful, but also ought to consider other factors as may be stated in the Memorandum of Appeal. In the present matter, no memorandum of Appeal has been filed. Only a notice of intended appeal has been filed. It is therefore not possible to decipher what grounds of appeal would be preferred.

6. What are then the other factors that the court ought to consider?

In the case **Dhidha Mfidho -vs- Van Leer East Africa Ltd (2006) e KLR** the Court of Appeal considered the fact that an applicant may not easily recover the money if paid out to the decree holder and if it has to institute other civil proceedings to recover the money. It rendered that such an eventuality in the interest of justice must be taken into account.

7. The applicant has stated that the respondent may not be able to pay back if the appeal is successful. The burden to prove such inability lies with the applicant. However if there is some evidence that the respondent is not able to repay, then the respondent is obligated to prove his means to pay say by affidavit or otherwise. The respondent herein has not filed any documents or even an affidavit in response to the application to state their means. It is important that the court is provided with tangible evidence of the respondents ability, and thus the burden shifts to the respondent. This has not been done.

8. The court has to balance the two rival interests in dispensation of justice in this regard. I have considered the rival submissions. It is evident that the respondents if paid the decretal sum and the appeal is successful they may not be able to repay the decretal sum back. No contrary submission has been tendered.

9. As to whether the applicants appeal may be rendered nugatory by a denial of an order of stay, the court shall consider the interest of both parties. The decree is a money decree. Had the respondents demonstrated their ability to repay the over Kshs.500,000/=, I would very easily have exercised my discretion in their favour. Without such demonstration, paying out the said sum would render the appeal nugatory if it turns out to be successful.

10. The decretal sum is already deposited in court. The issues raised are that the respondents and the

named dependants, a child and mother of the deceased were not dependants of the deceased, that no proof was adduced to confirm their stated status. Pending resolution of that dispute by the Court of Appeal, it would not be prudent to have the decretal sum released to them.

11. For those reasons, I am persuaded to allow the application dated 21st November 2016 in terms of prayer No. 3 thereof. An order of stay of execution of the decree and order dated 27th October 2016 is granted. Pending the hearing and determination of the appeal.

12. Costs shall be in the cause.

Dated, Signed and Delivered this 20th Day of July 2017.

J.N. MULWA

JUDGE