



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 248 OF 2016

DAVID BETT..... 1ST APPELLANT

SWAN CARRIERS LIMITED..... 2ND APPELLANT

AMEE HOLDINGS LIMITED..... 3RD APPELLANT

VERSUS

JONAH KELI MUTISO..... 1ST RESPONDENT

AND

PETER NJENGA2ND RESPONDENT

MOSES GITHINJI NJENGA.....3RD RESPONDENT

RULING

1. The Application dated 21/2/2017 is brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking stay of execution orders pending the hearing and determination of the Application and the Appeal thereafter. The Applicant also prays for the costs of the Application. The Application is premised on the grounds on the face of the Application and the Supporting Affidavit of Jacqueline Ndirangu, a Legal Officer with Fidelity Shield Insurance Company Limited, the insurers of the Appellants, and a Further Affidavit by the same deponent.

2. The Appellants' grounds are that they have appealed against the judgment of Hon. Chesang delivered on 11th April, 2016, have an arguable Appeal, that the Appeal would be rendered nugatory in the event that it succeeds if stay is not granted, they are ready to comply with the courts orders as to security and that they stand to suffer substantial loss and/or damage.

3. The Respondents filed a Replying Affidavit dated 9th March, 2017 in which they aver that the Appellants had earlier on filed a similar application for stay of execution before the Chief Magistrate's Court which application was dismissed for non-attendance and the Appellants have not informed the Court why they failed to attend Court. The Respondents also submits that there has been unreasonable delay in filing the instant Application.

4. The Application was canvassed by way of oral submission on 12th April, 2017 and the Parties relied on

various respective authorities which I have perused. The Respondent in opposing the Application submitted that in the event that the court is persuaded to grant the Application, the Court be pleased to make an order that half of the decretal sum be paid to the Respondents and the balance to be deposited in a joint account.

5. Order 42 Rule 6 of the Civil Procedure Rules outlines the conditions for granting an order of stay of execution which are;

- a. That the application has been made without unreasonable delay;
- b. That security for costs has been given; and
- c. That substantial loss may result to the Applicant unless the order for stay is made.

6. The Application was filed on 21st February, 2017 whilst the judgment being appealed against was delivered on 11th April, 2016 after the lapse of a period or more than 10 months. In essence the Appellants sat on their rights for 10 months before filing this Application. That, by any standards, is unreasonable delay. It has emerged that the Appellants had also filed a similar application on 27th June, 2016 before the lower Court which was dismissed for non-attendance on the part of the Appellants. The Respondents submit that no explanation was rendered by the Appellant to the Court for non-attendance.

7. It has also emerged that after the said application for stay of execution was dismissed, the Appellants filed another application dated 20th July, 2016 for reinstatement of the Stay of execution application. Amongst the reasons adduced in the second application as to why the Appellants failed to attend the lower Court to prosecute the stay or execution application was that *“the Applicants’ Counsel arrived late in Court after the matter had been called out as he encountered heavy traffic jam on the way to court. In the said application, it is averred that, “the Applicants’ Counsel arrived in Court Room No. 8 and found Hon. Mbeja SRM handling matter No. 15 in the cause list for 13th July, 2016”.*

8. This Court is alive to the fact that the orders being sought by the Applicants are discretionary orders which the Court can only grant after considering various factor surrounding the case and these will include the conduct of the Applicant in the matter. In the prevailing circumstances the conduct of the Applicant is that of an indolent litigator. The Appellants have not denied the existence of the said applications.

9. The Appellant has offered to provide such security as the Court may order for the due performance of the decree pending the determination of the Appeal in such a manner as the Court may direct. The requirement for security has been met

10. In the Supporting Affidavit before this Court, the Appellants have stated that the Respondents may not be able to refund the decretal amount in the likely event that the appeal is successful, in that the Respondent’s means are unknown. The Respondent has not demonstrated to this Court that he is financially capable and willing to re-imburse the Applicants the decretal amount or a portion of it should the Appeal succeed. What the Respondents aver in the Replying Affidavits is that the Applicants have not shown what prejudice, loss or damage they shall suffer if the orders sought are not granted and the Respondents pray that incase the Court decides to grant the Application, then it makes an order that the Applicant pays half of the decretal amount and the other half to be deposited in a joint account. From the Supporting Affidavit, the deponent states that they instructed their Advocates to appeal on the excessive award on general damages and also on liability; therefore the Appeal is on the quantum of damages as well as liability.

11. Notwithstanding the foregoing, the Court finds that this application was filed after unreasonable delay and the general conduct of the Appellants has been wanting. The Appellants’ Advocates filed an application for stay of execution in the lower court which was not heard on its merits but rather dismissed for non-attendance in court on the hearing date and thereafter the Appellants filed a subsequent

application seeking reinstatement of the Application of which he again failed to attend Court on the hearing date. I find that the Appellants have not been desirous in prosecuting this matter and Court is bound by the overriding objective of section 3A of the Civil Procedure Act to make such orders as may be prudent to prevent the abuse of the court process.

12. For the reasons stated, the application dated 21st February, 2017 is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Nairobi this 10th day of July, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the 1st Appellant.*

..... *for the 2nd Appellant.*

..... *for the 3rd Appellant.*

..... *For the 1st Respondent*

..... *For the 2nd Respondent*

..... *For the 3rd Respondent*