



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 37 OF 2016

STEPHEN D. ITUNGA.....1ST APPELLANT

ZIPPORAH MBAI.....2ND APPELLANT

NICHODEMUS KIMULE.....3RD APPELLANT

VERSUS

DAVID ALI.....RESPONDENT

RULING

The Application

The Appellants are seeking a stay of execution pending hearing of their appeal filed herein from an *ex parte* judgment entered against them by the trial Court in Kangundo Civil Suit 99 of 2012. The Appellants were held 100% liable by the trial Court, and an award of Kshs 628,700/= for general and special damages made in favour of the Respondent herein for an accident involving the Appellant's motor vehicle. The application is made in a Notice of Motion dated 12th May 2016, wherein the Appellants also seek in the alternative any other orders that this Court may deem just and expedient pending the hearing of their appeal.

The Appellants detailed out their grounds in the said application and in a supporting affidavit sworn on 12th May 2016 by Sandra Nyakweba, the Claims Director at Directline Assurance Company Ltd, the insurers of the motor vehicle that was the subject of the accident leading to the claim in the trial Court. In summary the Appellants are of the view that they have an arguable appeal which will be rendered nugatory if the orders of stay are not granted, and that the decree is of a substantial sum of money, and if paid to the Respondent may not be recovered if their appeal succeeds. The Appellants also stated that they are ready, willing and able to furnish such reasonable security on such terms as the Court may deem fit.

These grounds were reiterated by the Appellants' learned counsel, Kairu & McCourt Advocates, in submissions dated 5th July 2016 filed in Court, wherein reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules and Order 22 Rule 22(1) of the Civil Procedure Rules to argue that the Appellants had shown that they would suffer substantial loss; had brought the application without delay; are ready and willing to furnish security; and that they have an arguable appeal. Various judicial decisions were also cited in support of these arguments.

The Response

The Respondent opposed the application in a replying affidavit he swore on 6th June 2016. He averred that the application is fatally defective as it is brought pursuant to Order 22 Rule 22 of the Civil Procedure Rules which does not apply where an appeal has been filed. Further, that the Appellants had sought similar orders in the lower court which were denied. It was contended that the trial Court exercised its discretion fairly which discretion ought not be interfered with, and that the application is meant to frustrate the Respondent's enjoyment of the fruits of a just judgment for injuries he suffered as a result of the accident.

The Respondent's learned counsel, Muema Kitulu & Company Advocates, gave a summary of the proceedings in the trial Court in submissions filed in Court dated 12th July 2016. It was submitted that leave was required under Order 43 of the Civil Procedure Rules for the Appellants to appeal a decision made under Order 22 Rule 22 of the said Rules, which leave was not sought in the lower Court, and that the Appellants had not met the conditions for stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules. In particular that the Appellants had not shown the errors made by the trial Court or demonstrated the loss they are likely to suffer. The Respondent was of the opinion that should the Court be persuaded to grant the orders sought, it directs that the entire decretal sum be deposited in an interest earning account in the joint names of the counsel on record for the parties.

The Issues and Determination

I have read and carefully considered the pleadings filed. I appreciate the concerns raised by the Respondent as to the applicable law to the application, and that Order 22 Rule 22 of the Civil Procedure Rules relate to stay by a court to which a decree has been sent for execution, which in this case would be the trial court. However, this Court is enjoined to dispense substantive justice and not to have undue regard to technicalities under Article 159 of the Constitution, and does not find the use of the wrong provision of the law fatal to the Appellants' application.

The issue then before the Court is whether the execution of the judgment of the trial Court should be stayed and if so on what terms. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

The Appellants have in this respect stated that the Respondent has not shown his means that will enable him refund the amount paid to him as the decretal sum in the event of the appeal succeeding. The Respondent on the other hand stated that there is no basis for a stay as it will deny him the fruits of his judgment. Both are valid considerations that this Court should take into account in exercising its discretion to grant a stay of execution, as both parties are likely to suffer loss in the event of a decision to grant or not to grant such stay.

Therefore, bearing in mind the fact that while the Respondent has the right to enjoy the fruits of his lawfully obtained judgment, the Appellants too have a corresponding right to challenge the judgment of the trial court before the appellate court, and that both parties are amenable to security being deposited to secure their respective interests, the orders that commend themselves to me is that the Appellants' Notice of Motion dated 12th May 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment in Kangundo Civil Suit 99 of 2012 and any consequential orders and decrees arising therefrom pending the hearing and determination of this appeal, on condition that the Appellants shall deposit the decretal sum of Kshs 628,000/= in a joint interest earning account opened in the joint names of the Appellants' and Respondent's Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

2. The costs of the Appellants' Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 11th day of October, 2016.

P. NYAMWEYA

JUDGE