



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 22 OF 2015**

FRANCIS KARIUKI MUTURI.....1<sup>ST</sup> APPELLANT

TOM B. MENGE.....2<sup>ND</sup> APPELLANT

KAMBU CATHOLIC DIOCESE.....3<sup>RD</sup> APPELLANT

**VERSUS**

**JOSEPH MUTISYA NDUTU (*Suing as the administrator and representative***

***of the estate of* AGNES NDETO NDUTU.....1<sup>ST</sup> RESPONDENT**

**WILBERFORE OGONDO.....2<sup>ND</sup> RESPONDENT**

**RULING OF THE COURT**

1. The Notice of Motion application before the court is dated **6<sup>th</sup> July, 2015** and is filed pursuant to **Section 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 1 and 6, and Order 51 Rule 1 of the Civil Procedure Rules**. The application prays for the following orders;

- a. There be a stay of execution of the judgment entered against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants on 15<sup>th</sup> day of January, 2015 pending the *inter partes* hearing and determination of this application.
- b. There be a stay of execution of the judgment entered against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants on the 15<sup>th</sup> day of January, 2015 pending the hearing and determination of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants appeal.
- c. That the court be pleased to grant the orders sought subject to any condition as the court may deem just.
- d. The costs of this application be in the cause.

2. The application is premised on the grounds that the appellants are dissatisfied with the judgment of the court entered on 15<sup>th</sup> day of January, 2015 and have appealed against the same. The decretal amount being Kshs. 4,252,911/= is quite substantial, and that the appellants/applicants shall suffer irreparably if execution proceeds and the intended appeal succeeds, as the said sum of Kshs. 4,252,911/= will be beyond the reach of the respondent because his income is unknown and it is not clear if the said funds can be refunded to it if the same is paid to the respondent and consequently the appeal will also be rendered nugatory. The appellants insurers are prepared to comply with any such condition(s) as this court may

deem just within such a time that may be determined by the court particularly the provision of an **Insurance bond** for the said decretal amount. The appellants have sufficient cause for seeking the orders sought.

3. Further the application is supported by affidavit of **Paul Kabira**, the legal officer of **APA Insurance Limited** who is the insurer of the applicant herein. The applicant's case is that consent judgment on liability was delivered in this suit against the defendant herein on the 15<sup>th</sup> day of January, 2015 between respondents and the 1<sup>st</sup> defendant in the ratio of 10%:90% in favour of the plaintiff. In light of the above, the court assessed quantum in favour of the plaintiff for the sum of Kshs. 472,476.00 as against the 1<sup>st</sup> defendant. The matter herein being file between CMCC No. 140 of 2006 was consolidated with CMCC No. 208 of 2005. The court rendered its judgment hereunder. For CMCC No. 140 of 2005;

a) Pain and suffering .....	Kshs. 15,000/=
b) Loss of Expectation of Life .....	Kshs. 100,000/=
c) Loss of Dependency .....	Kshs. 2,131,976/=
d) Special damages.....	Kshs. 800/=
d) Less award .....	Kshs. 100,000/=
<b>Total</b>	<b><u>Kshs. 2,154,976/=</u></b>

4. In respect of CMCC No. 208 of 2005 the court particularized the damages as hereunder;

a) General damages .....	Kshs. 1,500,000.00
b) Future Medical Expenses .....	Kshs. 120,000.00
c) Special damages .....	Kshs. 950,000.00
<b>Total</b>	<b><u>Kshs. 2,570,481.00</u></b>

5. The appellants' insurers are dissatisfied with the said judgment and **APA Insurance Limited** has instructed the appellants' advocates on record to appeal against the said judgments. The appellants have since filed the appeal. The decretal amount being Kshs. 4,252,911/= is quite substantial in the circumstances of this case and the thirty (30) days stay of execution granted by the court on the 15<sup>th</sup> day of January, 2015, has lapsed. The said appeal is alleged to have overwhelming chances of success and the appellants/applicants are therefore reasonably apprehensive that the respondent may move to execute the judgment herein before the said appeal is heard and determined. The appellants/applicants shall suffer irreparably if execution proceeds and the intended appeal succeeds, as the said judgment amount will be beyond the reach of the respondent because his income is unknown.

6. The application is opposed by the respondents by the Replying Affidavit sworn by the 1<sup>st</sup> respondent on her own behalf and on the behalf of the consolidated files Nos. **Machakos CMCC No. 140 of 2006 and CMCC No. 208 of 2005**. The affidavit is sworn on **26<sup>th</sup> November, 2015**.

7. The respondent's opposition to the application is that the said application is replica of another application made by the 1<sup>st</sup> and 3<sup>rd</sup> appellants herein on **15<sup>th</sup> January, 2015** in consolidated file Nos. **Machakos CMCC No. 208 of 2005 and CMCC 140 of 2006** before the learned magistrate in which thirty (30) days of stay of execution were granted. The present application replicating the previous one made on 15<sup>th</sup> January, 2015 is made in bad faith and is intended to delay and/or deny the respondents the fruits of the judgment of the Learned Magistrate's Court in Machakos CMCC No. 208 of 2005 and delay and/or deny the estate of the deceased the fruits of the judgment in Machakos CMCC No. 140 of 2006. The

present application is made in bad faith as the appellant/applicants ought to have made good the judgment debt after the expiry of the thirty (30) days of stay of execution.

8. With the leave of court parties filed submissions which I have considered. The only issue for determination is whether the applicants have satisfied the conditions set out in **Order 42 Rule 6 of the Civil Procedure Rules** for granting of stay of execution of decree pending the hearing and determination of the appeal.

**Order 42 Rule 6(2)** of the **Civil Procedure Code** provides;

***“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”***

9. The applicants have submitted that they would suffer loss if the application is not granted, while the respondent submitted that no loss would be suffered since the respondent would be able to refund the decretal sum should the intended appeal succeed. So the possible loss being referred to herein is simply the ability or otherwise of the respondent to refund the decretal sum should the intended appeal succeed. The other conditions under **Order 42** as to timely filing of the application for stay, or granting of security have in my view, been satisfied by the appellant, in that the application was filed within a reasonable delay. The applicants are also willing to provide security by depositing with court the entire decretal sum.

10. The duty of this court then is to balance the interests of the applicant who has the right to appeal, and that of the respondent who also has the right to enjoy the fruits of the judgment.

11. To address this issue, the court notes that the judgment on liability was agreed by the respondent and the 1<sup>st</sup> defendant in the ratio of 10%:90% in favour of the respondent. This means that the applicant is clear in its mind that it is liable to the respondent. The only disagreement is on the quantum.

12. This court further notes that the decretal sums herein are substantial, and that although the respondent is a Lecturer at University and hence a man of means, refunding the decretal sums could be a challenge to any salary earner. Therefore, the applicant is likely to suffer a loss. A loss here means any difficulty, whether actual or infrastructural, which the applicant may have to face in the recovery of the sums due to it from the respondent. If the appellant pays the decretal sum in lump sum, any recovery from the respondent by way of installments over a period of time would itself amount to a loss. A loss need not be quantitative, provided it is determinable qualitatively. In the instant case, it is agreed that the applicant is liable to the respondent 90%. In that regard, there is every possibility that a substantial part of the decree will still be given to the respondent even after the appeal. Even though it is not the duty of this court to look at the merits of the appeal, this fact cannot escape the mind of the court. It is therefore the finding of this court that the respondent is entitled to be given part of the decree even as the balance is secured through some process.

13. In the upshot, the applicants' application for stay before the court is allowed as prayed with the costs in the cause on the following terms;

a. The respondents shall be paid half ( $\frac{1}{2}$ ) the decretal sum herein within fourteen (14) days of this ruling.

b. The remaining half ( $\frac{1}{2}$ ) shall be secured by an insurance bond to be provided by the applicant within fourteen (14) days of this ruling.

Orders accordingly.

**DATED AND DELIVERED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF DECEMBER, 2016.**

**E. OGOLA**

**JUDGE**

**In the presence of;**

Mr. Nthiwa holding brief for Deya for applicant

Mr. Kimeu holding brief for M/S Wambua for respondent

Court Assistant – Mr. Munyao