

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO.31 OF 2015

(Being an appeal from judgment delivered by Hon. Mrs. Obura in Kilifi SRM CC No.124 of 2011)

HAMZA M. OMAR.....1ST APPLICANT

HANAFI ABDI SHUGHULI.....2ND APPLICANT

VRS

FRIDA PENDO KAPUMU *a.k.a* FRIDAH PENDO GEORGE.....RESPONDENT

RULING

The respondent was awarded less 10% contributory negligence by the Kilifi Court in Kilifi SRM CC No.124 of 2011. Counsel for the respondent tabulated the payable amount including costs and interest to be Ksh.365,270/-. Being dissatisfied with the award, the appellant filed Civil Appeal No. 31 of 2015 before this court.

The application dated 12/8/2015 seeks an order of stay of execution pending the hearing and determination of the appeal. Parties agreed to determine the application by way of written submissions. I have read the submissions by the applicants' counsels and it is contended that the appeal will be rendered nugatory if the application is not granted. The award is excessive and if paid, the applicants will not be able to recover it from the respondent. There is threat to execute against the applicants.

On his part, counsel for the respondent maintains that the application does not meet the requirements for the granting of the orders being sought. There is no evidence that the applicants will suffer substantial loss or that the respondent is a man of straw. The applicants are only apprehensive and this is not enough. The applicants do not know the respondent and cannot allege that he is a man of straw. It is also submitted that Erastus Mwaniki Advocate purported to depone facts on behalf of the defendants without their authority. Counsels would like to have the affidavit in support of the application struck out.

The record shows that the judgment of the trial court was issued on 11th June, 2015. The application was filed on 14th August, 2015. This was a period of about two months. I do find that the application was filed without unreasonable delay. The next issue is that of substantial loss. Although there is evidence that, the applicants were insured by Direct Line Insurance Company Limited, the suit was against the applicants individually. The decree is against them. There is no evidence that the respondent is capable of repaying the amount should the appeal succeed even if it has not been shown that, he is not a man of straw. Equally, it is not clear if the applicants are capable of satisfying the decretal sum without any difficulties. The intended appeal is aimed at challenging the amount of general damages awarded by the court.

The court has to balance between the applicants' right to pursue their appeal and the respondent's right to enjoy the fruit of his judgment. I do find that for the interest of justice, the applicants do provide security while they pursue their appeal. The applicants should deposit a sum of ksh.300,000/- to act as security while they pursue their appeal.

In the end, I do find that the application herein is merited and the same is granted on condition that the

applicants do deposit either in court or in a joint account of both counsels a sum of ksh.300,000/- within ninety (90) days hereof. Costs shall follow the outcome of the appeal.

Dated, signed and delivered at Malindi this 3rd day of November, 2015.

SAID J. CHITEMBWE

JUDGE