



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 83 OF 2018

BETWEEN

SAMUEL KILEMI .....1<sup>ST</sup> APPLICANT

PETER KILEMI ..... 2<sup>ND</sup> APPLICANT

AND

FESTUS GITUMA KATHUKA (*Suing on behalf of the estate of*

DAVID MWANGI NJOROGE (*Deceased*).....RESPONDENT

*(An application for stay of execution pending the filing, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Meru (A. Mirima, J.) delivered on 9<sup>th</sup> day of October, 2017 in HCCCA No. 306 of 2013)*

RULING OF THE COURT

Following a fatal road accident in which the deceased died, the respondent instituted a suit in the Chief Magistrate’s court at Meru against the applicants blaming them for the accident. The court found them liable and awarded the respondent Kshs. 1,040,000 in loss of dependency, among other damages.

The applicants’ first appeal to the High Court was dismissed after the learned Judge, (Mrima, J.) found that it had been filed out of time and without leave.

The applicants have now moved this Court praying that we stay execution of the decree as they pursue the appeal. The auctioneers have proclaimed their goods and they are apprehensive that if the stay sought is not granted, they will suffer irreparable loss and the appeal will be rendered nugatory yet they have an arguable appeal.

In his replying affidavit, the respondent has indicated that since the decretal sum was fully settled in 2018 by the respondent’s insurers, this application is moot and serves no purpose as there is nothing to stay.

This statement has not been challenged and we are satisfied from it that indeed there is nothing to stay. But apart from that, the applicants have themselves admitted that they did not lodge the notice of appeal, and are therefore before us irregularly as the foundation of an application under **Rule 5(2)(b)** of the Court of Appeal Rules is the notice of appeal. See **Safaricom Limited vs. Ocean View Beach Hotel Limited and 2 others** Civil Application No. 327 of 2009 (UR7).

For these two reasons, this application is bereft of any merit and does not meet the threshold for granting an order of stay as explained in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013] eKLR.

We accordingly dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.

W. OUKO, (P)

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**