



IN THE COURT OF APPEAL
AT KISUMU
(CORAM: E. M. GITHINJI, HANNAH OKWENGU &
J. MOHAMMED, JJA.
CIVIL APPLICATION NO. 44 OF 2018

BETWEEN
HON. ROSE OGENDO NYAMUNGA.....FIRST APPLICANT
MRS. JOYCE OLWEYA.....SECOND APPLICANT
MR. PAUL OGENDO.....THIRD APPLICANT
AND

RICHARD B. O. ONSONGO.....RESPONDENT

(Application for stay of proceedings in the High Court of Kenya at Kisumu, pending the hearing and determination of an appeal from the decision of (Maina, J.) dated the 27th February, 2018 in HIGH COURT CIVIL SUIT NO. 9 OF 2014)

RULING OF THE COURT

[1] On 27th February, 2018, the High Court (Maina J) delivered a judgment in which it awarded **Richard B. O. Onsongo** (herein the respondent) general damages of Kenya Shillings Two Million Five Hundred Thousand (Kshs.2,500,000/=) and aggravated damages of Kenya Shillings Five Hundred Thousand (Kshs.500,000/=). together with costs and interest.

[2] **Rose Ogendo Nyamunga, Joyce Olweya and Paul Ogendo** (herein 1st, 2nd and 3rd applicants respectively), who were the defendants in the High Court suit, are dissatisfied with the judgment and have filed a notice of appeal. In addition, the applicants have filed a notice of motion dated 25th April, 2018, in which they seek orders under **Rule 5(2)(b), 42(1) and 47(1)&(2)** of the **Court Rules**, as well as **section 3(A)** of the **Appellate Jurisdiction Act**, seeking to stay any proceedings further to the judgment of 27th February, 2018, and all consequent orders flowing there from pending the hearing and determination of the intended appeal.

[3] The application is supported by an affidavit sworn by the 1st applicant in which she explains that they are dissatisfied with the judgment and have lodged an appeal, but are apprehensive that the respondent has already filed a bill of costs and may commence execution proceedings before the appeal is heard and determined. The applicants contend that they will suffer serious loss and irreparable damage if the execution proceeds. They maintain that they have a meritorious appeal and urge the Court to allow the application.

[4] In a supplementary affidavit sworn on 17th September, 2018, the 1st applicant depones that the other two applicants who are her siblings are jobless, and while she is a nominated Member of Parliament sitting in the Senate, she cannot with her salary afford to deposit the amount of Kenya Shillings Three Million (Kshs.3,000,000/=).

[5] In a replying affidavit sworn on 8th May, 2018, the respondent deponed that the party and party bill of costs had not been taxed but no decree had been drawn as required under Order 21 Rule 8 of the Civil Procedure Rules, and that no draft decree had been forwarded to the applicants counsel for approval nor had any decree been signed by the Court to give rise to the possibility of execution. Counsel urged that the notice of appeal filed by the applicants was filed out of time and that there was no competent appeal before the court, which can be the basis of granting an order for stay of execution of the judgment. In addition, the respondent annexed a copy of a ruling dated 19th April, 2018, in which the High court dismissed the applicants' motion, for an order of stay of execution.

[6] When this matter came before us on 4th October, 2018, the parties consented to have the matter adjourned and a stay of execution of the decree arising from the judgment delivered on 27th February, 2018 issued until 16th October, 2018, when the parties were to agree on a reasonable deposit. On 16th October, 2018, counsel for both parties appeared before us and the parties having failed to agree, it fell upon us to determine the application.

[7] We have considered the application before us, we note that the respondent's suit that resulted in the judgment of 27th February, 2018, was a suit for damages for defamation. We note also that the decree is a monetary decree. The respondent's advocate indicated to us that they were willing to concede to an order for stay of execution being granted subject to an acceptable security for the amount of the decree being offered. The applicants on the other hand are ready to provide a bank guarantee for half the decretal sum.

[8] We have considered this application, we note that the applicants have provided a draft memorandum of appeal indicating seven (7) grounds upon which their intended appeal will be argued. We do not find it appropriate to go into the merits of those grounds save to state that they appear to be arguable grounds.

[9] In order to satisfy the principle upon which this court can grant an order for stay of proceedings or execution pending appeal, the applicants must not only satisfy the Court that their intended appeal is arguable but also that unless the order of stay of execution is granted the intended appeal will be rendered nugatory. In this regard, we do note that the decree is a monetary decree. However, the judgment amount together with costs and interest is well over Kenya Shillings Three Million (Kshs.3,000,000/=). Execution if allowed to proceed may include attachment and sale of the respondent's property which may lead to loss that may not be recoverable. On the other hand it has not been shown that the respondent is likely to suffer serious prejudice from the delay that may be caused in awaiting the finalization of the appeal. We think that the respondent's interests can be sufficiently taken care of by an order for deposit of security.

[10] For the above reasons, we find that the applicants have satisfied the two limbs of arguability, and nugatory aspect that are prerequisite to the granting of orders under Rule 5(2)(b) of the Court Rules. Accordingly, we allow the application and order that there shall be an order for stay of all proceedings further to the judgment of the High Court dated 27th February, 2018, and all consequential orders flowing therefrom, pending the hearing of the applicant's appeal on the following conditions:

- (i) That the applicants shall either deposit a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=) in an interest earning bank account in the joint names of the two parties' advocates or, alternatively, provide a bank guarantee for a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=).
- (ii) That the applicants shall take all necessary action to have the appeal properly filed so that the appeal is heard and finalized within twelve (12) months from today.

Those shall be the orders of the Court.

DATED and delivered at Kisumu this 7th day of December, 2018.

E. M. GITHINJI

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.