



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & GATEMBU JJA

CIVIL APPLICATION NO. NAI 78 OF 2014 (UR 64/2014)

BETWEEN

SWALEH BREKI 1<sup>ST</sup> APPLICANT  
ISLAM.....

MASH BUS SERVICE 2<sup>ND</sup> APPLICANT  
LIMITED.....

AND

WINFRED MUTHEU KIAMUKO  
1<sup>ST</sup> RESPONDENT

TITUS MAUNDU NZAMBU

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(Application for stay of execution on the Judgment and Decree of the High Court of Kenya at Machakos (Dulu, J) Dated 7<sup>th</sup> June, 2012 and Ruling and Order in Machakos HCCC No. 130 of 2009 ( Jaden, J) Dated 122th March, 2014

in

Machakos H.C.C.C. No. 130 of 2009)

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RULING OF THE COURT

Before us is an application by way of a Notice of Motion taken out under **Rule 3(2) and (3) 5(2) (b), Rule 41 Rule 42, Rule 47, Rule 75** of the Court of Appeal Rules

and **section 3(3)** of the Appellate Jurisdiction Act. The applicants **Swaleh Breki Islam** and **Mash Bus Services Limited** substantively seek an order of stay of execution pending the hearing and determination of their appeal.

The application is founded on the grounds in the body of the motion, the content of the supporting affidavit of **Mrs. Susan Wakiaga** deposed on the 10<sup>th</sup> day of April, 2014 and oral submissions to court.

The brief background as gleaned from the paperwork before us is that, the respondents filed a fatal accident claim against the applicants vide Machakos HCCC No. 130 of 2009 **Winfreda Mutheu Kiamuko and another versus Swaleh Breki Islam and another**. A consent judgment was entered into between the parties apportioning liability at 80% as against the applicants and 20% as against the respondents. Judgment on assessment of damages was delivered by **Dulu, J** on the 7<sup>th</sup> day of June, 2012. The learned trial Judge allowed **Kshs. 7,239,900/=** as damages under the Fatal Accidents Act, applying a dependency ratio of one third; special damages of **Kshs. 123,386/=**, **Kshs. 100,000.00** under the Law Reform Act being **Kshs. 20,000.00** covering pain and suffering before death and **Ksh. 80,000/=** to cover loss of expectation of life. The total amount came to Kshs. 7,363,286/=. The applicants were aggrieved by that decision and lodged a notice of appeal dated 13<sup>th</sup> June, 2012 on 18<sup>th</sup> June, 2012 after requesting for proceedings for purposes of appeal on 14<sup>th</sup> June, 2012.

The applicants moved to the same venue, that is Machakos High Court and presented an application for stay of execution pending appeal. The respondents opposed that application. The merit disposal of that application resulted in the ruling by **B. Thurania Jaden, J** delivered on the 12<sup>th</sup> day of March, 2014 along the following lines:-

***“10. Liability having been settled by consent I am persuaded that the respondent can enjoy 2/3<sup>rd</sup> of the decretal sum while the rest awaits the outcome of the appeal. Consequently I make the following orders:-***

***(a) The applicants to pay 2/3<sup>rd</sup> of the decretal sum within the next 30 days from the date hereof. In default execution to issue.***

***(b) The applicants to provide security within 30 days from the date hereof for the remainder of the decretal sum.***

***(c) Costs in the cause.***

We have been informed that the applicants did not prefer an appeal against the ruling of **B. Thurania Jaden, J** aforementioned. In essence, it is still intact. Instead the applicant has moved to this forum by way of the application under consideration.

In his oral highlights to us, Mr. Mahugu, learned counsel for the applicants urged us to allow the application on the grounds that the applicants have satisfied the two principles required to be established before a party can earn a reprieve under the provisions of law on which the application is predicated. On arguability, counsel urged that the applicants are genuinely aggrieved as the learned trial Judge failed to reflect the 20% contributory blameworthiness against the respondents as against all the heads of damages awarded in the resulting judgment sought to be impugned on appeal; they have also shown not only a desire but seriousness in their quest for a second opinion on the learned Judge's assessment of damages by moving promptly to apply for a certified copy of the proceedings and also lodged a notice of appeal.

On the second ingredient counsel urged that the amount of the award is substantial; the respondents' means and ability to refund the same should the applicants succeed on their intended appeal is unknown. To the applicants, it is not enough for the respondents just to depose that they will be able to refund without exhibiting proof to that effect. Lastly that the applicants are willing to abide by any conditions that may be set by us for the conditional stay to be ordered should we deem fit so to order.

In response, the respondents opposed the application on points of law. The respondents concede that indeed the judgment sought to be impugned flowed from a consent order apportioning liability at 80% as against the applicants and 20% as against the respondent. They conceded that the learned trial Judge did not reflect the above apportionment of liability against the amount awarded against each head; the respondents are also aggrieved by the said judgment in so far as the learned trial Judge applied the one thirds ratio in determining loss of dependency instead of applying the two thirds ratio and they intend to put in a notice of cross-appeal.

The above notwithstanding, the respondents' learned counsel **Mr. Makau** urged us not to indulge the applicants because judgment having been entered on liability by consent there is no way the intended appeal can likely overturn in whole the learned trial Judge's judgment. All that the appellate Court can do for the applicant on appeal is to rework figures, an exercise which could have very well been accessed through an application for review or negotiation for a consent. Further that there is no way the respondents will be called upon to refund the entire decretal sum as what the applicants can possibly complain about is the excess covered by the learned trial Judge's failure to reflect the 20% contributory negligence against them. Lastly that since the applicants have failed to explain inability to comply with the learned Judge's order of conditional stay, their application should be dismissed in its entirety.

On case law, the applicants relied on the decision in the case of **Vishram Rauji Halai & Valji Muiji Patel versus Thornton & Turpin [1963] Limited CA NAI 15 OF 1990 (UR)** wherein stay of execution was granted where the respondent was unable to demonstrate ability to refund the decretal sum should the intended appeal succeed; the decision in **Githunguri versus Jumba Credit Corporation Limited No.2 [1988] KLR 838** for the proposition that Jurisdiction for this Court to grant a relief under **rule 5(2) (b)** of this Courts' Rules stems from a valid notice of appeal having been lodged in the matter;

(ii) the Courts jurisdiction under **rule 5(2) (b)** of this Courts Rules is purely discretionary and is available to a litigant who has demonstrated existence of the twin ingredients or principles namely that the intended appeal is not frivolous but arguable and secondly that if stay is not granted then either the appeal or the intended appeal as the case may be will be rendered nugatory; the decision in the case of **Maima Management Limited and another versus Heritage Bank Limited CA. Nai 215 of 1998 (86/98 UR)** wherein an order of stay was granted to preserve the substratum of the intended appeal.

The respondents on the other hand relies on the decision in the case of **David Morton Silvestein versus Atsangochesoni [2002] eKLR** for the proposition that in order to earn a reprieve under **rule 5(2) (b)** of this Courts Rules, a party has to establish both ingredients of the appeal or intended appeal being arguable on the one hand and on the other hand that the appeal or intended appeal will be rendered nugatory if the stay order is withheld; the decision in **Githunguri versus Jumba Credit Corporation Limited (No.2) supra.**

We have given due consideration to the above rival arguments and applied to them principles of case law cited above and we proceed to make the following findings with regard thereto:-

1. On the facts, the learned trial Judge's failure to apply 20% contributory blameworthiness against all the heads of damages awarded in favour of the respondents following a consent judgment as between the parties to that effect is arguable. It matters not that the issue may very well have been resolved by way of an application for review as the law permits the applicants to elect either to proceed by way of appeal or review. We therefore find that the applicant is properly before this seat of justice having lodged the requisite notice of appeal in time.
2. The general rule as we understand it is that by arguable is meant an appeal which is not frivolous but one in which a court of law properly directing its mind will rule that there is sufficient cause shown to enable the court call upon the respondent to respond to that appeal. See the case of **Joseph Gitahi Gachau & another versus Pioneer Holdings (A) Limited and 2others Civil Application No. 124 of 2008.** Secondly, in order to satisfy the ingredient on arguability, the appeal or intended appeal need not raise a multiplicity or any number of points. A single arguable point is sufficient. See the case of **Silverstein versus Chesoni [2002] 1KLR 867** and **Damji Pragji Mandaria versus Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2005.**
3. On the basis of the above, we are in agreement that the applicants have an arguable appeal. All that they are left with to satisfy is that the appeal will be rendered nugatory. It is common ground that liability was apportioned as between the disputants herein with the applicant agreeing to shoulder the greater part of the blame. It has therefore been correctly put by **Mr. Mutiso** that there is no way the entire judgment of the trial court will be overturned. The respondents will therefore end up with something which we are not in a position to determine at this juncture with precision as that is the preserve of the appellate bench as and when it will be seized of the matter.

4. The foregoing notwithstanding, we have not been told why the applicants found hardship in complying with the conditional stay granted by the High Court. Such explanation would have guided us in determining whether there is any other possible conditional stay order that may be made by us should we find it just to deem so. In the absence of such an explanation, we have no alternative but to state that although the applicants have succeeded in establishing one of the two pre-requisites required to be established under **rule 5(2) (b)** of this Courts Rules namely that the appeal/intended appeal is arguable, they have none-the-less failed to meet the threshold on the second but equally important ingredient of the appeal/intended appeal being rendered nugatory should it ultimately succeed. Since the rule is that both ingredients must be satisfied before we can grant the reprieve, we have no alternative but to fold our arms and withhold the relief sought. In the result, we dismiss the applicants' application dated 10<sup>th</sup> April, 2014 and lodged herein on the 14<sup>th</sup> day of April, 2014.

5. The respondent will have costs of the application.

**Dated and Delivered at Nairobi this 13<sup>th</sup> day of February, 2015.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original**

**DEPUTY REGISTRAR.**