



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 427 OF 2015

STANLEY KARANJA WAINAINA. 1ST APPELLANT

THERMOPACK LIMITED. 2ND APPELLANT

VERSUS

RIDON ANYANGU MUTUBWA. RESPONDENT

R U L I N G

By a Notice of Motion dated the 2nd day of December, 2015 the Appellants Stanley Karanja Wainaina and Thermopack Limited brought an application seeking from this court the following orders: -

1. Spent
2. That there be a temporary stay of execution of the judgment and/or decree in Nairobi CMCC No. 6044 of 2013 pending inter partes hearing of the application.
3. That the court be pleased to order stay of execution of the said judgment in Nairobi CMCC No. 6044 of 2013 delivered on 4th August, 2015 pending the hearing and determination of this appeal.
4. That in the alternative to prayer 3 above, the court be pleased to vary or alter the stay conditions issued by the trial court on 17th November, 2015 and grant stay of execution on condition that the entire judgment sum is secured either via issuance of bank guarantee, deposit in court or in any other manner directed by court.
5. That the costs of this application be in the cause.

The application is brought under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.

The application is premised on the following grounds.

- a. The Appellants were dissatisfied with the lower court's judgment and lodged this appeal challenging both the liability finding and damages award.
- b. The Respondent described himself as a motor vehicle rider. He has no other known source of income and there is no guarantee that he can refund the decretal sum (which is substantial) should the Appeal succeed.
- c. The Appellants, through the insurers of the subject motor vehicle at the material time, are ready and willing to furnish security by depositing the entire judgment sum in court, issuing a bank guarantee for the judgment sum or securing the same in any other manner as may be ordered by court.
- d. The lower court granted stay of execution on 17th November, 2015 on condition that the Appellants pay half of the decretal sum to the Respondent and to deposit the other half in court.

- e. The Appellants are dissatisfied with the lower court's condition that they pay half of decretal sum to the Respondent's Advocates. This appeal challenges both liability and damages award. Any amount paid to the Respondent's Advocates will be released to their client and will ultimately not be recoverable in the event the appeal succeeds. That will render the appeal nugatory.
- f. The Appellants urge this court to grant stay on condition that the entire judgment sum is secured as proposed above.

The application is further supported by the Affidavit of Winfred Mwikali Muoki sworn on the 2nd day of December, 2015.

In her supporting affidavit, the deponent who is the legal manager of Tausi Assurance Company Limited, who were the insurers of the 2nd Appellant's subject motor vehicle registration No. KAW 161K at the material time depones that her employer took up the defence of the suit and instructed the firm of Muchui and Co. Advocates to act for both the Appellant's who were the Defendants in the trial court and for this reason the employer has an interest in the appeal herein; since it would be called upon to satisfy any amount found due to the Respondent.

That the appeal arises from a judgment by Mrs. M. Chesang in Nairobi CMCC No. 6044 of 2013 on the 4th day of August, 2015 wherein the Appellants were dissatisfied and lodged this appeal challenging the findings on liability and quantum of damages.

That in the said judgment the learned magistrate entered judgment on liability for the Respondent at 100% and awarded general damages for pain and suffering at Ksh.1,200,000/-, special damages Ksh.99,976 and future medical expenses at Ksh.80,000/-.

The deponent further contends that the Respondent in his testimony before the lower court testified that he is employed as a Rider Messenger by Timsales Limited and he did not indicate any other source of income or avail evidence that he has financial ability to reimburse the judgment sum should the appeal succeed and in those circumstances, the appeal would be rendered nugatory.

She further depones that her employer is ready and willing to furnish security by way of a bank guarantee for the entire judgment sum by depositing the same in court or otherwise securing it in any other manner directed by the court pending the hearing and determination of the Appeal.

That the Appellants sought a stay of execution before the trial court which was granted on condition that the Appellants pay half of the decretal sum to the Respondents Advocates and deposits the other half in court within 21 days from the date of the ruling which was delivered on the 17th day of November, 2015. The Appellants are dissatisfied with the portion of the stay condition requiring the release of half of the decretal sum to the Respondent and have lodged this application for the court's consideration.

That according to her, half of the damages awarded in the sum of Ksh.689,988 is a substantial amount and the deponent and her employer are apprehensive that the Respondent will not be able to refund the same in the event the Appeal wholly succeeds and therefore urges the court to grant the application on conditions that they have proposed.

On his part, the Respondent has opposed the application by way of a replying affidavit sworn on the 8th day of December, 2015 wherein he depones that the application is made in defiance of the lower court orders which were made pursuant to the Appellant's application for stay of execution and which ordered payment of one half and security for the balance.

He further depones that he could furnish a bank guarantee for Ksh.689,988/- being half of the decretal sum herein and in the circumstances, no substantial loss is likely to be suffered by the Appellants in the event that the appeal succeeds. There was no dispute that an accident happened and he sustained serious injuries and the Appellants have not placed before this court their submissions or a copy of the judgment to enable the court to get a feeling of the case and in the premises, it is only fair to assume equal blame

and to sustain the order made by the lower court or make a similar order so that justice is done to him since he has a valid judgment whose fruits he should enjoy.

The submissions by Advocates for the respective parties mirror the depositions in their respective affidavits with each relying on the past decisions and the law.

In his submissions, the learned counsel for the Appellants/Applicants submitted that the Appellants are properly before the court and relied on the provisions of Order 42 Rule 6(1) of the Civil Procedure rules. The said Order provides: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may be for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the Appellate court to have the orders set aside”

He contended that the court has jurisdiction to entertain the application notwithstanding that an earlier one had been granted or refused by the court appealed from.

He submitted that the application is meritorious and satisfied the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules. He relied on Section 112 of the Evidence Act which provides that: -

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

That the Respondent was under an obligation to prove his financial status and demonstrate ability to refund the judgment sum and this failure must be construed against him. He asked the court to be persuaded by the ruling in HCCA No. 716 of 2003 **Johnson Mwiruti Mburu Vs Samuel Macharia** where Justice Njamu held that a Respondent’s possible inability to pay decretal amount was sufficient to justify grant of stay of execution pending appeal.

That though the Respondent in his Replying Affidavit alleges willingness to deposit a bank guarantee for the decretal sum, he has failed to attach bank statements or other documents proving that he has savings equivalent to the judgment sum or a portion thereof.

On his part, the learned counsel for the Respondent took issue with the Appellant’s application arguing that, it is a second application for similar orders as the trial court had heard an application for stay and granted the same on condition that the Appellants pay half of the decretal sum to the Respondent and deposits the other half in court. That though order 42 rule 6 (1) allows an applicant to apply for stay of execution in the appellate court, it does not mean that a party can ignore orders made in his favour and apply for fresh orders. The Respondent should obey the orders or demonstrate undue hardships or reasons for non-compliance which has not been done in this case. This in his submissions, is an abuse of the court process.

According to him, it is a cardinal rule of the law that court orders must be obeyed even if they are unfavourable and that they are binding until they are vacated and if the court is persuaded to issue fresh orders, they should be similar to the ones given by the lower court.

In his further submissions, he averred that the Respondent sustained injuries in the subject accident and the worst case scenario would be apportionment of liability at 50:50 and damages being reduced to some extent. He relied on the Court of Appeal decisions in Civil Appeal No. 252 of 2000 and HCCA No. 1044 of 2007 (2008) eKLR. He urged the court to find that the Respondent has offered to give a guarantee for full restitution and the applicants should not proceed as if the Respondent has no means. That this means

no substantial loss is likely to be suffered by the Appellants and therefore the application should fail on that ground alone.

I have carefully considered the materials before me and the submissions by the learned counsels for the respective parties.

The conditions for granting a stay of execution pending Appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules which are that: -

- i. The application must be made without undue delay.
- ii. That the Applicants must demonstrate that they will suffer substantial loss unless the order sought is granted.
- iii. 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.

On the first condition on whether the application was filed without undue delay, it is noted that the ruling by the trial court for the application dated 21st September, 2015 seeking stay of execution was delivered on the 17th November, 2015. The Application herein was filed on the 3rd day of December, 2015. This was a period of fifteen (15) days from the date of the ruling which, in my view, was reasonable time.

Regarding the second condition of substantial loss likely to be suffered by the Appellants if stay of execution is not granted; it was deponed that the Respondent is a motor cycle rider and that he did not indicate any other source of income. In response to this assertion, the Respondent in the replying affidavit depones that he is in salaried employment and he is ready and willing to deposit in court an irrevocable and renewable bank guarantee for half the decretal sum.

It is noted that though the Respondent alleges that he is willing to deposit a bank guarantee for the decretal sum, he has not attached any evidence by way of bank statements or other documents as proof that he indeed has the money. It is not enough for him to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & Another (UR)** stated: -

This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.

In my view, the Respondent was unable to discharge his burden.

On the third condition, the court has noted the offer by the appellants to furnish security by depositing the entire judgment amount in a bank account to be opened in the joint names of the two firms of Advocates or by securing the same in any other manner prescribed by the court.

Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules and argued that the Appellants had been granted a stay of execution by the trial court and in bringing the present application it was an abuse of the court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment in that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be

filed before another court as that would be an abuse of the court process or at best, *res judicata*. Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is.

In the upshot, I find that the application dated 2nd day of December, 2015 has merits and the same is hereby granted. The orders of stay of execution granted by the trial court on the 17th November, 2015 are hereby set aside.

The stay of execution, however, is granted on condition that the full decretal sum is deposited in a joint account in the joint names of both Advocates for the parties herein within 21 days from today's date failing which execution shall issue.

Dated, signed and delivered at Nairobi this 9th day of June, 2016.

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L NJUGUNA

JUDGE

In the presence

..... *for the Appellant*

..... *For the Respondent*