



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.90 OF 2019

SASAH GENERAL MERCHANTS LTD.....1ST APPELLANT

SAMWEL ODHIAMBO AKUMU.....2ND APPELLANT

VERSUS

MARY ATIENO OTIENO (*Widow sued as legal representative of the estate Of*

GEORGE OTIENO OPUDO – Deceased)..... RESPONDENT

(Being an appeal from original conviction and sentence in Civil case No.87 of 2018 of the

Chief Magistrate’s court at Oyugis dated 25th October, 2019 – Hon. J. P. Nandi, PM)

RULING

1. The application dated 25th January 2020 by the appellants is essentially for stay of execution of the ex-parte judgment made on 12th July 2019 in **Oyugis PMCC no.87 of 2018** in which the appellant had been sued for damages by the respondent on account of a road traffic accident which occurred along the Oyugis-Rodi road in which the appellants’ Mortor vehicle Reg. NO. KBT 209T and a cyclist who suffered fatal injuries.

After obtaining the necessary letters of administration “Ad Litem” respecting the estate of the deceased cyclist, the respondents filed the present suit against the appellants.

2. The suit was filed on 2nd August 2018 and on 19th November, 2018, judgment was entered against the appellants/defendants for want of appearance and for failure to file defence within the prescribed period. Thereafter, matter was fixed for formal proof and on 12th July 2019, the court delivered the impugned judgment. This was followed by a notice of motion dated 12th September, 2019 filed by the appellant seeking an order to set aside the exparte judgment and all consequential orders. However, in a ruling delivered by the court on the 25th October, 2019, the application was dismissed for want of merit. Being aggrieved by the ruling the appellant filed the present appeal on 11th March 2020 after having filed the present application on the 29th January 2020.

3. Apparently, the application was filed before the filing of the appeal notwithstanding that it was seeking stay orders pending the hearing and determination of the appeal against the ex-parte judgment delivered on 12th July 2019.

As it were, the appellants decided to put the cart before the horse or donkey.

Be that as it may, the inter-parte hearing of the application on 3rd February, 2020 did not materialize due to the unavailability of the original lower court file from Oyugis.

The next hearing date was set for 30th March 2020 but due to the onset of the current coronavirus (Covid-19) pandemic the matter stalled along with many others as the court operations were scaled down. It was revived on 18th June 2020 for directions after the operations of the court had partially scaled up. In that regard, the parties appeared for directions on 21st July 2020 when it was ordered that the matter be heard on 29th September, 2020 with the parties having liberty to file written submissions.

4. Both parties filed their respective submissions which have been given due considerations by this court in the light of the grounds in support of the application and those in opposition thereto.

The basic issue arising for determination was whether the appellant/applicants grounds for the application are satisfactory enough for this court's exercise of discretion in their favour. Indeed, the power to grant or refuse an application for stay is a discretionary one and **Order 42 , Rule 6 of the Civil Procedure Rules** is the applicable provision of the Law for that purpose. It is notable that such power was previously exercised in favour of the appellants by the trial court. This present application is therefore a "second bite of the Cherry" and is a reflection of the appellants' reluctance to allow the respondent enjoy the fruits of her judgment in the form of a decree for the total sum of kshs.2,215,000/- - together with costs and interests.

5. The appellant's fear that the amount is large such that payment thereof to the respondent would occasion them substantial loss especially if their appeal succeeds and the respondent fails to refund it, they implied that the respondent was incapable of refunding the amount since her financial capabilities are not known. However, they did not furnish necessary evidence to show that the respondent was indeed a person of straw who may not be able to refund the decretal amount if it was paid to her.

Besides, the payment of the decretal amount to the respondent would not amount to substantial loss if the amount in question cannot be said to be exorbitant or unreasonable considering the circumstances of the case and the claim arising therefrom. The arguability of the appeal of its high chances of success are not factors for consideration at this point. It cannot therefore be said that the appeal will be rendered nugatory if stay is not granted pending its hearing and determination. In any event an arguable appeal does not mean that the appeal shall definitely succeed (see, **Patel Vs E.A Cargo Hawling Services Ltd (1974) EA 75**)

6. The second factor for consideration in this application is security for the due performance of the decree. None was provided by the appellant even after being given an opportunity by the trial court to deposit the decreed amount in an interest earning account in the joint names of their advocates and those of the respondents. They have however indicated that they would be ready to furnish security.

Although their grounds for this application are unsatisfactory, it is nonetheless allowed in terms of prayer(3) on condition that the appellants shall deposit one half of the decretal amount in an interest earning bank account in the joint names of their advocates and those of the respondents in the next fourteen(14) days from the dates thereof, failure to which the stay order shall lapse forthwith and the respondent be at liberty to execute the decree.

Ordered accordingly.

(Delivered and signed this 3rd day of November, 2020)

J.R. KARANJAH

JUDGE OF THE HIGH COURT



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