



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CIVIL APPEAL NO. E30 OF 2021**

**KASSAM HAULIERS LIMITED.....APPELLANT**

**-VERSUS-**

**MEZGEBU GATACHEW MAMMO.....RESPONDENT**

**RULING**

1. Through a **Notice Of Motion** application dated **4<sup>th</sup> June, 2021**, the Appellant seeks for orders of stay of execution of the Judgment and Decree in **Voi Civil Suit No.256 of 2019 (Mazgebu Getachew Mammo -vs- Kassam Hauliers Ltd)** pending the hearing and determination of the instant appeal.

2. The Application is supported by the grounds on the face of it and in the Applicant's **Supporting and Supplementary Affidavit** sworn by its Director, **Mohammed Kassim Hussein** on **4<sup>th</sup> June, 2021** and **15<sup>th</sup> September, 2021** respectively. The Appellant avers that it is seeking stay since it has filed a declaratory suit against its insurer and in that suit it had filed an application seeking stay of execution and proceedings in **Voi Civil Suit No.256 of 2019** which application was dismissed for among other reasons that it had been filed by an advocate who was not properly on record, that the application had been filed after inordinate delay and lastly, that it would be in the interest of justice to bring the litigation to an end. The Applicant adds that the trial court erred in that finding since it had appointed two firms of advocates to represent it and there were two Notices of Appointment of the respective Advocates on record. That this is the basis of the instant appeal and the Appellant pleads with the court for the grant of the stay orders so that its goods which had already been proclaimed, are not attached and/or sold pending the appeal.

3. In his **Supplementary Affidavit**, **Mr. Mohammed Kassim** avers that the Appellant does not intend to set aside the Judgment in **Voi PMCC No.256 of 2019** or in any way disturb the award made therein but instead reiterates that the present Motion is premised on the provisions of **Order 42 Rule 6(1)** of the **Civil Procedure Rules**.

4. The Respondent opposed the application by filing a **Replying Affidavit** sworn on **30<sup>th</sup> August, 2021** by his advocate on record, **Mr. Augustus Khisa Wafula**. The learned counsel averred that the Plaintiff instituted **Voi PMCC No.256 of 2019** vide a **Plaint** dated **28<sup>th</sup> August, 2019** and served all the pleadings and summons upon the Appellant on **3<sup>rd</sup> December, 2019** but the Appellant failed to enter appearance. Consequently, the Respondent sought for default Judgment which was later entered as prayed in the **Plaint** for the sum of Kshs.1,172,410/=. The Appellant was then served with Notice of Entry of Judgment and in response thereof, it filed an application through the **Firm of M/S Wandai Matheka** seeking to set aside the Judgment. However, no prayers were granted at the ex-parte stage. In the Respondent's view, the Appellant abandoned the Application and instead filed another application through the **Firm of M/S J. Mbugua Mburu Associates** seeking to stay the said Judgment on grounds of the declaratory suit filed. However, the Respondent avers that since he is not privy to the insurance contract, the trial court was right in dismissing the application and the intended appeal similarly lacks merit.

5. Directions were issued that the application be canvassed by way of written submissions and the record shows that only the Appellant complied by filing submissions **15<sup>th</sup> September, 2021**. The Respondent on the other hand had not filed his submission by the time of writing this Ruling. I have also read through the Appellant's submission and they reiterate the assertions made in the application and the Supporting Affidavit as summarized above that I need not to repeat the same here.

**Analysis and Determination**

6. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed. I find the only issue for determination is whether stay execution can be granted as sought or better still, whether the court can issue an order staying the Judgment and Decree in **Voi Civil Suit No.256 of 2016** pending the hearing and determination of the present appeal.

7. In the instant case, it is not in dispute that the Appellant/Applicant is the **Judgment Debtor** in **Voi PMCC No.256 of 2016 (the primary**

*suit*) whereas the Respondent is the **Decree Holder**. It then follows that there is a valid Judgment in favour of the Respondent that the Appellant/Applicant is legally liable to settle. The Appellant/ Applicant has also expressly stated that it does not wish to appeal against that Judgment but intends to pursue an application for grant of stay of execution of the Judgment pending the determination of the declaratory suit. In that connection, the provisions of **Order 42 Rule 6** of the **Civil Procedure rules** which apply to an application for stay of execution of a decree subject of an appeal is inapplicable in relation to the **Judgment** entered on **16<sup>th</sup> January, 2020** but only to the Ruling dated **2<sup>nd</sup> June, 2021** which is the subject of this appeal.

8. In addition to that, the Appellant/Applicant has submitted that it will suffer substantial loss if the stay sought is not granted since the Respondent will carry on with the execution process by attaching its properties.

9. Given the facts of this case, I take the view that whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the Insurance Policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly. Therefore the Respondent in this case is not barred by the declaratory suit from executing against the Appellant directly.

10. I also seek the guidance laid in the case of **Butt –vs- Rent Restriction Tribunal [1979]**, where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent appeal proceedings. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge’s discretion. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion on whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

11. In addition to that, in the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2012] eKLR**, that:-

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

12. It therefore follows that the assertions by the Appellant/Applicant that the process of execution is likely to be put in place or that its properties are likely to be attached is not in itself a basis of granting the orders of stay as sought. In my view, purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. In that connection, having found the Judgment in the primary suit is not the subject of the present appeal, I see no basis for granting of stay of execution as sought.

13. In the upshot, I find that the application dated **4<sup>th</sup> June, 2021** is void of merit and dismiss the same with costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**No appearance for and by either party**

**Court Assistant - Gitonga**