REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 270 OF 2018

(Being an Appeal from the Judgment of Hon. F. Kyambia (PM) in Mombasa CMCC No. 1243 of 2013 delivered on 23/11/2018)

AWALE TRANSPORTERS CO. LTD......APPELLANT

VERSUS

KENNEDY KAUNDA ODINGO..........RESPONDENT

R U L I N G

Introduction

1. The Applicant herein moved this court vide an application dated 9.7.2020 seeking for the following orders: -

a. Spent

b. That this Court be pleased to stay execution of the Judgment delivered on 23 November, 2018 by Hon. F Kyambia, PM in CMCC NO. 1243 of 2013, pending hearing and determination of this Application inter-partes.

c. That this Court be pleased to stay execution of the Judgment delivered on 23 November, 2018 by Hon. F Kyambia, PM in CMCC NO. 1243 of 2013, pending hearing and determination of the instant Appeal.

d. That costs of the Application be in the cause.

2. The application was premised on the grounds on the face of the Application and supported by the Affidavit sworn on 9/7/2020 by **Mohamed Sheikh Farah,** who is the Applicant's Claims Manager. He avers that Judgment was entered in favour of the Respondent in CMCC NO. 1243 of 2013. Being aggrieved by the said decision, the Applicant sought a stay of execution of the same pending the lodging of an Appeal, which Appeal was filed on 14/12/2018 and subsequently amended on 26/7/2019.

3. The deponent avers that the Respondent's agent, Ms. Swift Auctioneer has proclaimed the Appellant's movable assets with the aim of selling them via public auction and unless orders of stay are granted the Respondent will actualize its threat through its appointed auctioneer.

4. The application was opposed vide a Replying Affidavit sworn on 15/7/2019 by **Bonface Otieno**, who is the Respondent's advocate. He avers that the Appellant already made an application for stay in the lower Court on 18/12/2018 seeking stay-pending Appeal and a ruling to the Application was delivered on 28/6/2019 whereby the Appellant was granted a conditional stay. However, to date the Appellant is yet to comply with the conditions that were set by the court. Further, the Respondent avers that the Appellant has failed to satisfy the provisions of **Order 22, Order 40 rule 1(a) and order 42 rule 6(1) and 2(a) of the Civil Procedure Rules** since the Appellant has not demonstrated any danger or threat of execution, there has not been any decree extracted by the Respondent and/or any Application for execution, no substantial loss has been demonstrated and the Appellant has failed to show that it has an arguable Appeal that would be rendered nugatory if stay is not granted.

5. The Respondent avers that the Application for stay is an abuse of the Court process, malicious and vexatious and only designed to keep the respondent away from the fruits of his judgment. Consequently, if this Court is inclined to grant the Applicant stay of execution, then the Appellant ought to be ordered to deposit the decretal amount in a joint interest earning account.

Determination

6. I have considered the affidavit evidence, the annexures thereto and submissions by both parties' advocates on record including the relevant applicable law and precedents relied upon.

7. The first issue for determination is whether on the evidence and material placed before court, the Applicant has satisfied the conditions upon which a stay of execution pending hearing of an Appeal can be granted.

8. Order 42 rule 6(1) of the ***Civil Procedure Rules*** provides as follows:

> **"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 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside."**

9. In the case of **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR,** it was held that:

> **"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."**

10. From the foregoing, I find that **Order 42 rule 6 (1) of the Civil Procedure Rules** provides jurisdiction to stay execution pending appeal to both the trial court and the appellate Court. Therefore, an appellate court may consider an application for stay pending hearing and determination of the appeal.

11. Turning to the second issue of the granting of an order for stay of execution pending appeal, this court is under a duty to balance the interests of the parties taking into account the fact that an appellant has undoubted right of appeal whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason.

12. **Order 42 Rule 6(2) of the Civil Procedure Rules** provides as follows: -

> **"No order for stay of execution shall be made under subrule (1) unless-**
>
> > **a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
> >
> > **b. 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".**

13. In the case of **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

14. Nevertheless, in light of the overriding objective stipulated in Sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer limited to the foregoing provisions. Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. When confronted with such circumstances, Courts ought to consider the twin overriding principles of proportionality and equality of arms, which are aimed at placing the parties before the Court on equal footing. And in exercising its discretion, this Court should always opt for the lower rather than the higher risk of injustice. See case of **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

Substantial loss

15. The decretal sum herein was Kshs 1,062,804= as per the Warrants of Attachment. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Means to demonstrate his ability to refund the Appellant the money in the event it is successful in its appeal. In the case of **G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this very court held as follows:-**

> **"It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful."**

16. In the absence of proof that the Respondent would be able to refund the Appellant the decretal sum without any hardship, this court was satisfied that the Appellant would suffer substantial loss. The Appellant had thus satisfied the first condition of being granted a stay of execution pending appeal.

***Filing* the Application for stay without undue delay**

17. In the case of **Jaber** ***Mohsen Ali & another v Priscillah Boit & another E&L NO. 200 OF 2012[2014] eKLR*** it was stated:

> **"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."**

18. It is noteworthy that the decision the Appellant wished to appeal against was delivered on 23/11/2018, an Application for stay was made on 18/12/2018, a ruling delivered on 28/7/2019 granting the Appellant a conditional stay, and when the Appellant could not comply, an Application for review of the lower Court ruling on stay was made on 28/6/2019. However, the said review was dismissed vide ruling delivered on 31/1/2020. It is noteworthy that the present application was filed on 9/7/2020, which is a delay of more than five months after the Applicant request for review was dismissed and there has been no explanation proffered by the Applicant pertaining to the delay of more than five months in bringing the Application for stay of execution. Consequently, this Court is satisfied the second condition for the granting of an order for stay of execution pending Appeal has not been met by the Applicant.

19. Finally, the Appellant has not indicated whether it was ready and willing to comply with any order and/or direction as regards security for the due performance of the decree. This can deal a fatal blow to its application for the reason that the court could impose any conditions on security as would be ultimately binding on it for the due performance of decree and/or order.

20. In the case of **Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000**, it was held that: -

> **".........Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously." (Underlining provided)**

21. I find and hold that the instant Application is a ploy by the Appellant to deny the Respondent the fruits of his Judgment. The upshot is that applying the above principles, I hereby disallow the application before me and dismiss it with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 25th day of January, 2021.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes