



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 30 OF 2020

AVIC INTLBEIJING (EA) CO. LIMITED.....APPELLANT/APPLICANT

VERSUS

MELLOW TRADERS AUCTIONEER.....1ST RESPONDENT

UNITOUCH SECURITY SERVICES LIMITED.....2ND RESPONDENT

(Application for stay of execution of the decree/judgement of Hon. Kasavuli (SRM) in Mavoko CMCC No 141 of 2017 delivered on 9th March 2020).

RULING

1. The Appellant's/Applicant filed an application by way of Notice of Motion dated 30th September, 2020 seeking the following Orders:

i. **Spent.**

ii. **THAT** this Honorable Court be pleased to grant stay of execution of the judgement of the trial Court delivered on 9th March, 2020 against the Appellant/Applicant pending the hearing of the appeal herein **Machakos Hcca No. 30 of 2020, Avic Intl Beijing (EA) Co. Limited –Vs- Mellow Traders Auctioneers & Unitouch Security Services Limited.**

iii. **THAT** costs be in the cause.

2. The background of this Application is that, judgment in the matter sought to be appealed against was delivered on 9th March, 2020 and the ruling of the trial Court delivered on 28th September, 2020 in favour of the 2nd Respondent against the Applicant and that the Applicant being aggrieved by the said judgment and ruling lodged an appeal at the Machakos High Court through a Memorandum of Appeal dated 2nd April, 2020 and filed on 6th April, 2020. Further, that there is high and probable likelihood of execution of the said judgment in the absence of Stay Orders by this court. The Appellant/Applicant has an arguable appeal that raises serious triable issues and thus the need to allow the determination of the appeal on merit and that any execution herein will render the Appellant/Applicant's appeal nugatory; that the Appellant/Applicant stands to suffer irreparable loss and or harm if the Orders sought are not granted; that the Appellant/Applicant is ready and willing to deposit security as required by law; that no prejudice will be occasioned upon the 2nd Respondent if the Orders sought herein are granted save that the correct position of the law and proper dispensation of justice shall be done once and for all; and that it is in the wider interest of justice that the Orders sought herein are granted.

3. The application is further based on the supporting affidavit sworn by Morris Mutinda Shem, Accountant of the Appellant/Applicant wherein he reiterated the grounds in support of the application, annexing copy of the filed Memorandum of Appeal.

4. In the said affidavit, the Accountant of the Appellant/Applicant further deposes that the Application has not been delayed since the previous application for stay of execution before the trial Court was dismissed on 28th March, 2020. Further, that the 2nd Respondent is in a position to deposit the decretal sum should the same be required.

5. The application is opposed by the 2nd Respondent, Edward Ooro Ouma, as authorized by the Board of Directors of the 2nd Respondent, who filed a Replying affidavit sworn on 30th November, 2020 deposing in contention that the application is fatally defective and lacks merit and should be dismissed with costs. The 2nd Respondent deposes that the claim against Appellant/Applicant was on account of services rendered in 2016 under a contract of service and that the Appellant/Applicant's application for stay in the trial Court was dismissed. It was further averred that the offer of security by the Appellant/Applicant for the due performance of the decree should be declined as it amounts to

a further delay to satisfy the decree.

6. The application was canvassed by way of written submission.

7. The Appellant/Applicant submitted that it has filed an appeal against the decree of the trial Court and that should the orders sought not be granted, the appeal would be rendered nugatory. It was further submitted that the 2nd Respondent will in no way be prejudiced if the orders sought are granted and that the applicant is ready and willing to deposit the decretal sum in a joint interest earning account. Counsel attributed the late filing of the delay of execution by the 2nd Respondent to the Covid-19 pandemic in the country, which led to the scaling down of the activities, in which the interim Orders which had been granted by the trial Court on 24th June, 2020 were discharged on 28th September, 2020.

8. The Appellant/Applicant submitted that it will suffer substantial loss in the event stay is not granted since it has filed an appeal which has high chances of success. The Appellant/Applicant relied on the **High Court case of Antoine Ndiaye versus African Virtual University 2015 eKLR**. The Appellant/Applicant finally submitted that the application was brought in good faith and in the interest of justice.

9. Opposing the application, the 2nd Respondent's counsel submitted that grant of stay in case of Appeal subjects the 2nd Respondent to further irreparable loss on account of the Appellant/Applicant's actions. The 2nd Respondent will not be in any position to refund the amount already lost and costs in the unlikely event of the success of the appeal. The 2nd Respondent further relied on the case of **Nyahururu ELC No. 116 (A) of 2017 (Formerly Nakuru ELC No. 495 of 2013) Mary Wambui Waweru vs. Serah Wanja Wachira (sued as the Personal Representative of the Estate of Lyster Wachira Mwangi (Deceased))** where the court observed that the financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonest miscreant without any form of income.

10. The 2nd Respondent further submits that even without going to the merit of the Appeal, there is no evidence that the Applicant will suffer substantial loss as it is not the duty of the Court to deny successful litigants the fruits of his/her judgement considering that in this situation the case was commenced by the Appellant/Applicant and successfully defended and counterclaim upheld.

11. After considering the rival submissions, I find that the only one issue for determination is whether the order of stay of execution should be granted.

12. Grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules**, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(2) No order for stay of execution shall be made under sub-rule (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.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

13. An Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in **Order 42 Rule 6(2)**, aforementioned:

i. that substantial loss may result to the applicant unless the order is made,

ii. that the application has been made without unreasonable delay, and

iii. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

14. In **Butt vs. Rent Restriction Tribunal [1979]**, 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:

i. *That the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.*

ii. *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.*

iii. *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.*

iv. *Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

15. As to what substantial loss is, it was observed in **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.”

16. In the instant case, it is the Appellant/Applicant's case that the loss occasioned upon it was as a result of negligence on the part of the 2nd Respondent. The 2nd Respondent on their part, states that it has suffered on account of the Appellant/Applicant's failure to pay for services rendered, and any further delay will subject the 2nd Respondent to substantial loss unjustifiably.

17. The court, in **RWW vs. EKW [2019] eKLR**, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The 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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

18. I have looked at the judgement and subsequent ruling of the trial Court on the stay of execution taking into consideration the observations of Hon. Kasavuli. The appellant, on its part, states that the execution of the decree will lead to substantial loss and that the 2nd Respondent being ready and in a financial position to refund the decretal amount if the appeal succeeds. It would be in the interest of justice for the order of stay sought **NOT** to be granted on the basis that the Appellant has **NOT** demonstrated that it will suffer substantial loss if the same is not granted.

19. In **Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

20. From the above decision, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Looking at the circumstances of the case and the fact that the parties herein are both of financial capability, it would be in the interest of justice that security be imposed on the Appellant. Suffice to add that the Respondents had lodged a counterclaim against the appellant's claim in the lower court and hence an order that the decretal sums be deposited into an interest earning account in the joint names of the parties' advocates would be appropriate in the circumstances as the parties canvass the appeal since their rival standpoints will be kept on the same footing with no party stealing a match against the other. The successful party will of course access the monies together with interest accrued. The worry of delay in the determination of the appeal is cured by the fact that the appeal can easily be fast tracked by way of written submissions and hence the same can easily be wrapped up within the shortest time possible.

21. In the upshot, the application, dated 30th September,2020 is allowed in the following terms:

a) The Appellant is hereby granted an order of stay of execution of the decree in Mavoko Cmcc No. 141 of 2017 pending the determination of the appeal on condition that the entire decretal sums be deposited into a joint interest earning account in the joint names of the advocates for the parties within thirty (30) days from the date hereof failing which the stay shall lapse.

b) The costs hereof shall abide in the appeal.

It is so ordered.

Dated and delivered at **Machakos** this 25th day of **February, 2021**.

D. K. Kemei

Judge