



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 47 OF 2020

KENYA COACH INDUSTRIES LIMITED....APPELLANT/APPLICANT

-VERSUS-

STANLEY MUSEMBI.....1ST RESPONDENT

MAUREEN WAVINYA MUSAU.....2ND RESPONDENT

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1. This ruling is precipitated by the Notice of Motion dated 2nd September, 2020 brought by the appellant/applicant herein and supported by the grounds set out in its body and the facts stated in the affidavit of **James Omondi**, the Human Resource Manager of the applicant. The applicant sought for an order for stay of execution of the judgment delivered by the trial court on 6th December, 2019 in Milimani CMCC NO. 6196 of 2017 pending the hearing and determination of an appeal against the said judgment.
2. The 1st respondent opposed the Motion by filing the Grounds of Opposition dated 10th September, 2020 putting forward the following grounds:
 - a. THAT there is an inordinate delay in presenting the application.
 - b. THAT the appeal will not be rendered nugatory as the 1st respondent is sufficiently endowed and capable financially.
 - c. THAT the application is bad in law.
3. The 1st respondent also put in a replying affidavit he swore on 10th September, 2020 to which **James Omondi** rejoined with a supplementary affidavit sworn on 24th November, 2020.
4. The parties were directed to file and exchange written submissions on the Motion. The 2nd respondent did not participate at the hearing of the Motion or file any responding documents.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and resisting it; the Grounds of Opposition and the contending submissions plus the authorities cited.
6. A brief background of the matter is that the 1st respondent instituted a suit against the applicant and the 2nd respondent vide the plaint dated 24th August, 2017 and sought for the sum of Kshs.760,000/ plus cost of the suit and interest thereon for breach of contract. The suit was defended by both the applicant and the 2nd respondent.
7. Upon hearing the parties, the trial court entered judgment in favour of the 1st respondent and against the applicant and 2nd respondent as prayed in the plaint.
8. According to the record, the 2nd respondent applied for a stay of execution before the trial court vide the application dated 22nd January, 2020 and which application was dismissed with costs by way of the ruling delivered on 8th May, 2020.
9. On the instant Motion, the question as to whether the applicant's appeal is arguable, which issue was addressed both by the applicant and the 1st respondent, cannot be determined by this court since it is the preserve of the Court of Appeal.

10. Before considering the merits of the appeal, I observed that the 1st respondent has in its submissions challenged the competency of the appeal on the ground that it was filed out of time and without leave of the court.

11. However, from my perusal of the Grounds of Opposition and the replying affidavit of the 1st respondent, I observed that the above issue was not at all raised therein.

12. The law is well settled that submissions do not constitute evidence and that a party cannot be heard to argue its case or present its evidence through submissions. Such position was stated by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** thus:

“Submissions cannot take the place of evidence...Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.”

13. For that reason, I am not bound to consider the argument raised concerning competency of the appeal and will limit myself to the issues raised in the respective affidavits.

14. On the merits, the guiding provision in considering an application seeking an order for a stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following conditions in determining an application for stay:

i. The application should have been brought without unreasonable delay;

ii. The applicant must demonstrate the substantial loss to be suffered; and

iii. There must be provision of security for the due performance of the decree or order being appealed against.

15. The above conditions were similarly laid out in the case of **G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR** cited in the applicant’s submissions.

16. On the first condition, the applicant on the one hand avers and submits that the Motion has been timeously filed. The 1st respondent on the other hand stated that there has been an inordinate delay in bringing the instant Motion.

17. From my study of the record, I note that the impugned judgment was delivered on 6th December, 2019 whereas the Motion was brought close to nine (9) months later. In my view, while there has been a delay in filing the instant Motion, I do not think such delay to be inordinate.

18. Under the second condition on substantial loss, it is apparent from the Motion that the applicant is anxious that unless an order for a stay of execution is granted, the 1st respondent will proceed to execute the decree.

19. In contrast, the 1st respondent is of the view that the applicant is simply intent on delaying him from enjoying the fruits of his judgment and that he is a man of means, therefore capable of refunding the decretal sum in the event that the appeal succeeds. In retort, the applicant avers that the 1st respondent has not produced any documentation to support his statement that he runs a thriving business with high returns.

20. The courts have time and again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal’s analysis in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held thus:

“Once an applicant expresses a reasonable fear that 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...”

21. The above rendition was reaffirmed by the court in the case of **G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another** (supra) when it held that in the absence of any affidavit evidence or proof of ability to pay back the decretal sum, the court was convinced as to the substantial loss that would result to the applicant therein.

22. In the absence of anything to indicate or ascertain the 1st respondent’s financial capacity here, I am satisfied that the applicant has reasonably demonstrated the manner in which it stands to suffer substantial loss should the order for a stay of execution be denied.

23. In respect to the third and final condition, the applicant expressed that it has been undergoing financial difficulties which may render it unable to comfortably deposit the decretal sum. In response, the 1st respondent contends that in the absence of security for the due performance of the decree, he has no protection in the appeal.

24. It is clear from the provisions of **Order 42, Rule 6(2)** (supra) that the provision of security for the due performance of the decree is a condition for the granting of an order for a stay of execution.

25. Consequently, the Motion dated 2nd September, 2020 is found to be meritorious and it is allowed, therefore giving rise to a grant of the

following orders:

a. There shall be a stay of execution of the judgment delivered on 6th December, 2019 on the condition that the applicant deposits the decretal sum of Kshs.760,000/ in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 60 days from today, failing which the order for stay shall automatically lapse.

b. Costs of the Motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021

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A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Omondi for Mr. Achach for the Appellant/Applicant

Mr. Muoki for the 1st Respondent

..... for the 2nd Respondent