



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

INSOLVENCY PETITION NO.1 OF 2019

BORDERLESS TRACKING LIMITED..... PETITIONER

-VERSUS-

GLOBAL TRUCKS LIMITED.....RESPONDENT

R U L I N G

1. This is a ruling on the petitioner's Notice of Motion dated 21/10/2020. It was brought under *Article 159 (2) (d) of the Constitution of Kenya, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 10, Rule 11 and Order 51 Rule (1) of the Civil Procedure Rules.*
2. The petitioner sought a stay of the taxation of the respondent's bill of costs dated 25/6/2020 pending the hearing of **Civil Appeal No. E222 of 2020**. The grounds upon which the application was premised upon were set out in its body and in the supporting affidavit of **Elizabeth Waweru** sworn on 21/10/2020.
3. These include: that by an application dated 18/3/2019, the respondent sought the striking off of the petition on the ground that the Statutory Demand was signed by the Deputy Registrar of the High Court.
4. That by a ruling delivered on the 27/4/2020, **Kasango J** allowed the application and struck out the Petitioner's petition. The petitioner then proceeded and filed an appeal against the said order, to wit, Civil Appeal No. E222 of 2020.
5. Subsequently, the respondent filed its party and party bill of costs dated 25/6/2020 which was then listed for taxation on 26/10/2020. The petitioner contended that if the bill proceeded to taxation, his appeal would be rendered nugatory. That the respondent shall proceed with execution on the costs and thereby prejudicing him.
6. The respondent did not file any document in opposition to the application. On 19/1/2021, the Court directed that the parties do file submissions. However, as at the time of writing this ruling, only the petitioner had filed its submissions.
7. The court has considered the pleadings and submissions on record. This is an application for stay of execution pending appeal.
8. The jurisdiction of the Court is to be found in **Order 42 Rule 6 of the Civil Procedure Rules**. The principles applicable are that; the application should be made timeously, the applicant should demonstrate that he will suffer substantial loss if the stay sought is not granted and the applicant should provide security for the performance of the decree that might be found to be ultimately binding on him.
9. On time, the petitioner cannot be said to have been timeous. The bill of costs was filed on 25/6/2020 and taxation had been scheduled for 26/10/2020. The present application was filed on 21/10/2020. Whichever angle one looks at it, there was inordinate delay in the filing of the application. The petitioner waited from June to October 2020 before lodging the application.
10. On substantial loss, the petitioner submitted that if the bill of costs are taxed, the respondent may proceed with execution thereby rendering the appeal nugatory. That that will subject the petitioner to financial loss. Further, that the respondent is already indebted to the petitioner to the tune of USD 58,387.728 which was the main reason for filing the insolvency petition against the respondent. That in the premises, if the stay is not granted the appeal will be rendered nugatory as it touches on the debt owed by the respondent.
11. The respondent is alleged to owe the petitioner a sum of USD 58,387.728. It succeeded in having the petition against it struck out. However, if the taxation is proceeded with, the costs assessed and recovered from the petitioner, if the appeal succeeds, there is nothing to show that the respondent will be able to repay the same.
12. In **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] Eklr**, the Court of Appeal held: -

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”

13. And in **RWW v EKW [2019] Eklr**, the court held: -

“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.”

14. In the present case, the respondent is said to owe the petitioner in excess of US\$ 58,000/-. There is no evidence that any costs assessed could be repaid if the appeal is successful. The respondent did not oppose the application. I hold that the petitioner has satisfied the second requirement.

15. On the third limb, **Rule 6(2) of Order 42** requires that an applicant should offer security. I note that the petitioner did not offer any security as required. Security is the cornerstone of any stay order. This should be fatal to the application. However, provision is in the discretion of the Court. The application having not been opposed, I am not prepared to order any.

16. Accordingly, the application dated 21/10/2020 is allowed in terms of prayer 4. The costs to be in the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2021.

A. MABEYA, FCI Arb

JUDGE