



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC CIVIL APPLICATION NO E 007 OF 2020

H YOUNG & COMPANY (E. A.) LIMITED.....APPLICANT

VERSUS

YADINI HOLDINGS LIMITED.....RESPONDENT

RULING

1. The Notice of Motion dated 10th November 2020 is filed by **H. Young & Company (E. A.) Ltd**, (hereafter H. Young). By that application H. Young seek leave to file an appeal out of time against the judgment of **Thika Chief Magistrate's Court Civil Case No.665 of 2018**. H. Young also seeks stay of execution of that judgment pending that intended appeal. Further H. Young seek the release of attached goods in execution of the decree of that judgment.

2. That application is supported by the affidavit of the Legal/Officer of H. Young, namely **Kelvin K. Ngetich**. He deponed by that affidavit that H. Young become aware the Thika Chief Magistrate's judgment, which as delivered on 8th October 2020, when it was served with the notice of attachment in execution of the decree. The legal officer further alluded to two applications filed on its behalf before the Thika Chief Magistrate's Court seeking orders for leave to change the advocates who represented H. Young which order was granted by that court and also the applications sought stay of execution of the decree. The legal officer stated that the decree holder of the Thika Chief Magistrate's case, **Yadini Holdings Ltd.** (hereafter Yadini) attached its motor vehicles, and hence why orders are sought from this court for the release of those motor vehicle.

3. Yadini is opposed to the prayers sought by H. Young.

4. The affidavit of Yadini, in opposition to the application is sworn by **Anthony Gikaria**, the learned counsel of Yadini. He deponed that H. Young failed to disclose to this court, when it approached this court *ex parte*, that it had filed and withdrawn the applications before the Thika Chief Magistrate. This non-disclosure, according to the counsel of Yadini, was evidence of bad faith and an abuse of the court process by H. Young. The view of the said Learned Counsel was that the present application before this court was *res judicata*, in view of the previous applications before the Thika Chief Magistrate's Court. Further the learned advocate of Yadini deponed that the *ex parte* orders made by this court were made without Yadini being given an opportunity to be heard.

5. The Learned Counsel of Yadini deponed that H. Young had failed to show that it deserves its prayer for leave to file an appeal out of time, because H. Young was served with the notice of delivery of the Thika Chief Magistrate's Court judgment and was served with notice of entry of that judgement.

ANALYSIS AND DETERMINATION

6. I have considered the parties affidavit evidence.

7. There is no doubt that every party who is aggrieved by A Judgment/Ruling whether of The High Court or the Magistrate's Court has a right to file an appeal. That right is preserved by the **Constitution**. Under **Article 165(1) (e)** of the Constitution it is provided that the jurisdiction of the High Court is both original on appellant as conferred on it by legislation. **Article 164 (3)** of the Constitution provides that the Court of Appeal has jurisdiction to hear appeals from the High Court.

8. This jurisdiction is further set out in Section 65(1) of the **Civil Procedure Act Cap. 21** which provides that an appeal from Magistrate's Court and Kadhi Court lies in the High Court. Section 3 of the Appellant Jurisdiction Act also provides that the Court of Appeal has jurisdiction to hear appeals from the High Court and other Tribunals prescribed by an Act of Parliament. H. Young clearly wishes to exercise that right of appeal.

9. **Section 79 B of the Civil Procedure Act** does provide that the High Court may, before hearing the subordinate court's appeal, summarily reject such an appeal if the judge does consider that there is no sufficient grounds for interfering with the subordinate court's ruling/judgment.

10. The stage at which this court is empowered to reject an appeal under S. 79 B has not yet arisen in this matter. Rejection by the High Court is done when the appeal has been filed and during the time direction for the hearing of that appeal are given. It is for that reason I decline to consider the argument raised on behalf of Yadini that H. Young's draft memorandum of appeal does not disclose any reasonable appeal that can succeed. The time for considering whether the appeal has shown sufficient ground is not now.

11. H. Young has invoked Order 42 Rule 6(1) of the Civil Procedure Rules (hereafter the Rules). That Rule is in the following terms:

“(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 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.” (underlining mine)

12. A careful consideration of the above Rule shows that a party is permitted to file an application for stay of execution, whether or not such stay is refused or granted, by the court appealed from. That Rule, therefore, recognizes that an application before the court appealed from, and whether such a court refuses or grants stay of execution, a party is at liberty to file an application to stay execution of the decree to the court appealed to. The position hereof is that H. Young first filed applications for stay of execution of decree before the Thika Chief Magistrate's court. While those applications were yet to be heard inter partes H. Young filed, before this court, the present application under consideration. On filing this application H. Young filed before Thika Chief Magistrate's Court notice of withdrawal of its pending applications, for stay of execution.

13. Yadini argued that the above scenario leads the present application before this court to be *res judicata*.

14. Section 7 of the Cap. 21 provides that a court shall not hear any suit or issue which has finally been decided by a competent court. The Court of Appeal in the case **Accredo A.G and 3 others v Steffano Uccelli and Another (2019) eKLR** cited a Supreme Court's decision which considered the test to be applied in determination whether a matter is *res judicata* as follows:

*“The test for determining the application of the doctrine of res-judicata in any given case is spelt out under **section 7 of the Civil Procedure Act**. In **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:*

“(a) The suit or issue was directly and substantially in issue in the former suit.

“(b) That former suit was between the same parties or parties under whom they or any of them claim.

“(c) Those parties were litigating under the same title.

“(d) The issue was heard and finally determined in the former suit.

“(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

The foregoing elements apply in equal measure to applications.”

15. It is crystal clear when one considers the above elements that the test for *res judicata* fails to be met in this matter. This is because the application before Thika Chief Magistrate's was not finally determined by that court. But even if it was finally determined, Order 42 Rule 6(1) exempts applications for stay of execution of decree from the doctrine of *res judicata*. That Rule 6 (1) provide liberty to a party who succeeds or fails to obtain stay of execution before the court appealed from to approach the court appealed to and seek exactly similar orders.

16. The plea by Yadini that the present application is *res judicata* fails for the above reasons.

17. The court in the case **HE -V- SM (2020) eKLR** while considering an application for stay of execution pending appeal had this to say:

“13. 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.

9. 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. It will however be noted that the court in considering an application for stay of execution pending appeal, the court should balance the rights of all parties: see **HE -V- SM** (supra).

19. The claim of Yadini before the Thika Chief Magistrate, which is the subject of the proposed appeal was as a result of damage caused to its eucalyptus trees, to coffee trees and the costs of fighting a fire which Yadini alleged were caused by the negligence of H. Young. The Thika Chief Magistrate’s Court determined that claim in favour of Yadini and awarded it damages amounting to KSh.3,451,683.00 plus costs and interest. H. Young has set out in its grounds in the draft Memorandum of appeal that the trial Magistrate erred in finding it was 100% liable for the loss Yadini suffered. H. Young also stated in that memorandum of appeal, amongst other grounds that Yadini did not prove it was negligent.

20. Bearing in mind that H. Young has a right to appeal the Magistrate’s decision but also being fully aware that Yadini has also a right to enjoy the fruits of its judgment I will order there be a stay of execution on condition that H. Young does provide security for the due performance of the decree. H. Young shall therefore within 30 days deposit in an interest earning account of both law firms of the applicant and respondent Ksh.3 million (THREE MILLION). To that end the amount deposited, if any, by H. Young into court following the ex parte order of this court of 17th November 2020 shall be released to H. Young. Since stay of execution is granted on the above stated conditions the attached goods, attached by **Carnelian Enterprises Auctioneers** shall be released on payment of the said auctioneer’s fees to be agreed and if not agreed to be taxed.

21. The final issue to determine is whether leave should be granted to file an appeal out of time. H. Young submitted that they were unaware of the judgment of Thika Chief Magistrate’s Court until the auctioneer approached it for attachment of its goods.

22. Although Yadini annexed a Notice of delivery of that judgment which was served on the then H. Young’s learned counsel, I note that although H. Young was indeed represented by that counsel Yadini proceeded to serve H. Young directly with the notice of entry of judgment. That service was through mail. I am of the view that, that service on H. Young was unsatisfactory for having been sent directly to H. Young when H Young had an advocate.

23. It is because of the above that I find H. Young has shown reasonable grounds why it was unaware of the entry of judgment against it and consequently why it failed to file its appeal within 30 days required under Section 78 G of Cap 21. Leave to file an appeal out of time is therefore granted.

CONCLUSION

24. In the end I grant the following orders.

a) Pending the determination of the yet to be filed appeal stay of execution of the judgment of Thika Chief Magistrate’s Court Civil Case No. 665 of 2018 is granted on condition that H. Young & Company (E. A.) Limited shall within 30 days from today’s date deposit into a joint interest earning account of both law firms of the parties hereof KSh.3 million (THREE MILLION). In default execution to issue.

b) The goods belonging to **H. Young & Company (E. A.) Limited** which were attached by **Carnelian Enterprises Auctioneers** shall be released, once the deposit is made as stated in (a) above, on H. Young Company (E. A.) Ltd paying the auctioneers’ charges to be agreed and in defaulted to be taxed.

c) H. Young & Company (E. A.) Limited is granted leave to file an appeal within 14 (FOURTEEN) days from today against the Thika Chief Magistrate’s Court judgment of 8th October 2020 in Civil Case No. 665 of 2018.

d) In default of filing such an appeal as set out in (c) above execution of Thika Chief Magistrate’s Court Civil Case No. 665 of 2018 shall issue.

e) If any amount was deposited into this court by H. Young & Company (E. A.) Ltd in obedience to the order of this court of 17th November 2020 such amount shall henceforth be released to H. Young & Company (E. A.) Ltd.

SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

For the Applicant – Omwanza (Mr.)

For the Respondent - Gikaria (Mr.)

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE