



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA

CIVIL APPEAL NO. 188 OF 2019

TYL LIMITED.....APPELLANT

VERSUS

FREIGHTWELL EXPRESS LIMITED.....RESPONDENT

RULING

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated **26<sup>th</sup> January, 2021**. The same is expressed to be brought under **Sections 1A, 1B, 3A and 79G** of the **Civil Procedure Act**, **Order 42 Rule 1, 2, 6(1) and (2)**, and **Order 51**, of the **Civil Procedure Rules**. By the Application, the Appellant/Applicant seeks the following orders: -

**1. Spent;**

**2. Spent;**

**3. Spent;**

**4. THAT there be stay of execution of decree issued on 21<sup>st</sup> March 2019 herein pending the hearing and determination of the appeal;**

**5. THAT the costs of this application be provided for;**

**6. THAT this Honourable Court be pleased to make such further or other orders as it may deem fit and just to grant.**

2. The Application was supported by an Affidavit sworn on **26<sup>th</sup> January, 2021** by **Boniface Mwaura**, the **Managing Director** of the Appellant.

3. The **Motion** is premised on the grounds that the instant application has been brought before court without any delay and the Appeal lodged herein has a good chance of success.

4. In the **Supporting Affidavit**, the Appellant avers that he will suffer substantial loss if stay is not granted and execution proceeds. He further reiterates that there are high chances that the Respondent may not be able to pay back the decretal amounts plus interest if the Appeal succeeds.

5. According to the Appellant, it is imperative that stay of execution be granted as they were condemned to pay Kshs.1,422,631.60 and Kshs.33,000,000/= in interest without being accorded the right to be heard by the trial court.

6. The Respondent opposed the Application by filing a **Replying Affidavit** sworn on **2<sup>nd</sup> February, 2020** by **D. Muyaa**, the Respondent's Counsel. She deponed that the Ruling being Appealed against was delivered on **20<sup>th</sup> August, 2019** and that it has taken the Appellant one year and five months to file the application herein. She has stated that no attempt has been made to explain why this application could not have been made earlier, and that it is a delaying tactic to deny the Respondent the fruits of the Judgment as was awarded by the trial court.

7. It is the Counsel's contention that if stay is granted, the Respondent will suffer prejudice by causing unjustified delay in the enjoyment of the fruits of the Judgment that was delivered by the trial court.

8. Further, the Respondent's Counsel further stated that the Appellant should not be granted stay of execution pending appeal as they have not satisfied the requirement for security for costs. Her view is that the amount of Kshs.33.3 million is still outstanding and that stay should not be issued to enable the Respondent execute.

9. In conclusion, the Counsel has urged this Court to dismiss the **Notice of Motion** application dated **26<sup>th</sup> January, 2021** with costs to the Respondent.

10. Following the directions given by the court on **3<sup>rd</sup> February, 2021**, the application has been canvassed by way of written submissions. The Appellant's/Applicant's submissions are dated **16<sup>th</sup> February, 2021** and filed on **17<sup>th</sup> February, 2021** whilst the Respondents submissions are dated and filed on **9<sup>th</sup> March, 2021**.

11. Parties relied on their written submissions in their authority.

### **Analysis and determination**

12. In determining the application notice dated **26<sup>th</sup> January, 2021**, I have considered all the pleadings and submissions by the parties together with the cited statute and case law. In my view, the only issue for determination is whether or not to grant the stay of execution pending appeal as sought by the Appellant.

**13. An application for stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010** which specify the circumstances under which the court may grant such Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -

**a. Substantial loss may result to the applicant unless the order was made;**

**b. The application was made without unreasonable delay; and**

**c. Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.**

14. On whether this application was brought without undue delay, I have considered the grounds presented and read through the submissions by either party. I find that the Order for which stay is sought was issued on **21<sup>st</sup> March, 2019** while the Ruling appealed against was read and delivered on **20<sup>th</sup> August, 2019**. The Memorandum of Appeal was lodged on **19<sup>th</sup> September, 2019** while this application for stay was filed on **27<sup>th</sup> January, 2021**. It is therefore evident that it took the Applicant almost two years to file the instant application, which in my view is un-reasonable. I find that no explanation has been tendered by the Applicant to justify this delay. This being the case, I find the delay by the Applicant in filing the application inordinate and unexplained.

15. On the issue of substantial loss, the Appellant has submitted that the subject matter before the Trial Court was for Kshs.1,422,631.60 but the Respondents were awarded over Kshs.33,000,000/= in interest on a matter that the parties were never heard on merit.

16. According to the Appellant/Applicant, the sum awarded in interest has resulted into a huge decretal sum which could lead to it closing shop. It states that it stands to suffer undue hardships and irreparable damage if the orders of stay of execution are not issued. Also, the Appellant is adamant that they will suffer a substantial loss as they may not be able to recover the Kshs.1,422,631.60 plus interest of Kshs.33,000,000/= from the Respondent in the event of success of the appeal as it is not privy to the resources of the Respondent, who have not also shown in their pleadings how they intend to repay the said amounts.

17. The court in the case of **National Industrial Credit Bank Limited -vs- Aquinas Francis Wasike and Another (UR) C.A. 238/2005** stated: -

**“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses 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 or loss...”**

**Further, the Appellant has argued that in awarding the Respondent Kshs.33,000,000/= in interest, the trial court went beyond its pecuniary jurisdiction of the lower court which is of Kshs.20,000,000/=.**

18. It is the Appellant's concern that the Respondent will commence execution of the decree to their detriment. The Appellant is convinced that should the decree be executed, their appeal will be rendered nugatory.

19. With regard to security for costs, the Appellant acknowledges that the same is at the discretion of the Court. In their submissions, the appellant has urged the Court not to impose security for costs as a condition for stay of execution pending appeal but stated that if the court were to impose any security, then that the same be on the principal amount which was the subject matter before the trial Court.

20. I have looked at the pleadings and submissions of the parties, both parties agree that the principal amount before the trial court was Kshs.1,422,631.60. The award of more than Kshs.33,000,000/= was awarded as interest against, such principal and the same was not subject

of hearing as between the parties. To allow the Respondent proceed with execution of the decree herein, would lead to an unfair, unjust and unreasonable. It would indeed cause undue hardship on the Appellant. **(See the case of Michael Obare Taga –vs- Fredrick Ambrose Odour Otieno [2020]eKLR)**. I am therefore persuaded that the Applicant is bound to suffer substantial loss if stay is not granted in the circumstances.

21. In view of the of the above, the court grants the Appellant/Applicant stay of execution pending appeal, however, on condition that the Appellant/Applicant shall within 45 days deposit the principal sum of Kshs.1,422,631.60 in a joint interest earning account in the name of the Advocates for both parties. The Applicant is further directed to expedite the hearing of the Appeal.

22. Cost to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 29<sup>TH</sup> DAY OF APRIL, 2021**

**D. O. CHEPKWONY**

**JUDGE**