



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. E080 OF 2021

GREENLINE BUS COMPANY LTD

(MVUMILIVU SAFARIS).....1ST APPELLANT

JOHN WAITHAKA THUO2ND APPELLANT

VERSUS

VICTOR KANENE MAINARESPONDENT

(Being an appeal from the Judgment delivered by the Honourable E. Kigen, SRM in Eldoret CMCC NO.397 of 2019)

RULING

INTRODUCTION

1. Before me for determination is the **Notice of Motion** application dated **9th August 2021**, by the Appellants/Applicants herein. They seek orders that;

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to grant order for stay of execution of the judgement and/ or decree made on 2nd July, 2021 for Kshs. 1,200,000/= pending the hearing and determination of the appeal.

4. That costs of this application be provided.

2. The application is premised on grounds set out therein and is supported by affidavits sworn separately by Kevin Nguni's and John Waithaka Thuo on 6th August, 2021.

3. The Applicants' case is that judgment herein was delivered on 2nd July, 2021 for Kshs. 1,200,000/= exclusive of costs and interest with a stay of execution of 30 days. The Applicants being aggrieved with the said decision have lodged an appeal against the same. The decretal amount is substantial and should execution proceed the Applicants herein stand to suffer irreparable loss and prejudice since ability of the Respondent to refund the decretal amount is unknown. The intended appeal raises triable issues and unless the proceedings herein are stayed this suit stands to be rendered nugatory.

4. The Applicants are ready and willing to provide a bank guarantee as security for stay of execution pending the hearing and determination of the appeal, and that in the interest of justice and fairness the orders sought herein be granted.

5. The Respondent opposed the application via grounds of opposition dated 19th August, 2021. The Respondent argues that the application offends the mandatory provisions of Order 42 Rule 6 of the Civil Procedure Rules. That the Applicants have not demonstrated they will suffer substantial loss if the orders herein are not granted. That an order for stay of execution pending appeal should only be granted if the Appellants pay half of the decretal sum plus costs to the Respondent and the remaining half of decretal sum be paid in joint interest earning account as there is a consent on liability and that the Appellants are only challenging the quantum.

DETERMINATION

6. I have carefully considered the application, the supporting affidavits, the grounds of opposition and the submissions filed as well as the authorities relied upon.

7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* which provides as follows:

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

8. In the case **Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** the court held that;

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

8. In this case the Appellants’ contention is that they are likely to suffer substantial loss as their appeal is likely to be rendered nugatory, should stay not be granted. The decree herein is of Kshs.1,200,000/= (One Million, Two Hundred Thousand Only). It is stated to be manifestly high on the face of the injuries sustained by the Respondent herein. The Respondent on the other hand contends that the Appellants have not established that there would be any substantial loss on their end if the stay was not granted.

10. Further, it is submitted that the Respondent may not be able to refund the amounts awarded in event the same is paid and appeal succeeds. Where the allegation is that the Respondent will not be able to refund the decretal sum the burden is upon the Applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others v Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

11. The law, however appreciates that it may not be possible for the Applicant to know the Respondent’s financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001.**

12. Accordingly, while appreciating that the Applicants did not sufficiently disclose their basis for believing that the Respondent would not refund the decretal sum, the Respondent did not respond on the aspect of his ability to refund the amount in event the appeal succeeds. Conversely, the Appellants do not contend that if compelled to pay the decretal sum they are likely to fold up. The Appellants propose that they be allowed to give security of the entire decretal amount by way of bank guarantee.

13. An Applicant must satisfy the Court that the application was made without **unreasonable delay**. The Court noted that the impugned judgment was delivered on 2nd July 2021, the **Memorandum of Appeal** was filed on **19th July, 2021** and an application for stay was filed

on **9th August, 2021**. This Court finds that the application was filed in plenty of time.

14. As to whether the proposed appeal is arguable, I have looked at the Memorandum of Appeal in the light of the judgment of the trial court. The Applicants propose to challenge the quantum and contend that the trial court erred in assessing an award which was excessive and wholly erroneous estimate of the loss and damages suffered by the Respondent. In **University of Nairobi v Ricatti Business of East Africa [2020] eKLR** the Court of Appeal while citing the case of **John Gitahi & Another v Pioneer Holding (A) Ltd and 2 Others Civil Application No, 124 of 2008** observed that;

“An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before court; one which is not frivolous.”

15. Plainly therefore, the appeal is arguable, bearing in mind that an arguable appeal is not necessarily an appeal that must ultimately succeed.

16. On the issue of security, the Applicants have averred that they are ready to provide security for the decretal sum. The law is that where the Applicant intends to exercise his right of appeal, and in the event that he is likely to succeed he should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has judgment in his favour should not, if the applicant were eventually to be unsuccessful in his intended appeal, find it difficult or impossible to realize the decree.

17. The Bank Guarantee given by Diamond Trust Bank and annexed to the Supporting Affidavit sworn by Kevin Ngure may not specifically cover the Respondent. However, the Court in fashioning the security is not necessarily bound by what is offered by the Applicants. In this case, the appeal is directed at the quantum of damages only. Since liability is not in dispute it must be appreciated that at the end of the day the Respondent will be entitled to some amount.

18. Having considered this instant application in its entirety, I hereby, grant stay of execution pending the hearing of the appeal on condition that;

a) The Appellants herein deposit the entire decretal sum in a joint interest earning account in the names of the Advocates for the parties on record within thirty (30) days from the date of this ruling failing which the stay shall automatically lapse.

b) The costs of the application shall be for the respondent.

DATED AND DELIVERED IN ELDORET THIS 23RD DAY OF NOVEMBER 2021.

E. K. OGOLA

JUDGE