



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 130 OF 2006

MOHAMMED HASSIM PONDOR (*Suing on behalf of*

THE INTERNATIONAL AIR TRANSPORT – IATA1ST PLAINTIFF

MERCANTILE & GENERAL ASSUARANCE

COMPANY LIMITED..... 2ND PLAINTIFF

VERSUS

DEBONAIR TRAVEL LIMITED1ST DEFENDANT

KENNEDY GICHUHA CHEGE2ND DEFENDANT

BERITA KASWII GICHUHA3RD DEFENDANT

RULING

1. There are two applications for consideration. That of 11th July 2019 by the 1st and 2nd Defendant for the following orders:-

1. spent

2. spent

3. That there be a stay of the ruling and order issued herein on 25/06/2019 by the Honourable Deputy Registrar pending the hearing and determination of the 2nd Defendant’s appeal thereon.

4. That the costs of this application be provided for.

2. The other is by the 3rd Defendant of 31st July 2019 for the following order:-

1. spent

2. spent

3. The Honourable Court be pleased to set aside and review the orders of the learned Deputy Registrar as were issued on the 25th of June 2019 and 26th of July 2019.

3. I start with latter. Although both sides have made arguments for and against the application, I would think that the application faces a difficulty on a fundamental matter.

4. The decisions sought to be reviewed are related orders of the Deputy Registrar made on 25th June 2019 and another on 26th July 2019. Both are in the course of Notice to Show Cause proceedings.

5. The ultimate orders of Deputy Registrar read as follows:-

- a) That the Judgment Debtor's shall each make a lump sum down payment of Kshs.5,000,000/= within 30 days from date of this Ruling.
- b) That the balance by monthly instalments, the amount of which parties may agree or the same will be set by Court after 30 days from today's date.
- c) Failure to pay the Kshs.5,000,000 within 30 days from date of this Ruling, the Judgment Debtor shall be committed to civil jail for a period of 6 months.
- d) Mention on 26.7.2019 to confirm compliance and for further orders.

6. Following the Judgment Debtor's failure to pay the sum of Ksh.5,000,000.00 within 30 days, the Court declared that the default order of clause (c) had taken effect. That is, the Judgment Debtor would be committed to civil jail for a period of 6 months.

7. My understanding is that the Deputy Registrar was exercising the powers granted to her by Order 22 Rule 31 which reads:-

[Order 22 rule 31] (1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

8. A person aggrieved by a decision under that rule has a right of Appeal from such decision to a Judge in Chambers (Order 49 Rule 7(1) and (b) and the Memorandum of Appeal(setting out the grounds of Appeal) shall be filed within 7 days of the decision.

9. The Applicant readily admits that it is the procedure to follow but explains as follows:-

“[7] That my advocate on records at the time of issuance of the Order on 25th June 2019 did not inform me of the avenue of appealing the ruling for the review of the orders neither did they inform of the possibility of approaching the Decree holder with an alternative payment plan”.

10. It does not seem that a challenge can be made to a Judge in respect to such an order by any other way other than by an Appeal. This Court is unable to entertain the Application of the Notice of Motion dated 31st July 2019 and strikes it out with costs.

11. The 2nd Defendant chose, and correctly so, to challenge the said decision by way of Appeal but perhaps out of time having been filed on 9th July 2019 outside the 7 days period. Indeed, there is an application for that Appeal to be deemed as properly filed. That application, dated 10th July 2019, appears not to have been prosecuted. But as the validity of the Appeal has not been raised by the Judgment Creditor, I proceed as if it is properly before Court.

12. The usual grounds for grant of stay pending appeal would in my view be applicable in this matter. Those are found in Order 42 Rule 6(2) which reads:-

[Order 42 Rule 6(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.

13. In addition, this Court has to be satisfied that the Appeal is arguable. An Appeal that is arguable is one that must not necessarily succeed but one that is not frivolous and should be given an opportunity to be fully canvassed.

14. The Deputy Registrar ordered 2nd Defendant to pay Kshs.5,000,000.00 within 30 days having observed in her ruling that:-

“The 2nd Defendant has demonstrated ability to pay. He has paid Kshs.4,900,000.00 and during cross-examination, he testified that he can afford Kshs.100,000.00 per month from his relatives”.

15. Yet the evidence available was that the Kshs.4,900,000.00 was made over a period of 7 years, payment of Kshs.4,000,000.00 in 2011 and Kshs.900,000.00 in a period spread over the year 2018. An argument can be made that, on the evidence, the Judgment Debtor has no ability to pay Kshs.5,000,000.00 in 30 days and so the order made by the Court was setting him up for civil jail. Bearing in mind that the purpose of NTSC is to threaten a reluctant debtor into paying his debt and not to condemn one who is truly unable to pay, that may well be an arguable

point on Appeal.

16. If this Court were to fail to grant the stay sought then the Judgment Debtor would face a jail term. That amounts to substantial loss, in particular, when one considers that he may well serve the full term of 6 months before his Appeal is heard and determined.

17. The 2nd Defendant therefore deserves some respite through stay but as always it must be conditional upon the giving of some security for the ultimate performance of the decree. The condition for stay that I give is that the Judgment Debtor shall pay a monthly sum of KShs.300,000.00 pending hearing and determination of the Appeal. The hearing of the Appeal to be expedited.

18. The Chamber Summons of 11th July 2019 is allowed in terms of the orders made in the preceding paragraph. Costs in the cause.

19. The Notice of Motion dated 31st July 2019 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 31st Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Odongo for 3rd Defendant

Kamau for Gichuhi for 1st and 2nd Defendants

Chege for Waigwa for Decree Holder

Court Assistant: Nixon

Court: Hearing of Appeal on 24th February 2020