



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 150 OF 2018

CEFA ENTERPRISES LTD.....APPELLANT/APPLICANT

VERSUS

BENEDICT KYALO KIMUYU.....1ST RESPONDENT

BMG HOLDINGS LIMITED.....2ND RESPONDENT

MULATI SABABI.....3RD RESPONDENT

BENEDICT MBALU.....4TH RESPONDENT

RULING

1. The background to the instant ruling is that vide a ruling delivered on 18.9.2019 the applicant was granted leave to file an amended memorandum of appeal as well as stay of execution pending determination of the appeal subject to deposit of a third of the decretal amount in court within 30 days. The applicant approached this court vide notice of motion application dated 7.10.2019 that was brought under Section 80 of the Civil Procedure Act and Order 45 and 51 of the Civil Procedure Rules and the only prayers that remain for the determination of this court is the request by the Applicant for stay of execution pending hearing and determination of the appeal pending before the Court as well as permission to deposit the directors' motor vehicle log book into court instead of cash.

2. The application is premised on the grounds that the applicant's business was faced with looting in their premises and were unable to comply with the court order and now seek review of the ruling with regard to the choice of security. It is the Applicant's position that its business had been unable to get enough cash to comply with the court's ruling and in this regard offered log books of the directors' motor vehicle. The applicant vide affidavit deponed on 7.10.2019 and commissioned on 11.10.2019 attached copies of the said logbooks as well as pleadings in respect of a suit in the Business Premises Rent Tribunal where the applicant is said to be a tenant of the suit premises. Vide a further affidavit deponed on 31.10.2019, the applicant's director reiterated that it would be in the interests of justice that the application be allowed.

3. The 1st Respondent in opposition to the application, averred vide affidavit deponed on 22.10.2019 that the application is bad in law, is an abuse of the court process; that the court became functus officio when it delivered its judgement on 18.9.2019. It was stated that the application was an afterthought and that the litigation in the Business Premises Rent Tribunal has nothing to do with the respondent and as far as the respondent is concerned the court orders ought to be complied with.

4. The advocates for the parties agreed to dispose of the application through written submissions.

5. The Applicant vide unsigned submissions dated 7.10.2019 cited the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and also relied on the case of **Accredo Ag & 3 Others v Steffano Uccelli & Another (2017) eKLR** in urging the court to review the ruling. On the issue of stay of execution, counsel submitted nothing thereon.

6. In reply, the Respondent's counsel submitted that this court has no jurisdiction to review its ruling based on material before the Business Premises Rent Tribunal. It was further submitted that the motor vehicle is not a worthy security as no valuation reports had been placed before the court and that it is clear that the applicant had no ability to deposit security and in addition that the facts being alluded to by the applicant were well within its knowledge and are not new being that they occurred in August yet the ruling was delivered in this matter in September. It was counsel's argument that the applicant was not deserving of review. Counsel invited the court to consider the case of **Francis Njoroge v Stephen Maina Kamore (2018) eKLR** and **Martha Wambui Mwangi v Irene Wanjiru Mwangi & Another (2018) eKLR**.

7. The application raised three issues on whether the applicant has satisfied the conditions for grant of review; whether it has been demonstrated that the directors' motor vehicles are assets sufficient to fulfil the mentioned security in respect of the ruling delivered by the

court and whether stay should be granted.

8. I will combine the 1st and 2nd issues. With regard to the first issue, the instant application is brought under Order 45 as well as Section 80 of the Civil Procedure Act. Order 45 (1) of the Civil Procedure Rules provides that:

‘Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.’

9. The Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** was of the view that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds:

‘i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or

ii. That there was a mistake or error apparent on the face of the record; or

iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.’

10. The issue of a logbook being used as security for stay of execution of a decretal sum was discussed in **Lochab Brothers Ltd v Lilian Munabi Nganga & 2 Others [2007] eKLR**, where the court dismissed a similar application to substitute security with a logbook, the court expressed the view that –

‘there is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.’

11. In the case of **Esri Star Ltd & Another v Sila Oweshiwani [2018] eKLR** the court held that “a motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for stay of execution in a case involving a money decree.”

12. From the foretasted authorities, it is apparent that courts are convinced that a logbook is not and cannot be the ideal security in the circumstances owing to the circumstances and the uncertainties that it possesses in terms of how the respondent will recover the decretal sum. In addition, the use of a logbook as security would mean that the applicant would have to comply with the Movable Property Security Rights Act, 2017 that undoubtedly will take time and further delay the conclusion of the matter hence leaving the respondent anxious.

13. Going back to the grounds for grant of a review order, there is no demonstration that there was an error on the record, and the applicant imputes the discovery of new evidence and or sufficient reason. From the record, the applicant has averred that its premises were the subject of a suit in the Business Premises Rent Tribunal and as it is it was unable to sell stock so as to raise the decretal amount. I am not satisfied that this is new and important evidence as the suit seemed to have predated the instant one meaning that the facts thereto were within the knowledge of the applicant. I am not swayed that the applicant has raised sufficient reason to warrant a review. The fact that the applicant was unable to sell stock due to a matter that relates to persons some of which are not party to the instant suit would be tantamount to condemning a person unheard. The pleadings that the applicant has annexed in support of its application presents facts pertaining to the suit in the Business Premises Rent Tribunal that are seemingly biased in favour of the applicant and this court is unsure as to whether there is more than meets the eye in that suit. The upshot is in my humble opinion and in light of the foregoing analysis that the applicant herein has failed to provide sufficient reason to substitute the security as ordered by this court and as such prayer 3 of the application cannot succeed.

14. With regard to stay of execution, Order 42 Rule 6 empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“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.”

15. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

16. In the case at hand, there is an amended memorandum of appeal that raises new grounds that relate to the proceedings that led to the judgement in the trial court and if this gravamen is not addressed the amended appeal will be relegated to an academic exercise. The Applicants have not established that they will suffer substantial loss if the execution is not stayed. However I am cautious not to put the applicant at risk of being condemned unheard. The respondents have emphasized the need for deposit of the decretal amount.

17. Was the application filed without unreasonable delay? The application has been filed between a period of 2 years and one year after the delivery of the orders complained of. It is noted that the amended appeal was filed on 23rd September, 2019 and this application was filed not long thereafter hence indicative of the Applicant’s interest in pursuing the appeal. I find no inordinate delay on the part of the Applicant.

18. The Applicant has not indicated its readiness to furnish security for the due performance of the decree and has sought to supply another form of security that has been discounted above. I am also not comfortable that the applicant seems to want to bring the respondent into a matter that is res inter alios acta and none of the parties interests have been taken of. A perusal of the memorandum of appeal shows that the applicant is appealing against the decision on what amounts to breach of his right to be heard and I hence find it arguable.

19. In the result the appellant’s application dated 7.10.2019 partly succeeds and is allowed in the following terms:

(a) An order of stay of execution is granted upon the applicant depositing a third (1/3) of the decretal sums into a joint interest earning account in names of both Advocates within the next fourteen (14) days from the date of this ruling failing which the stay shall lapse.

(b) The costs hereof shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 27th day of January, 2020.

D.K. Kemei

Judge