



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL CASE NO. 4 OF 2014

PJ CRAFT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BASETRACK EQUIPMENT LIMITED.....1ST DEFENDANT/RESPONDENT

CAROLINE WAMBUI NJORA.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff's substantive suit herein was dismissed after a full hearing by the judgment of Meoli, J. read by me on 14th March, 2019. In the relevant parts of the judgment, the court determined and ordered, inter alia, as follows:

“35....the Plaintiff is liable to pay the balance of the purchase price of Kshs 800,000/- to the Defendants...

36. The Court further directs that the sum of Shs 800,000/- deposited into court by the Plaintiff is to be released to the Defendants.....”

2. Immediately upon the reading of the judgment, the plaintiff's counsel sought stay of execution to allow for an appeal. I granted stay for thirty (30) days. Twelve days later, on 26th March, 2019, the plaintiff filed a Notice of Appeal in the High Court. There is no indication that the Notice was filed in the Court of Appeal.

3. The plaintiff then went silent. On 4th June, 2019, the defendant took a mention date. On 23rd September, 2019, Counsel holding brief for the plaintiff indicated that they would be substituting counsel. On their part, counsel for the defendant indicated that the mention was to deal with release to the defendants of the Shs 800,000/- which had been deposited into court. They complained that they were unable to access the funds as they did not have the original receipt, which the court accounting officials required. By this time the stay of execution had lapsed.

4. This court directed that the Kshs 800,000/= deposited into court:

“...be released by the court to the defendants with or without production of the original receipt within thirty (30) days in the event that no appeal or application challenging the judgment is so filed”

5. On 7th October, 2019, the plaintiff filed a certificate of urgency seeking to stay the execution of the judgment with regard to release of the Kshs 800,000/= awarded to the defendant. The court did not certify the application urgent, but allowed it to be served and a date to be taken in priority prior to October 23rd 2019. That date was fixed by the defendant.

6. On 23rd October, 2019, the court consented to a new counsel coming on record for the plaintiff, who was granted leave to file a further affidavit in respect of the application. Stay orders were again declined and parties were directed to file skeletal written submissions for hearing on 3rd December, 2019.

7. On 3rd December, 2019, counsel holding brief for the plaintiff stated that counsel of record was indisposed but that he sought a ruling date. No replying affidavit or submissions were filed by the plaintiff. The defendants had duly filed their submissions.

Analysis and Determination

8. The only issue before me in the plaintiff's Notice of Motion dated 2nd October, 2019 is item d) of the application which reads as follows:

“d) that the Honourable Court be pleased to grant Appellants stay of execution of the judgment delivered on 27th February, 2019 with regard to the release of Kshs 800,000/= deposited in court by the Plaintiff pending hearing and determination of this suit”
(emphasis added)

9. Whether stay of execution of the judgment delivered on 27th February, 2019 with regard to release of Kshs 800,000/= should be granted to the plaintiff.

10. The grounds upon which the application is founded are:

“1. That judgment was entered in Naivasha Civil Case No 4 of 2014 PJ Craft Limited vs Basetrack Equipment Ltd and Caroline Wambui Njora on 27th February, 2019

2. That the Appellants were dissatisfied with the judgment and they subsequently lodged a Notice of Appeal

3. That appeal has arguable and strong grounds”

11. The defendants filed a Replying affidavit on 23rd October, 2019 pointing out that: prayer d) cannot be granted as it is already overtaken by events since the suit has been determined; the plaintiff did not seek stay pending appeal; no draft memorandum of appeal was filed to enable the court ascertain whether there were arguable grounds of appeal; there was been an inordinate six (6) month delay in filing the application; the application is not merited. They repeated these issues in their submissions.

12. Despite the response of the defendants the plaintiff neither filed a response to the replying affidavit even though they sought and were granted leave to do so. Further, they did not file any submissions despite the court's directions.

13. In the circumstances of this case, all that the court has to take into account is the grounds founding the application in support of the applicant's case. Ground 1 merely states the obvious fact that the judgment in the substantive suit was rendered on 27th February, 2019. Ground 2 is a statement of fact that the applicant is dissatisfied with the judgment and has lodged an appeal. Nevertheless, there is nothing to show that an appeal has indeed been filed in the Court of Appeal, nor is any there a draft memorandum of appeal to enable the court consider whether the appeal has arguable grounds. Thus Ground 3 is also unsupported by any argument.

14. An application to stay a judgment or part of it is, in essence, a preliminary part of the appeal process, and is covered under **Order 42 Rule 6** of the **CPR**. This court exercised its power under **Order 42 R 3** and did grant a 30 day stay when the judgment was read. After the lapse of that period, the stay also lapsed.

15. **Order 42 Rule 6 (2) – (5)** of the **CPR** provides:

“(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling”

16. In essence the plaintiff's application fails all the criteria required under **Order 42** of the **Civil Procedure Act** as to: substantial loss; deposit of security; or that there was no unreasonable delay

17. The application is therefore hereby dismissed with costs.

18. Orders accordingly

Dated and Delivered at Naivasha this 27th Day of February, 2020

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mwithirania holding brief for Muhoho for the Applicant
2. No representation for the Respondent
- 3 Court Clerk: Quinter Ogutu