



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 1721 OF 1999

SIRAJI ENTERPRISES LIMITED.....1ST PLAINTIFF/RESPONDENT

HUSSEIN A. AWALE.....2ND PLAINTIFF/RESPONDENT

VERSUS

NDERITU WACHIRA RECEIVER & MANAGER

OF BULLEYS TANNERIES LIMITED

(UNDER RECEIVERSHIP).....1ST DEFENDANT/APPLICANT

BULLEYS TRADING (1988) CO. LTD.....2ND DEFENDANT/APPLICANT

DUNCAN NDERITU NDEGWA.....3RD DEFENDANT/APPLICANT

JAMES NJENGA KARUME.....4TH DEFENDANT/APPLICANT

JUDITH WANJIKU KIBAKI.....5TH DEFENDANT/APPLICANT

RULING

1. The ruling relates to a notice of motion application dated 19th February 2020, brought under the provisions of; section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules, and all enabling provisions of law.
2. The applicants are seeking for an order of stay of execution of the judgment delivered in this matter on 30th January 2020, and the resultant decree pending the inter parties hearing and determination of the intended appeal, and the honourable court be pleased to issue such further orders as it may deem fit in the interest of justice. The costs of the application be provided for.
3. The application is supported by the grounds on the face of it and was supported by the affidavit dated on 19th February 2020, sworn by Nderitu Wachira, the Receiver Manager of Bulleys Tanneries Limited (In Receivership). He deposed that, the applicants are aggrieved and dissatisfied with the judgment delivered in this matter on 30th January 2020 by the Hon. Justice Limo. That, they have filed a notice of appeal against the said judgment and requested for typed proceedings relating thereto in order to lodge the record of appeal.
4. Pursuant to the judgment, they were directed to pay a sum of Kshs. 43, 099,322.55 with interest and costs of the suit to the respondents. However, they stand to suffer substantial loss if that sum; which sum is colossal is paid out to the respondents as they may not be able to recover it. That, the 1st respondent is a foreign company incorporated in the Republic of Uganda with no known assets or sources of income in Kenya. Thus in the event that the appeal is successful, the money may not be recovered. Further, the 2nd respondent has no capacity to refund/pay the decretal sum if paid to him prior to the determination of the appeal, and in the event the appeal succeeds.
5. That as aforesaid, the decretal sum is of such magnitude that, if not secured by an order of the court, it would adversely and severely prejudice the applicants and render the whole substratum of the appeal nugatory. Further the applicants have a good and arguable appeal with good prospects of success as evidenced in the draft Memorandum of Appeal.
6. That, if the stay of execution orders are not granted, the respondents will proceed with execution and the appeal herein will be rendered

nugatory hence subjecting the applicants to privation, irreparable loss and damage.

7. The applicants finally averred that, they are willing to provide a Bank Guarantee as security for the performance of the said decree. That, the respondents will not suffer any prejudice if the orders sought are granted and in the interest of justice, the said orders ought to be granted.

8. However, the application was opposed through a replying affidavit dated 25th February 2020, sworn by Ahmed Yassin H.A Awale, the Administrator of the Estate of the Late Hussein A. Awale. He averred that, the honourable court entered judgment in favour of the respondents based on the evidence on record tendered by the parties herein and as such a successful litigant ought to have access to the consequences of the court findings and any subsequent decision which tends to impede justice can only be rendered in exceptional circumstances which has not been demonstrated here by the applicants.

9. That, the application is not made in good faith and it is merely intended to delay the execution of the decree herein. The respondents will be greatly prejudiced by the delaying tactics employed by the applicants herein for a claim which has been outstanding since 1998, over 21 years. The respondents are willing and able to repay the decretal amount in the event the appeal will be successful which is doubtful, taking into account the material evidence on record.

10. Further, the respondents have waited for so long for the determination of this suit and the amount decreed by the court. It is only fair and just that they be allowed to enjoy the fruits of their rightfully obtained judgment. That the 1st respondent is an East African Company; incorporated in Uganda, carrying out the business of hides and skins, and will be capable of repaying the decretal amount.

11. That, the honourable court has jurisdiction to deal with the claim; as the amount claimed was computed by the 1st applicant and that there is no dispute as to the amount due to the 2nd respondent at the time this suit was filed in 1999.

12. The application is described as; lacking merit, incompetent, an abuse of the court process, and a tactic employed by the applicants to deny the respondents enjoyment of the fruits of the judgment and frustrate the execution of the decree in favour of the respondents.

13. That the ability of the applicants to furnish security ought not to give an unfair advantage to the applicants as Articles 27(1), 48 and 50 of the Constitution provide for equality of all persons before the law.

14. Further, the applicants have not met the requirement for grant of stay of execution as a money decree can only be stayed under special circumstances which have not been demonstrated by the applicants. They have not established what substantial loss they would suffer should the application be disallowed.

15. That, from the record of appeal filed on 12th February 2007, by the applicants at the Court of Appeal vide Civil Appeal No. 17 of 2007 at Nairobi, the applicants admitted holding in their possession unclaimed quantity of stocks and yet when the respondents demanded the same, the applicants refused to release them and sold them as their own.

16. I have considered the application in the light of the materials placed before the court and the oral address by the parties. I find that, the issue to determine is whether; the applicants have met the threshold of grant of the orders sought. The grant of the orders sought for is subject to the court's exercise of its discretionary power which in any event has to be exercised judiciously and/or reasonably in the interest of justice.

17. The provisions of Court of Appeal in the case of; **Butt v Rent Restriction Tribunal [1982] KLR 417** set the guiding factors in considering the application as herein as follows:-

“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 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.

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.”

18. In the same vein, the procedural provisions of; Order 42 rule 6 (1) and (2) of the Civil Procedure rules states that;

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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 sub rule (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.

19. Basically then the Applicants must satisfy the court;

a) That the Application has been made without unreasonable delay;

b) That substantial loss will result to the Applicant unless such order is made;

c) Security for due performance of the decree has been given by the Applicant

19. Having heard the parties learned counsel I find that there is no dispute that the application was filed without undue delay. However, none of the parties have established by document the ability to refund the sum if the appeal succeeds or otherwise. As regards the security offered and the sentiments by the respondents thereto and their own suggestions on the security amenable to, I find that this debt has been pending for long and therefore the interest of the decree holder ought to be considered too.

20. In summation I associate with the sentiments the judgment of; Clarke LJ in the Hammond Suddard case,

“ in short, CPR 52.7 provides that unless the appeal court or the lower court orders otherwise an appeal does not operate as a stay of execution of the orders of the lower court. The grant of a stay is discretionary. The court needs to balance the risks of injustice which may be occasioned by the grant or refusal of a stay. The obvious risk of injustice if the stay is refused is that the appeal may be stifled. The obvious risk if it is granted is that, after an unsuccessful appeal, the respondent will be unable to enforce the judgment. The risk that, if paid in the meantime, an unsuccessful respondent to the appeal may be unable to disgorge its receipt does not arise in relation to HMRC.”

21. In conclusion I order that, there shall be a stay of execution pending appeal on condition that: -

a) the applicants deposit 50% of the decretal sum in an interest earning account, in a reputable commercial bank in joint names of the law firms representing the parties;

b) The other 50% sum be secured by a Bank Guarantee within the same period of time,

c) In default execution to issue

d) Each party to meet its own costs

22. It is so ordered

Dated, delivered and signed on this 27th day of February 2020

G. L. NZIOKA

JUDGE

In the presence of:

Mr. Lakicha for the plaintiffs/respondents

Ms. Mburu for the defendants/applicants

Robert-----Court Assistant