



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 78 OF 2019

VOLCAN HOLDINGS LIMITED.....APPELLANT/ APPLICANT

-VERSUS-

FESTUS KAZUNGU MAITA.....RESPONDENT

RULING

1. This is the Notice of Motion dated 22nd October, 2019 and filed on 14th November, 2019. Its brought under Order 42 Rule 6 and Order 51 of the Civil Procedure Rules and sections 1A, 1B, 3A and 65 of the Civil Procedure Act. The application is seeking for an order of stay of execution of the judgment in Kilungu Principal Magistrates' court Civil Case No. 321 of 2018 and any consequential orders arising therefrom pending the hearing and determination of the pending appeal.

2. The application is supported by the grounds on its face and supporting affidavit of Jamwel Mwakandana Kivinga. The main ground is that the Applicant being dissatisfied with the judgment has filed an appeal and is fearful of suffering loss and grave prejudice if stay of execution is not granted.

3. The deponent of the supporting affidavit is an advocate of the High court of Kenya and the one in conduct of this case. He depones that there is a judgment from the lower court but there is no stay of execution. That there is therefore a likelihood of the Respondent moving to execute the same.

4. He further avers that the Applicant's insurers M/s Geminia insurance company limited are willing to pay the decretal sum in the event of an unsuccessful appeal. The Applicant's fear is that if the money is paid to the Respondent and the appeal is successful the Respondent may not be in a position to refund the money. He has expressed the Applicant's willingness and readiness to comply with any terms as to security as may be ordered by the court.

5. The Respondent filed the following grounds of opposition in response to the application:

- a) **That** the present application is an abuse of the court process.
- b) **That** the application is an afterthought and is lacking in substance, unnecessary, vexatious and frivolous.
- c) **That** the application as drawn is totally defective and unattainable.
- d) **That** the application is only meant to deny the Respondent the fruits of his judgment.

6. The parties agreed to dispose of the application by written submissions.

7. Mr. Kiwinga for the Applicant submits that the Applicant has filed an appeal and set out the grounds upon which it is set. That the grounds demonstrate an arguable appeal. He cited the case of **Lawrence Musyoka Ndambuki and Another –vs- Daniel Kato Ndambuki (2018) eKLR** where the court while relying on the case of **Butt –vs- Rent Restriction Tribunal (1982) KLR7** stated that:

“If there is no overwhelming hindrance, a stay ought to be granted so that an appeal is not rendered nugatory should the appeal succeed”.

8. He submits that the Applicant will suffer irreparable loss if the stay order is not granted. He argues that the decretal sum of Kshs.934,940/= is a huge sum which if paid to the Respondent may not be refunded in the event of a successful appeal.

9. He submits that the law requires that where there is an allegation that the Respondent is not possessed of means, the burden of proof shifts

to him/her to demonstrate by way of affidavit, that he/she is possessed of such sufficient means that should the decretal sum be paid the same will be refunded in the event of a successful appeal.

10. To support this argument, he relies on the case of **National Industrial Credit Bank Limited –vs- Aquinas Francis Wasike and Another (UR)** which stated thus:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the Respondent was unable to discharge his burden.”

11. He also referred to the case of **Johnson Mwiruti Mburu –vs- Samuel Macharia Ngule (2004) eKLR** where Justice J.G. Nyamu stated thus:

“I have considered the case of Kenya Shell –vs- Kabiru & Another (1986) KLR 410 – see holdings 2 to 4 for the principles to consider and the unreported case of Cotecna Inspection SA –vs- Hems Group Trading Company Limited Civil Appeal No. 303/2000 unreported where the Court of Appeal in an application involving a money decree had to consider the possible inability of the Respondent company failing to refund the moneys. The court went on to grant a stay although a substantial money decree was the subject matter. In the circumstances of this case I find that substantial loss could result to the Applicant in view of the possible inability of the Respondent to pay.”

It is his submission that in compliance with Order 42 Rule 6(2)(b) of the Civil Procedure Rules the Applicant has indicated its willingness to deposit security and/or comply with the terms the court will give.

12. He finally submits that both the appeal and application were filed within reasonable time, the appeal having been filed 13 days of delivery of the judgment. He urged the court to grant the orders sought.

13. Mr. Waiganjo for the Respondent submits that there is a consent judgment in this matter on liability in the ratio of 90:10%. He set out the conditions of stay of execution as laid out in the case of **John Mwangi Nderitu –vs- Joseph Ndiritu Wamathai (2016) eKLR**. On substantial loss he submits that the supporting affidavit sworn by an advocate is a breach of the provisions of the Civil Procedure Act which require that affidavits be confined to such facts as the deponent is capable of his own knowledge to prove. That the affidavit should be struck out as no such basis had been laid. He referred to the case of **Express Kenya Limited and Another –vs- Charles Kipkoech Leting (2006) eKLR** in support of this argument.

14. Relying on the case of **John Gachanja Mundia –vs- Francis Muriira alias Francis Muthika & Another (2016) eKLR** counsel submitted that the Applicant’s allegations in regard to the proposed Respondent’s financial limitation are not based on any true facts. This is what the court held in the **John Gachanja Mundia** case (*supra*)

“Stay of execution is a matter of the discretion of the court but for the court to postpone the right of the judgment holder to immediately enjoy the fruits of his judgment, the Applicant must show that the Respondent cannot make a refund of the decretal sum; as that would certainly reduce a successful Appellant to merely a holder of a barren success, thus a pious explorer in the judicial process. I must, however, restate the law, that is; the onus of proving substantial loss would occur falls on the shoulders of the Applicant. He must not throw or shift to the Respondent to state his financial ability before the Applicant has shown a prima facie case on reasonable facts that there is some financial limitation on the part of the Respondent. It is only after the legal burden is discharged by the Applicant that the Respondent will be called to discharge his evidential burden or provide affidavit of means”.

15. It is therefore counsel’s submission that the cornerstone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the Applicant unless stay of execution was granted. He submits further that the appeal has no merit and as such reimbursement of the decretal sum by the Respondent would not be a necessary event and as such there will be no loss to the Applicant.

Analysis and determination

16. I have considered the application, supporting grounds and affidavit, grounds of opposition, submissions and cited cases. What I find falling for determination is whether the Applicant has satisfied the condition/conditions for grant of stay of execution.

17. The conditions under which stay of execution may be granted upon an appeal being filed are found in Order 42 Rule (6)(2) of the Civil Procedure Rules which provides as follows:

Order 42 Rule (6)(2)

(2) No order of stay 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 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.

18. Mr. Waiganjo for the Respondent has asked this court to expunge from the record the affidavit by Mr. Kiwinda advocate for the Applicant. The reason he cites is that Mr. Kiwinda does not have personal knowledge of the facts of the Applicant's substantial loss and the Respondent's incapability to refund any sums paid. Order 19 Rule 3 Civil Procedure Rules provides:

3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

Rule (6) striking out matter.

The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

19. In the case of **Express Kenya Limited** (*supra*) Justice Musinga (*as he then was*) had dealt with a similar issue and this is how he expressed himself:

"I agree with Mr. Gekonga that it was not proper for Mr. Nyagwencha advocate to depone that the Applicants will suffer substantial loss if they complied with the conditional orders of stay of execution as stated hereinabove. The same can also be said of Mr. Nyagwencha's deposition that the Applicants will not be able to recover any money that may be paid to the Respondent. He did not state the basis of those depositions and I agree that the depositions breached the requirements of Order XVIII Rule 3(1). The affidavit in support of the Appellant's application is incompetent and inadmissible and I strike it out.

20. Coming to Mr. Kiwinda's affidavit sworn on 22nd October 2019 and what is complained of by the Respondent, I find the relevant portions of affidavit to be paragraphs **8** and **9** which state as follows: -

Paragraph 8: That the applicants stand to suffer substantial loss and prejudice if this application is not allowed, while the Respondent will suffer no such loss.

Paragraph 9: That if the decretal sum is paid out before the determination of the appeal already filed herein, the Respondent will not be in a position to refund the same in the event that the appeal is successful as he has no known means of restitution.

21. Mr. Kiwinda could not depone to facts about substantial loss to be suffered by the Applicant or even the inability to refund the cash by the Respondents without laying a basis for it. He did not act as per the proviso to Order 19 Rule 3(1) of the Civil Procedure Rules by providing the source of the facts and grounds. That being the case, I strike out paragraphs **8** and **9** of the supporting affidavit.

22. There is no dispute that the appeal was filed within a very short time after delivery of judgment, it was filed about 28 days after the filing of the appeal. There can't therefore be said to have been any delay in filing the same. The matter before the lower court was also heard within a record time of ten (10) months.

23. The copy of judgment shows that on 2nd August 2019 the parties recorded a consent on liability at 90:10% in favour of the Respondent.

24. From the grounds of appeal listed the Applicant is basically challenging the quantum which it finds to be too high. It states at ground 4 that:

"The learned trial Magistrate in assessing quantum of damages took into account irrelevant factors and wrong decision principles and arrived at a wrong decision and excessive award on quantum of damages."

25. The award by the trial court is Kshs.813,195/= plus costs and interest. This is not a small sum of money. Considering that an appeal has been filed against the judgment caution must be taken to ensure that the appeal if successful is not rendered nugatory. I am not losing sight of the fact that liability was agreed on. This means the Respondent is entitled to general damages even if it is lower than what has already been awarded. He too should be seen to enjoy the fruits of his judgment.

26. The Applicant has shown its willingness and readiness to abide by any conditions to be given by the court for purposes of the provision of security.

27. After due consideration of all the issues raised and my findings above I find that the application has merit. I grant stay of execution as prayed on the following conditions:

i. Kshs.400,000/= be paid to the Respondent through his advocates within 30 days.

ii. The balance of the decretal sum to be secured through a bank guarantee within the same period.

iii. Failure to comply will vitiate the order of stay of execution.

iv. The appeal must be fast tracked.

Orders accordingly.

Delivered, signed and dated this 25th day of February, 2020 in open court at Makueni.

.....

H. I Ong'udi

Judge