



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO 3 OF 2020

HILLSPARK INVESTMENT & CO. LTD.....APPELLANT/APPLICANT

VERSUS

CHACHA SEBASTIAN MURIMI.....PLAINTIFF/RESPONDENT

(Being an appeal from the judgement and decree of Hon.W. Juma, CM, delivered on 13/3/2019 in the Chief Magistrate's Court at Narok in Civil Case No. 206 of 2018, Chacha Sebastian Murimi v. Hillspark Investment & Co. Ltd)

RULING

The case for the applicant

1. Pursuant to the provisions of Order 50 Rule 6, Order 50 Rule 1, Order 22 Rule 22 of the 2010 Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and all other enabling provisions of the law, the applicant has applied for the major following orders.

1. spent
2. An order of stay of execution of the judgement/order of the lower court pending the hearing and determination of the instant application.
3. An order of stay of execution of the judgement/order of the lower court pending the hearing and determination of the appeal in Civil Appeal NO. 3 of 2020.
4. An order to make provision for costs.

2. The application is supported by both the eight grounds that are set out on the face of the notice of motion and the fifteen paragraphs supporting affidavit of the claims director (Isabella Nyambura) of Directline Assurance Co. Ltd on behalf of the applicant.

3. The major grounds in support of the application are as follows. The *ex parte* judgement was delivered on 13/3/2019 and the plaintiff/respondent may execute any time. The applicant was aggrieved by the said judgement and as result it filed an application in the lower court on 1/4/2019 to set aside the same and have the defence filed but the same was dismissed on 11/12/2019. The applicant being aggrieved by the dismissal filed an appeal in the High Court being HCCA No. 3 of 2020. At the same time the applicant filed an application dated 9/1/2020 in the lower court seeking an order of stay of execution of its *ex parte* judgement pending the hearing and determination of the appeal.

4. Furthermore, the applicant has stated that the lower court granted an order of stay of execution of its ruling on 28/2/2020 for 30 days. That court further directed that an order of stay of execution be sought in the High Court. The orders of the lower court have now lapsed and unless an order of stay of execution is granted by this court the applicant's appeal will be rendered nugatory and the applicant will suffer irreparable loss. The applicant is willing to furnish reasonable security as may be ordered by the court and that no prejudice shall be suffered by the respondent.

5. The applicant through the claims director of Directline Assurance Co. Ltd (Isabella Nyambura) has deposed to a 15 paragraphs supporting affidavit in support of the application. The following are the major averments.

6. She has averred that Directline Assurance Co. Ltd are the insurers of motor vehicle registration No KBX R at whose instance this claim is being defended. Additionally, she has replicated the matters that are set out in the grounds that are set out on the face of the notice of motion,

except for the following matters. She has averred that following advice from its advocates the applicant may not be able to recover the decretal amount from the respondent on a successful appeal in the event the execution process is completed. Again following advice from the applicant's advocates, the deponent believes that the instant application has been filed without unreasonable delay.

7. In her further affidavit, the deponent has averred following advice from the applicant's advocates that the respondent was awarded Shs 1,869,674/=; which affidavit was filed pursuant to this court's order of 1/4/2020. Finally, the deponent has averred based on advice from its advocates that the lower court judgement and proceedings have not been typed.

The submissions of the applicant

8. The applicant has filed written submissions in support of the application. Counsel for the applicant has cited many authorities including *Halai & Another v Thorton & Turpin (1963) LTD [1990] KLR 365* cited in *Elena Doudoladova Korir v Kenyatta University Industrial Court Cause No 1715 of 2011, (Nairobi registry), [2014] e-KLR*, in which the Court of Appeal held that an applicant has to satisfy three conditions before the court grants him an order of stay of execution. Those conditions include a demonstration that he will suffer substantial loss unless an order of stay is granted and that the application must be made without unreasonable delay.

9. Counsel submitted based on the foregoing authority that the applicant has met the conditions required for the grant of an order of stay of execution.

10. Counsel further submitted that the respondent has not in his replying affidavit disclosed or furnished the court with any documentary evidence to prove his financial standing. Additionally, the respondent has also not filed any documentary evidence to show that he owns any property which can satisfy the decretal sum should the appeal succeed.

11. Counsel has in that regard relied on *Amal Hauliers Ltd v Abdulnasir Abubakar Hassan [2017] e-KLR*, in which that court held that:

“the respondent has not disclosed any source of income that she would use to refund the applicant the decretal amount should the appeal succeed. The applicant has thus established that it will suffer substantial loss if the intended execution is not stayed.”

12. Counsel has also submitted that the respondent's means are not known and the applicant stands to suffer irreparable damage if a substantial amount of money is paid to him. In his affidavit, the respondent has not responded to this fact, which counsel submits amounts to an admission that he cannot refund the money.

13. Counsel has therefore urged the court to grant the application.

The case for the respondent

14. The respondent through Kenneth Ondieki Obae has filed a ten paragraphs (10) replying affidavit in opposition to the application. The deponent has averred to the following major matters.

15. The application before the court is an abuse of the court process and is intended to frustrate, delay and deny the respondent the enjoyment of the fruits of his judgement. The application is frivolous, vexatious and a waste of the court's time.

16. The deponent has also averred based on information from the respondent which the deponent believes that he is willing and ready to undertake to return the entire decretal sum of money or any money that this court may order to be released to the applicant if the applicant's appeal succeeds. The deponent has further averred that the respondent was a passenger in the applicant's vehicle and even if the case were to start afresh, he stands no chance of succeeding and that the respondent will finally recover judgement against the applicant and will be compensated for the injuries that he sustained.

17. Finally, the deponent has averred that in the event the court grant's the application, he prays that the court orders at least a half of the decretal sum of money be released to the respondent and the balance be deposited in court pending the hearing and determination of the appeal.

The submissions of the respondent.

18. Counsel for the respondent has submitted that the grant of an order of stay of execution can only be rendered only in exceptional circumstances. The applicant has not demonstrated the existence of those exceptional circumstances in the instant application.

19. Furthermore, the applicant has not demonstrated that it will suffer any pecuniary and tangible loss.

20. Finally, the respondent has submitted that in the event the court is inclined to grant the application, the respondent has prayed that a ½ and/or ¾ of the decretal sum be released to the respondent. And that the balance be deposited in court or in the joint names of the advocates for the parties pending the hearing and determination of the appeal. The respondent has cited *Halai & Another v Thorton & Turpin (1963) LTD [1990] KLR 365* cited in *Elena Doudoladova Korir v Kenyatta University Industrial Court Cause No 1715 of 2011, (Nairobi registry), supra*, in support of his submission.

Issues for determination.

21. I have considered the affidavits, the submissions and the authorities cited by both counsel. As a result, I find the following to be the

issues for determination.

1. whether the applicant has established a case for the grant of an order of stay of execution pending the hearing and determination of the instant application and the appeal.
2. who bears the costs of this application?

Issue 1

22. An applicant for the grant of an order of stay of execution must satisfy the court that substantial loss will result unless stay is granted. The applicant must also satisfy the court that the appeal will be rendered nugatory unless stay is granted. Furthermore, the applicant must also satisfy the court that the application was made without unreasonable delay. And finally, the applicant has to provide security for the due performance of the obligations imposed upon him by the decree.

23. The foregoing conditions were aptly set out by the Court of Appeal in *Halai & Another v Thorton & Turpin (1963) LTD [1990] KLR 365 cited in Elena Doudoladova Korir v Kenyatta University Industrial Court Cause No 1715 of 2011, (Nairobi registry, supra, in which that court pronounced itself in the following terms:*

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the appellant must establish sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

24. I find that unless an order of stay of execution is granted the appeal will be rendered nugatory. Furthermore, I also find that unless an order of stay of execution is granted substantial loss will ensue. Additionally, I find that the application has made without unreasonable delay.

25. I also find that the application is not frivolous and is not an abuse of the process of court.

26. Furthermore, I find that the respondent has not provided documentary evidence to show any sources of income or that he owns any property which can satisfy the decretal sum should the appeal succeed. Again the court in *Amal Hauliers Ltd v Abdulnasir Abubakar Hassan, supra*, restated that principle in the following terms:

“the respondent has not disclosed any source of income that she would use to refund the applicant the decretal amount should the appeal succeed. The applicant has thus established that it will suffer substantial loss if the intended execution is not stayed.”

27. In the premises, I find that the applicant has met the conditions for the grant of an order of stay of execution pending the hearing of both the application and the appeal in terms of prayer Nos. 2 and 3 of the notice of motion.

Issue 2

28. Since this is an interlocutory application, costs of this application will be costs in cause.

29. The grant of the foregoing orders is subject to the applicant depositing in court a sum shs. 1,869,674/= within 30 days failing which these orders will lapse.

Ruling signed, dated and delivered at Narok this 25th day of June 2020 in the absence of both counsel vide their e-mail.

J. M. BWONWONG’A.

J U D G E

25/06/2020