



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 623 OF 2015

LUPAIN INVESTMENT (K) LTD.....APPLICANT/DECREE HOLDER

VERSUS

SITICO PETROLEUM

PRODUCTS LTD.....RESPONDENT/JUDGMENT DEBTOR

AND

KENYA PIPELINE COMPANY LIMITED.....GARNISHEE

RULING

This Ruling relates to a Notice of Motion Application dated 22nd August 2018, brought under the provision of **Order 42 Rule 4 of the Civil Procedure Rules 6, 7, Section 3A and 63 (e) of the Civil Procedure Act 2010**, and all enabling provisions of the law. The Applicant sought orders;

- a) That the Court issues a temporary stay of execution of the Ruling and Order of the attachment of stocks held by the Garnishee on behalf of the Judgment Debtor to satisfy the decree herein to the tune of USD 52,586 together with interest thereon made on 27th July 2018 pending the inter parties hearing of this application.
- b) That the Court grants a stay of execution of the Ruling and Order issued by this Court on 27th July 2018 pending the hearing and determination of the appeal filed by the Garnishee.

The Application was based on grounds;

- a) The Garnishee filed Notice of Appeal against the Ruling of this Court delivered on 27th July 2018 and applied for typed proceedings Ruling and Order of the Court.
- b) That the Garnishee's Appeal has high chances of success and would be rendered nugatory if a stay of execution was not granted by this Court.
- c) That the Garnishee stands to suffer substantial loss if the stay of execution was not granted as it shall be made to pay out the decretal sum to the Judgment Creditor, yet all of the Judgment Debtor's product is the subject of a lien exercised by the Garnishee for outstanding amounts due and owing to the Garnishee by the Judgment Debtor, which amounts were excess of the value of the product.
- d) That the Garnishee would suffer substantial loss if the stay of execution is not granted because of the hardship it faced in complying with the Orders of the Court as it did not have in its storage[the] product belonging to the Judgment Debtor which could be attached to satisfy the decree herein.
- e) That the Garnishee was ready to furnish security for the due performance of the decree obtained herein.
- f) The Application was brought timeously, without delay.

REPLYING AFFIDAVIT

The Judgment/Debtor opposed the application by an affidavit filed in court on 5th September 2018, sworn by Uruji Daido a Director. He averred that if it was true that the Garnishee had no stocks to satisfy the decree of USD 52,856.00 as deemed to in paragraph 7 then the Applicant's apprehension of execution is misplaced as no attachment is capable of being levied.

He asserted that the contents of paragraph 8 were unfounded. The attachment was limited to a laudable product of 48,662 m3 and not any other assets as alluded to in satisfaction of the judgment debtor's debt which in any event the Garnishee had stated in no uncertain terms it did not have.

That the Judgment debtor response to paragraphs 9 denied that it was unable in the event of the success of the Appeal to repay the decretal sum for the following reasons;

- a) The Decree holder is licensed commodity dealer with the Garnishee
- b) The Decree holder is going concern

DECREE HOLDER'S/RESPONDENT'S WRITTEN SUBMISSIONS

The Decree-holder relied on Order 42 Rule 6 (2) of CPR that 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.”

Kenya Hotel Properties Ltd vs Willesden Investments Ltd [2007] eKLR

“The decree is a money decree and normally the Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the Respondent is not a man of straw but a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the Applicant. However, with time it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the Applicants if stay is refused purely on grounds that the decree is a money decree.”

APPLICANT'S SUBMISSIONS

The Applicant submitted that of in reliance **Order 42(6) (2) CPR** it had complied with the legal requirements of grant of stay of execution.

The Conditions include principles set out in the case of **Amal Hauliers ltd vs Abdulnasir Abubakar Hassan [2017] eKLR** which relied on **Butt vs Rent Restriction Tribunal [1982] KLR 417.**

The Applicant submitted that it was aggrieved by this Court's Ruling of 27th July 2018 and on 8th August 2018 filed Notice of Appeal which was filed in Court on 10th August 2018. A copy is attached to its application as **JR-3**.

The instant application for stay of execution was filed on 22nd August 2018 and the Court granted that it be canvassed by filing and highlighting of written submissions.

The Applicant's basis of the application is as follows;

a) The Garnishee/Applicant entered into a transportation and storage Agreement on 1st March 2015 with the Judgment Debtor was to provide transport and storage of its petroleum products. One of the conditions in the Agreement was that the Garnishee would have lien over all products of the Judgment Debtor in Garnishee's custody and would be at liberty to sell such products and apply the proceeds in satisfaction of the lien, in the event of default of payments by the Judgment Debtor. The Garnishee attached to the application the Judgment Debtor's statement as at 29th September 2017 as USD 171,755.734 outstanding debt to the Garnishee as **JR-5**.

b) The Garnishee stands to suffer substantial loss if it is made to pay out the sum of USD 52,856.00 together with interest thereon on account of stocks held on behalf of the Judgment debtor as the Garnishee has lien over the same products by virtue of the terms of the Transportation and Storage Agreement.

c) The Garnishee stands to suffer substantial loss if it pays the decretal sum as the same will irreparably affect and negate the very core of the Garnishee's appeal.

The Garnishee relied on the case of **Antoine Ndiaye vs African Virtual University [2015] eKLR** which referred to **Tropical Commodity Suppliers Ltd** and held;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss. Great or small. That is of real worth or value as distinguished from loss without value or loss that is merely nominal....”

DETERMINATION

The issue for determination is whether the Garnishee /Applicant ought to be granted stay of execution pending hearing and determination of the appeal lodged against this Court’s Ruling of 27th July 2018.

Order 42 CPR prerequisites for stay of execution pending appeal include;

- i) Appellant to prove filing Notice of Appeal
- ii) Substantial loss may result unless order for stay of execution is granted
- iii) Appellant to file application for stay of execution without unreasonable delay
- iv) There must be an arguable appeal not necessarily successful but not frivolous
- v) The appellant to propose/give such security as the Court approves or orders for due performance of such decree or order as may ultimately be binding on him.

These requirements were echoed in the case of **Chris Munga & Bichage vs Richard Nyagaka Tongi & 2 Others (2013) eKLR** the Court of Appeal held;

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The Applicant who would succeed upon such an application must persuade the Court on 2 limbs; that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the Application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These 2 limbs must both be demonstrated and it would not be enough that only one is demonstrated....”

In the instant application, the Garnishee sought stay of execution of the Ruling of 27th July 2018 specifically that ‘Petroleum products held by Garnishee be attached to satisfy the decree herein’.

The Applicant filed Notice of Appeal as annexed to the application. The instant application was filed on 22nd August 2018 almost a month from delivery of the Ruling on 27th July 2018 so it was filed within reasonable period and there was no delay.

The Applicant has demonstrated that the execution of the decree that is release to the Decree holder products held on behalf of the Judgment debtor would jeopardise its claim against the judgment debtor.

The Applicant illustrated by the Statement of Account of the Judgment Debtor annexed to the Application. The Account shows that the Judgment Debtor owes the Garnishee **USD 171,755,734** which is way above the Decree holder’s claim of **USD 52,856**. The Judgment debtor did not contest or controvert the Applicant’s contention of the debt.

The Applicant also cited **Clause 16.3 & 16.4** of the Transport & Storage Agreement annexed to the Garnishee’s Replying Affidavit to Decree Holder’s Notice of Motion of 28th July 2017. The Agreement stipulates that the Garnishee’s right against the Judgment Debtor in the event of non-payment within 15 days after delivery of invoice, shall suspend delivery of Products to the Judgment Debtor and shall be at liberty to dispose the said products to recover amounts owing.

Therefore, if the Garnishee settles the Decree as per the Court’s Ruling, it will also compromise its own pending claim against the Judgment Debtor.

Secondly, the Judgment Debtor’s outstanding amount is way more than the Decree holder’s claim against the Judgment Debtor. The Garnishee in settling the decree will incur substantial loss, settling the Decree-holder’s decree while it has not recovered its own claim from the Judgment Debtor.

On whether there is an arguable appeal, this Court will not endeavour to open up matters determined by a Court of equal and competent jurisdiction. This Court took over the matter at the stay of execution application stage after it was heard and determined by the Trial court. This Court lacks appellate jurisdiction to discuss merits of the Ruling.

With regard to provision of security, the Garnishee conceded to furnishing security for due performance of the Decree.

In light of the fact that the Applicant has complied with the requirements for stay of execution and the fact the Judgment Debtor failed to oppose or contest liability it has with the garnishee, the Court finds that not granting the stay of execution would render the appeal nugatory.

DISPOSITION

1. The Garnishee/Applicant’s application of 22nd August 2018 for stay of execution pending appeal to the Ruling of this Court of 27th

July 2018 is granted with costs, on condition;

2. The Garnishee shall provide either Ksh 2 million in a joint account held by advocates on record of the Garnishee and Decreeholder OR bank or insurance guarantee of similar amount deposited with DR Commercial & Tax Division within 30 days from date of delivery of the Court Ruling.

3. The Court is aware of the ongoing Corvid 19 pandemic lockdown of Courts as announced by CJ on 16th April 2020 and reopening of Courts on 15th June 2020 on virtual platform; these circumstances may affect compliance with the timelines. Parties shall at liberty to apply to Court in case of such eventuality.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND JUNE 2020. (VIRTUAL CONFERENCE)

M.W. MUGAI

JUDGE

IN THE PRESENCE OF:

Emsi & Associates For Garnishee/applicant – N/a Paul Mungla & Co For Decreeholder – N/a Sitico Petroleum Products Limited For Judgment Debtor – N/a