



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 467 OF 2019

CREEKVIEW LIMITED.....APPELLANT

VERSUS

SCRATCH LOGISTICS LIMITED T/A SCRATCH BAR.....RESPONDENT

RULING (1)

1. In its Notice of Motion application dated and filed on 14th August 2019, the Appellant sought an order for stay of execution of the judgment and decree that was delivered by Hon A.N. Makau (Ms) on 12th July 2019 in **Milimani CMCC No 6842 of 2017 Creekview Limited vs Scratch Logistics Limited t/a Scratch Bar** pending the hearing and determination of the appeal herein. Its said application was supported by the Affidavit of its Director, Vivek Shah. The same was also sworn on 14th August 2019.
2. It contended that it stood to suffer substantial and irreparable harm and that it had an arguable Appeal with a probability of success, which would be rendered nugatory if it was not granted an order for stay of execution pending appeal. It therefore urged this court to allow its application as prayed.
3. In support of its application, it relied on the cases of **Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 Others [2014] eKLR** and **Focin Motorcycle Co Limited vs Ann Wambui Wangui & Another [2018] eKLR**.
4. Despite the court having directed the Respondent to file its response to the present application and Written Submissions by 20th November 2019, it had not done so by 12th February 2020 when the matter was mentioned to confirm compliance and/or for further orders and/or directions. Further, it had also not paid the Court Adjournment Fees (CAF) it was ordered to pay on the said Mention date. In addition, it had also not furnished the court with its response to the aforesaid application by the time this court reserved and/or wrote its decision despite this court having directed it on 29th April 2020 to do so by 12th May 2020.
5. The court did not also see the Preliminary Objection that had been alluded to by the Appellant herein in its Written Submissions. It was not clear from its said submissions what the Preliminary Objection was about. Further, the Respondent did not expound what the said Preliminary Objection was about. In view of those difficulties, this court did not therefore consider the same.
6. Technically, the present application was therefore unopposed. However, even where an application was unopposed, the court was still under a duty to establish whether or not an applicant's application for an order for stay of execution was meritorious. It was also under a duty to consider parties' written submissions even where they had not filed responses to applications for the reason that any party could oppose an application on points of law only.
7. Out of this obligation, which was really to do substantive justice to both parties, this court considered the Respondent's Written Submissions that were dated and filed on 4th February 2020. It, however, did so reluctantly because the Respondent failed to pay the CAF and had no audience before the court for not complying with a court order.
8. The Respondent placed reliance on the cases of **Machira t/a Machira & Co Advocates vs East African Standard (No 2) [2002] KLR** and **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR** in support of its case.
9. Notably, before an applicant can be granted an order for stay of execution pending appeal, he has to demonstrate that he has met the following conditions that have been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

- a. **That substantial loss may result unless the order is made.**

b. That the application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

10. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

11. In the case of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another** (Supra), this very court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

12. The court noted that the Respondent had not filed any Affidavit of Means to demonstrate that it was financially able to refund the Appellant the decretal sum if the same was paid to it before the intended appeal herein could be heard and determined and the Appellant was successful in its Appeal herein.

13. In the absence of proof by the Respondent to demonstrate its ability to refund the Appellant the decretal sum, this court was satisfied that the Appellant would suffer substantial loss. It had thus satisfied the first condition of being granted an order for stay of execution pending appeal.

14. The judgment the Appellant wished to appeal against was delivered on 12th July 2019. The Appellant filed its present application on 14th August 2019. This court found and held that the said application had been filed without undue delay and consequently, the Appellant had satisfied the second condition for the granting of an order for stay of execution pending appeal.

15. The Appellant had not indicated whether it was ready and willing to comply with any order and/or direction as regards security for the due performance of the decree. This could not deal a fatal blow to their application for the reason that the court could impose any conditions on security as would be ultimately binding on it for the due performance of decree and/or order.

16. Indeed, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the applicant.”

17. This court therefore found and held that the third condition of being granted an order for stay of execution pending appeal had been met.

DISPOSITION

18. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated and filed on 14th August 2019 was merited and the same is hereby allowed in terms of Prayers No (3) therein in the following terms:-

1. THAT there shall be a stay of execution of the decree in Milimani CMCC No 6842 of 2017 Creekview Limited vs Scratch Logistics Limited t/a Scratch Bar pending the hearing and determination of the Appeal on condition the Appellant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the Respondent, the sum of Kshs 2,500,000/= within thirty (30) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 18(1) hereinabove, the conditional stay of execution shall automatically lapse.

3. Either party is at liberty to apply.

4. Costs of the application will be in the cause.

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of July 2020

J. KAMAU

JUDGE