



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 33 OF 2020**

**EDN GEORGE DIESEL LIMITED..... APPELLANT**

**VERSUS**

**PETROLUBE (K) LIMITED.....RESPONDENT**

**RULING**

1. In its Notice of Motion application dated 23<sup>rd</sup> January 2020 and filed on 24<sup>th</sup> January 2020, the Appellant sought an order for stay of execution of the judgment delivered by Hon Makau on 10<sup>th</sup> January 2010 (sic) in **Milimani CMCC No 21 of 2018** pending the hearing and determination of the appeal herein. His said application was supported by the Affidavit of its Director, George Gichini Mungai that was sworn on 23<sup>rd</sup> January 2020.

2. The Appellant contended that on 10<sup>th</sup> January 2020, Hon Makau entered judgment against it in favour of the Respondent herein for the sum of Kshs 3,065,834/=, which judgment it averred was littered with irregularities.

3. It pointed out that its Appeal had a reasonable chance of success and if the order for stay of execution was not granted, it would be rendered nugatory if it succeeded as it would not be able to recover the said decretal sum. It asserted that it was a company with assets in the country exceeding Kshs 100,000,000/= and it was more than able to satisfy the decretal sum should it not succeed on appeal.

4. In opposition to the said application, on 12<sup>th</sup> February 2020, the Respondent's Director, Oliver Mascaren swore a Replying Affidavit. The same was filed on 18<sup>th</sup> February 2020. The Respondent contended that there was a valid judgment on record from which a decree, warrants of attachment and proclamation had already been issued. It added that the Appellant had filed three (3) applications for review in the lower court but that the same were all dismissed.

5. It termed the present application as fatally incompetent because there was no Appeal for the main suit, inexplicably belated and frivolous in fact and law. It denied that the Appellant would suffer irreplaceable loss should it pay it the decretal sum, costs and auctioneers fees. It stated that the Appellant had failed to offer security and that if the court was inclined to allow the present application, then it ought to deposit the decretal sum in a joint interest earning account in the names of the lawyers.

6. A perusal of the Appellant's submissions showed that it had advanced arguments to demonstrate that its Appeal was merited. However, it did not submit on the question of whether it had met the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 warranting it to be granted an order for stay of execution pending appeal.

7. On its part, the Respondent relied on the cases of **Alba Petroleum Limited vs Total Marketing (K) Limited [2019] eKLR** and **Republic vs Retirement (sic) Benefits Appeals Tribunal exparte Heritage A.I.I. Insurance Co Limited R.B.S. [2017] eKLR** where the common thread was that no stay can be granted if there was no appeal which had been filed. It was emphatic that the Appellant had not met the threshold set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

8. Before considering whether or not there was merit in the Appellant's application for an order of stay of execution pending appeal, this court took the view that it could grant the order for stay of execution notwithstanding that no appeal had been filed. Indeed, under Order 42 Rule 6 (1) of the Civil Procedure Rules, the appellate court has power to grant an order of stay of execution if such order had not been granted by the court from which the appeal had been preferred.

9. Order 42 Rule 6 (1) of the Civil Procedure Rules provides as follows:-

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from**

except 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** (emphasis court), 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.”

10. Having settled the said issue, this court determined that before a court could grant an order for stay of execution, it had to be satisfied that the applicant had demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The said conditions are as follows:-

**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.**

11. 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.

12. The Respondent did not demonstrate that it was financially able to refund the Appellant the decretal sum if the same was paid to it before the Appeal herein could be heard and determined. Whereas the decretal sum did not appear colossal going by how each party described itself, it was the view of this court that difficulties by the Appellant herein to recover the decretal sum could be deemed to amount to substantial loss.

13. In the case of **Dr G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar**, this very court pronounced itself 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.”**

14. In the absence of proof to demonstrate her ability to refund the Appellant the decretal sum, this court was satisfied that it would suffer substantial loss if it paid the Respondent the decretal sum and it succeeded in its Appeal herein. It had thus satisfied the first condition of being granted a stay of execution pending appeal.

15. The decision the Appellant intended to appeal against was delivered on 10<sup>th</sup> January 2020. The present application was filed on 23<sup>rd</sup> January 2020. The application was thus filed without undue delay. It had therefore satisfied the second condition for the granting of an order for stay of execution pending appeal.

16. It was willing to deposit the entire decretal sum into a joint interest earning account in the name of its advocates and those of the Respondent, a condition the latter had proposed should be imposed by the court before granting it the orders that it had sought. This was sufficient security for the due performance of the decree as would be binding upon it. It was therefore the considered opinion of this court that the Appellant had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

## **DISPOSITION**

17. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application that was dated 23<sup>rd</sup> January 2020 and filed on 24<sup>th</sup> January 2020 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

**1. THAT there shall be a stay of execution of the decree delivered by Hon Makau on 10<sup>th</sup> January 2020 in Milimani CMCC No 21 of 2018 pending the hearing and determination of the Appeal on condition the Appellant shall deposit into an interest earning account in the joint names of his counsel and counsel for the Respondent, the sum of Kshs 3,606,834/= 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 17(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.**

18. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of July 2020**

**J. KAMAU**

**JUDGE**