



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 554 OF 2019

YOUNG TRADERS LIMITED.....APPELLANT

VERSUS

EVALISTO KULE.....1STRESPONDENT

FANTASY AUCTIONEERS.....2ND RESPONDENT

JADIEL GITHINJI MAINA.....3RD RESPONDENT

RULING

1. In its Notice of Motion application dated 8thOctober 2019 and filed on 9thOctober 2019, the Appellant sought an order for stay of execution of the judgment and decree that was delivered in **CMCC No 7008 of 2012** on 3rdOctober 2019(sic) pending the hearing and determination of the appeal herein. It's said application was supported by the Affidavit of Monicah Kinuthia, its Managing Director that was sworn on 8thOctober 2019. She also swore a Supplementary Affidavit on 24th January 2020 that was filed on 27th January 2020.

2. It contended that it was aggrieved by the entire judgment that was entered against it. It further averred that in the event its application was not allowed, it stood to suffer substantial loss and/or suffer prejudice and further, its appeal, which had high chances of success, would be rendered nugatory. It added that the Respondent did not stand to suffer any prejudice at all and hence it was in the interest of justice that the application be allowed with the subject matter still intact.

3. In support of its application, it relied on the case of **Nairobi Women's Hospital vs Purity Kemunto [2018] eKLR**.

4. Despite the court having directed the Respondents to file their response to the present application and Written Submissions by 5th December 2019 and 20th January 2020 respectively, they had not done so by 31st January 2020 when the matter was mentioned to confirm compliance and/or for further orders and/or directions. They had also not filed the same by the time this court reserved and/or wrote its decision. The 1st Respondent had also not paid the Court Adjournment Fees he was ordered to pay on 31st January 2020.

5. Technically, the present application was 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.

6. 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.

7. 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.

8. In the case of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR**, 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.”

9. The court noted that the Respondents had not filed Affidavits of Means to demonstrate that they were financially able to refund the Appellant the decretal sum if the same was paid to them before the intended appeal herein could be heard and determined and the Appellant was successful in its Appeal herein.

10. In the absence of proof by the Respondents to demonstrate their 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.

11. The judgment the Appellant wished to appeal against was delivered on 10th September 2019. It had erroneously been indicated on the face of the application that the said judgment was delivered on 3rd October 2019. The Amended Decree and Certificate of Stated Costs dated 30th January 2020 was clear that the judgment was delivered on 10th September 2019. The court thus adopted the said date for purposes of considering whether or not the Appellant had filed its present application without undue delay.

12. Evidently, the Appellant filed its present application on 9th October 2019. Bearing in mind that judgment was delivered on 10th September 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.

13. 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.

14. 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.”

15. 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

16. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 8th October 2019 and filed on 9th October 2019 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 in Milimani CMCC No 7008 of 2012 Evalisto Kule vs Young Traders Limited & 2 Others pending the hearing and determination of the Appeal on condition that the Appellant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the 1st Respondent, the sum of Kshs 61,305/= 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 16(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.

17. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of July, 2020

J. KAMAU

JUDGE