



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 109 OF 2019**

**WANANCHI GROUP (K) LIMITED.....APPELLANT**

**VERSUS**

**TEC INSTITUTE OF MANAGEMENT LIMITED....RESPONDENT**

**RULING**

1. The appellant (applicant) was the defendant in a suit instituted in the lower court by the respondent. The suit was concluded vide judgment delivered on 30<sup>th</sup> January 2019 in favour of the respondent in the sum of KShs.9,984,002 together with costs of the suit and interest.

2. The applicant was aggrieved by the judgment of the trial court and on 8<sup>th</sup> February 2019, it filed an appeal to this court challenging the validity of the trial court's judgment. On 26<sup>th</sup> February 2019, the applicant presented before the trial court an application for stay of execution of the impugned judgment pending the hearing and determination of its appeal.

3. On 7<sup>th</sup> October 2019, the learned trial magistrate *Hon. P N Gesora (CM)* allowed the application and ordered stay of execution of the judgment on condition that the applicant deposited the entire decretal amount in court within 21 days giving credit to KShs.4,224,856 the applicant had earlier deposited in the court's bank account no.116931044 as a condition for setting aside default judgment which had been entered against it.

4. Being dissatisfied with the condition imposed by the trial court to the grant of stay, the applicant moved this court vide the Notice of Motion dated 28<sup>th</sup> October 2019 principally requesting this court to set aside the conditional stay issued by the trial court and to grant stay on condition that the KShs.4,224,856 earlier deposited by the applicant continued to be held as security pending disposal of the appeal.

5. The application is premised on the grounds stated on its face and the depositions made in the supporting affidavit sworn on 28<sup>th</sup> October 2019 by *Mr. Michael Maina*, the applicant's Legal and Regulatory Affairs Manager. In the main, the applicant contends that the order requiring it to deposit a further KShs.5,759,146 is punitive as it will greatly impact on its working capital and if the application was allowed, the respondent is not likely to suffer any prejudice.

6. The application is opposed through grounds of opposition dated 18<sup>th</sup> November 2019 and a replying affidavit sworn on 11<sup>th</sup> November 2019 by *Mr. John Kariuki*, the respondent's learned counsel. The grounds of opposition are replicated in the averments made in the replying affidavit to the effect that the application amounted to an abuse of the court process as it was designed to delay the course of justice and to deny the respondent enjoyment of the fruits of its judgment; that instead of filing a fresh application for stay in this court, the applicant ought to have sought review of the trial court's orders; that the applicant has not demonstrated that it was likely to suffer any substantial loss if stay was not granted on terms sought; that having already deposited KShs.4,224,856, depositing the balance of the decretal sum will not occasion the applicant substantial loss.

7. By consent of the parties, the application was prosecuted by way of written submissions. The applicant filed its written submissions on 4<sup>th</sup> March 2020 while those of the respondent were filed on 17<sup>th</sup> June 2020.

8. I have considered the application, the grounds of opposition, the affidavits on record in support and in opposition to the motion as well as the rival written submissions filed on behalf of the parties. Having done so, I find that the parties submitted at length on matters touching on the merits of the pending appeal which was completely unnecessary. In determining applications for stay of execution pending appeal, the court is not required to interrogate the merits or otherwise of the pending appeal since doing so may prejudice hearing of the appeal. Besides, unlike the Court of Appeal, the High Court in deciding whether or not to grant stay pending appeal is not mandated to consider whether the pending appeal is arguable.

9. The respondent has contended that the instant application amounts to an abuse of the court process as the applicant had obtained orders of stay before the trial court but instead of complying with those orders or seeking a review of the same, it filed the current application.

10. With respect, this claim is misplaced considering that under *Order 42 Rule 6 (1)* of the *Civil Procedure Rules* (the *Rules*), a party who has proffered an appeal either to the High Court or to the Court of Appeal has a right to file in the appellate court an application for stay of execution of the impugned decree or order whether or not an application for stay had been granted or refused by the court appealed from. The appellate court is empowered to consider such an application independently and make such orders thereon as it deems fit.

11. For the avoidance of doubt, I think it is important to reproduce the said provision to understand its true import. It states 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, 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.” [emphasis added]**

12. My interpretation of the above provision is that once an appeal is filed, the appellate court is clothed with original jurisdiction to hear and determine an application for stay pending appeal afresh irrespective of whether such stay had been granted or refused by the trial court. In addition, where an application for stay had been decided by the lower court, any party aggrieved by the court’s decision has a right to apply to the appellate court to have the lower court’s decision set aside.

In the premises, it is my finding that in opting to file the instant application to this court instead of seeking a review of the trial court’s decision, the applicant did not abuse the court process but merely exercised its right under *Order 42 Rule 6 (1)* of the *Rules*.

13. Turning to the merits of the application, the law governing stay of execution pending appeal is set out in *Order 42 Rule 6 (2)* of the *Rules* which provides as follows:

**“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.”**

14. It is trite law that the remedy of stay of execution pending appeal is discretionary. In exercising its discretion, the court must be guided by established legal principles and must take into account the peculiar circumstances of each case. Whether an applicant has demonstrated sufficient cause to justify the grant of stay is determined by considering whether the applicant had satisfied all the preconditions for grant of stay stipulated in *Order 42 Rule 6 (2)* of the *Rules*.

15. Starting with the requirement that the application ought to be filed timeously, I note that the impugned judgment was delivered on 30<sup>th</sup> January 2019 and the appeal was filed about a month later on 28<sup>th</sup> February 2019. On the same day, the applicant filed an application for stay in the trial court which was determined on 7<sup>th</sup> October 2019. The current application was filed three weeks later on 28<sup>th</sup> October 2019. It is thus clear that the application was filed without unreasonable delay.

16. Regarding substantial loss, I must say that although all the three conditions for grant of stay are important, the requirement for demonstration of the likelihood of substantial loss occurring if the stay sought is denied is the overarching consideration because if there was nothing to show that an applicant was likely to suffer substantial loss if stay was refused, there would be no justification for suspending the respondent’s right to enjoy the fruits of its judgment.

17. The Court of Appeal in *Kenya Shell Limited V Benjamin Karuga Kibiru & Another, [1986] eKLR* emphasized the centrality of the requirement for demonstration of likelihood of substantial loss in applications for stay pending appeal when it expressed itself as follows:

**“Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”**

18. The onus of proving substantial loss rests with the applicant. This is in alignment with the cardinal principle of the law of evidence that he who alleges must prove. It is now settled that proof of substantial loss must be by way of credible evidence not just averments or unsubstantiated statements. I am fortified in this proposition by the holding in *Machira T/A Machira & Company Advocates V East African Standard, (No. 2) 2002 KLR 63* where the court stated that:

**“... It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.**

**If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or**

**particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensure and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg. appeal or intended appeal) ...."**

19. In this case, the applicant has claimed that if it was ordered to deposit KShs.5,759,146 in addition to the KShs.4,221,856 already deposited in court, it will suffer substantial loss as its working capital will be adversely affected. The applicant has not however availed to this court any evidence to substantiate that claim. While it is not disputed that the applicant is a going concern, there is no evidence to suggest that it is likely to fold up its operations or to demonstrate how its operations would be adversely affected if the condition imposed by the trial court to the grant of stay pending appeal was upheld.

20. In applications for stay pending appeal, the court must strive to balance the competing interests of both parties and determine the application in a manner that will cause the least prejudice to either of the parties. The court must always bear in mind that in as much as the applicant is entitled to exercise his right of appeal, the respondent being the successful litigant has an equally weighty right to enjoy the fruits of his judgment and both these rights must be safeguarded.

21. I have considered the applicant's offer of security in the form of the money earlier deposited in court in the sum of KShs.4,221,856. This is slightly less than half of the decretal amount. In my view, having weighted the competing interests of the parties, I find that the interests of justice in this case demands that stay of execution of the lower court's judgment be granted to enable the applicant exercise its right of appeal but on terms which will secure the entire decretal sum so that if the applicant is unsuccessful in its appeal, the respondent will be in a position to access the decretal sum without much difficulty.

22. Flowing from the foregoing, it is my finding that prayer 3 of the motion is merited and it is hereby allowed on terms I will state shortly. Prayer 4 is incapable of being granted considering that the orders issued by the trial court on 7<sup>th</sup> October 2019 have already lapsed while prayer 5 is not merited for the reasons expressed above.

23. In the end, prayer 3 of the motion is allowed on terms that the applicant will deposit the remainder of the decretal sum, that is, KShs.5,759,146 in a joint interest earning account operated by both counsel on record. Considering that the amount is substantial, the deposit shall be made within 60 days of today's date failing which the stay orders granted will stand discharged.

24. Costs of the application will abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of July 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Kiruri for the applicant

Mr. Muriithi for the respondent

Ms Mwinzi: Court Assistant