



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 152 OF 2015

MOHAMMED SALEH HASSAN.....PLAINTIFF/RESPONDENT

VERSUS

FEISAL JAMA T/A KENUGA ENTERPRISE.....DEFENDANT/APPLICANT

R U L I N G

The Facts

1. This ruling is in respect of the defendant's notice of motion application dated 19th May 2020. The application is brought under Sections 1, 1A, 3 and 3A of the Civil Procedure Act, Order 51 rules 1 and 3 and Order 42 Rule 6 of the Civil Procedure Rules, 2010. It seeks stay of execution pending appeal.
2. The dispute giving rise to the present suit concerned two agreements between the parties. The first agreement was one by which the parties agreed that the plaintiff would import and sell to the defendant three used ex UK trucks whose price the defendant would pay in installments but with interests at 15% p.a. That agreement was dated 3.1.2012. The matter was heard on the merits and on the dated 30th April 2020, the court found in favour of the plaintiff and awarded him the sum of Kshs. 11,491,529.00 together with costs and interests at the contractual rate of 15% p.a from the date of the suit till payment in full.
3. The defendant/applicant is aggrieved by the judgement of 30th April 2020 and has filed a notice of appeal and the instant application for stay pending appeal.

The parties' submissions on the application

4. On 28th May 2020, the advocates for the parties attended court and agreed on timelines for filing submissions and that there would not be any need to highlight those submissions once filed. Pursuant to such consent, the defendant filed his submissions dated 11.06.2020 on the 16.06.2020 while the plaintiff applicant did so on the 19.06.2020.
5. Both counsel concur that the threshold to be met is coded under Order 42 Rule 6 as interpreted by the superior courts of Kenya and that the crystallised principles are that; Substantial loss may result to the applicant unless stay is granted; the application for stay must be made without unreasonable delay; and that the applicant ought to offer such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
6. I have had the benefit of reading the submissions by both counsel and by virtue of the very nature of the application the court's task must remain to establish if the applicant has met the prerequisite of grant of stay pending appeal.
7. The applicable principles for grant of stay are now well settled and have been reiterated in a multitude of decided cases. I can only add that 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 copulative used word is "**and**" which connotes that all three (3) conditions must be met simultaneously.
8. The first condition requires the applicant to demonstrate evidence of substantial loss in case stay is not granted. It is simply not enough for the applicant to say that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. "**Substantial loss**" must mean something over and beyond the ordinary loss to which every judgement debtor is necessarily subjected to when he loses his case. **Kimaru, J** in ***Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007*** as quoted in ***Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR*** held thus:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

9. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (1986) eKLR, Gachuhi Ag JA (as he then was) said thus about “substantial loss”:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it was before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

10. Similarly in *SAMVIR TRUSTEE LIMITED v GUARDIAN BANK LIMITED* [2007] eKLR, Warsame J (as he then was) said thus:

“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

11. I have read and understood the defendant’s application for stay. I quickly noticed that he did not provide tangible evidence of the substantial loss that he will suffer in the event stay is not granted. From the application, I understand the defendant/applicant to be merely saying “the judgement debt is a lot of money and I will suffer loss if it is paid.” On the strength of the above quoted judicial pronouncements, I do find and hold that the defendant has failed to establish substantial loss. As such, he has not met the first condition for grant of stay of execution.

12. The second requirement is that the applicant offers to avail such security as the court may order for the due performance of the decree that may result upon determination of the appeal. This requirement serves to strike a balance between the conflicting interests and rights between the two litigants. The decree holder has the legitimate right to the property in the decree while the judgment debtor holds the right to access court by way of an appeal unhindered. In balancing those competing interests, the security serves to assure both that on conclusion of the appeal whoever succeeds will resort to the availed security without undue protraction.

13. The security to be ordered would depend on the decree itself. In this matter the decree is monetary and it is that sum that ought to be secured pending the conclusion of the appeal. This Court is guided by the following holding of the Court of Appeal in *KENYA HOTEL PROPERTIES LIMITED v WILLESDEN INVESTMENTS LIMITED* [2007] eKLR:

“The decree is a money decree and normally the courts have held 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 is 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.”

14. The above position was adopted by a differently constituted bench of the Court of Appeal in *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another* [2015] eKLR. I understand the Court of Appeal to be saying that a money decree will be stayed only where the applicant is likely to suffer undue hardship in having the decretal sum refunded to him on the success of the appeal. That is the reason where the applicant expresses the fear that the respondent would be unable to effect a refund, it becomes the obligation of the respondent/decreed-holder to demonstrate ability to pay.

15. The third condition requires the applicant to lodge the application without unreasonable delay. The Court notes that there was no delay in filing the instant application. Judgement was delivered on 30th April 2020 and the application was filed on 19th May 2020. In any event, the respondent does not contest the same element.

16. The defendant/applicant having failed to demonstrate the substantial loss and being unwilling to avail the entire decretal sum as security, and the prerequisite being cumulative I find that the thresholds have not been met and thus the application cannot succeed but must fail.

17. Before I end, there were concerns raised by the plaintiff decree holder and concerning the readiness for execution in the absence of an extracted decree and the costs which are yet to be taxed. That would have been valid concern save that I have seen a decree issued on the 30.04.2020 apparently extracted and paid for by Mr Tindi advocate for the decree-holder. On costs, the law remains that execution ought not issue prior to taxation unless with the leave of the court. That am sure the parties and counsel are obligated to observe and should not be by itself the basis to refuse an application for stay. For the reasons given the application fails and is dismissed with costs.

Dated, signed and delivered at Mombasa this 25th day of September 2020

P.J.O. OTIENO

JUDGE