



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 381 OF 2019**

**CAR & GENERAL (KENYA) LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**NAPHTALI CHUNGANI ALIGULA.....1<sup>ST</sup> RESPONDENT**

**JOHNSON MUTEMI NGUTU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant/applicant herein lodged the Notice of Motion dated 8<sup>th</sup> July, 2019. The Motion is supported by both the grounds laid out in the body of the application and the facts stated in the sworn affidavit of David Chesoni. The applicant sought for the substantive order for stay of execution of the ruling and order issued by the trial court on 5<sup>th</sup> July, 2019 pending the hearing and determination of an appeal against the same. The applicant equally sought for an order that the cost of the Motion be in the cause.
2. The application stands opposed by way of the replying affidavit sworn by the 1<sup>st</sup> respondent on 11<sup>th</sup> December, 2019. Going by the record, it is apparent that the 2<sup>nd</sup> respondent did not participate at the hearing of the Motion.
3. When the Motion came up for hearing, this court directed the parties to put in written submissions. While the applicant and 2<sup>nd</sup> respondent's respective advocates had indicated that they had filed written submissions, the copies thereof were not availed to this court at the time of writing this ruling.
4. Be that as it may, I considered the grounds articulated in the Motion and the facts deponed in the affidavits supporting and resisting the Motion.
5. A brief background of the matter according to the parties is that the 1<sup>st</sup> respondent instituted a suit against the applicant and the 2<sup>nd</sup> respondent in CMCC NO. 7132 of 2017. Subsequently, an interlocutory judgment was entered against the applicant and the 2<sup>nd</sup> respondent followed by final judgment in favour of the 1<sup>st</sup> respondent and against the applicant and the 2<sup>nd</sup> respondent on 31<sup>st</sup> January, 2019 in the sum of Kshs.305,400/.
6. The applicant thereafter filed the application dated 12<sup>th</sup> April, 2019 before the trial court and sought for an order of a stay of execution of the final judgment pending hearing and determination of an appeal against the same.
7. Upon hearing the parties, the trial court dismissed the application.
8. It is clear that the application now before me concerns itself with a similar order for stay of execution. The relevant provision is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions to be satisfied in granting an order for stay of execution.
9. I will begin with the first condition to do with whether the application has been brought without unreasonable delay. It is apparent that the impugned judgment was delivered on 31<sup>st</sup> January, 2019 and thereafter, the applicant's first application seeking a similar order for stay of execution was dismissed by the trial court on 5<sup>th</sup> April, 2019. The present application was subsequently filed close to three (3) months later on 8<sup>th</sup> July, 2019. In my view, this does not amount to unreasonable delay.
10. On the second condition on substantial loss, the applicant stated that the 1<sup>st</sup> respondent has no known assets which puts the applicant at the risk of being unable to recover the decretal amount from the 1<sup>st</sup> respondent once the same is paid and the appeal succeeds, rendering the

appeal nugatory.

11. In his affidavit in support of the Motion, David Chesoni further stated that the applicant is apprehensive that the 1<sup>st</sup> respondent could soon commence the execution process, thereby causing the applicant to suffer irreparable harm. In reply, the 1<sup>st</sup> respondent stated that the Motion is intended to prevent him from enjoying the fruits of his judgment.

12. The purpose behind the principle of substantial loss in an application for a stay of execution was aptly addressed in the Court of Appeal case, namely **Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** thus:

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”***

13. Further to the foregoing, the courts have reasoned that substantial loss entails that which ought to be prevented in order to maintain the status quo of the parties involved, otherwise the appeal in question would be rendered nugatory.

14. On the one part, it is true that a party is entitled to the fruits of his judgment. On the other part, once the financial capabilities of a party are brought to question, it is the duty of such party to demonstrate that he or she is capable of refunding the decretal sum in the event that the appeal succeeds.

15. In the present instance, the 1<sup>st</sup> respondent did not bring any evidence to show that he is able to refund the decretal sum. On that ground, I am convinced that the applicant has shown the substantial loss it stands to suffer should this court decline to grant an order for stay of execution.

16. In respect to the third condition on the provision of security, David Chesoni stated in his affidavit that the applicant is ready and willing to furnish security for the due performance of the decree. In retort, the 1<sup>st</sup> respondent suggested that the entire decretal sum be deposited in a joint interest earning account.

17. The upshot, therefore, is that the Motion found to be meritorious. Consequently, there shall be an order for stay of execution pending the hearing and determination of the appeal on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocate and or firm of advocates appearing in this appeal within 30 days from the date hereof failing which the stay order shall lapse. Costs of the application to abide the outcome of the appeal.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24<sup>th</sup> day of September, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant/Applicant

.....for the 1<sup>st</sup> Respondent

.....for the 2<sup>nd</sup> Respondent