



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 462 OF 2018

PETER GACHANGAGA NJIHIA.....APPELLANT

VERSUS

TRANSWIDE PHARMACEUTICALS LIMITED.....RESPONDENT

RULING

1. In his Notice of Motion application dated and filed on 17th September 2019, the Appellant herein sought an order of stay of execution pending the hearing and determination of the Appeal herein. The said application was supported by the Affidavit of his advocate, Mwaniki Gachomo that was sworn on the same date.
2. He contended that the Learned Trial Magistrate erred in having found that the issues raised by the applicant (**sic**) in its Statement of Defence ought to have been raised in **CMCC No 2884 of 2008** yet it was never a party to the said suit.
3. He added that the Respondent was in the process of executing the warrants of attachment which would render the Appeal nugatory as he would be forced to pay a decretal sum that he disputed.
4. He pointed out that there was undue and unexplained (**sic**) delay in getting the typed proceedings for collection from the Registry as efforts made to obtain the same had been futile. He stated that he was willing to abide by any conditions that this court would impose in the interest of justice. He therefore urged this court to allow his application as prayed.
5. In opposition to the said application, on 15th October 2019, the Respondent's Credit Controller, Linus Kinoti, swore a Replying Affidavit on the Respondent's behalf. The same was filed on 17th October 2019. The Respondent pointed out that the Appellant's Memorandum of Appeal did not bear a court stamp and could not therefore be said to have been duly filed. It stated that what was delivered in **CMCC No 2884 of 2008** was an order for Summary judgment on 24th September 2018 and a Ruling dated 19th August 2012 and consequently, the Memorandum of Appeal, if at all the same was filed, was filed outside the statutory time set for proffering appeals.
6. It was emphatic that an appeal did not operate as a stay of execution and it was therefore within its rights to execute as no stay had been granted against the said execution. It stated that the present application was an attempt to delay it from enjoying the fruits of its judgment and termed it an abuse of the court process. It thus urged this court to dismiss the said application.
7. Both parties were agreed on the conditions that must be met before an order for stay of execution pending appeal can be granted. In this regard, the Appellant relied on the cases of **Butt vs Rent Restriction Tribunal [1982] KLR 417**, **Florence Hare Mkaha vs Pwani Tawakal Mini Coach & Another [2014] eKLR** amongst other cases to support his case.
8. On its part, the Respondent placed reliance on the cases of **Runda Water Limited & Another vs Timothy John Nicklin & Another [2017] eKLR**, **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR** amongst other cases to argue that the Appellant had not met the conditions for being granted an order of stay of execution pending appeal.
9. In answering the question as to whether the Appellant herein could be granted an order in the absence of an appeal, this court had due regard to Order 42 Rule 6 (1) of the Civil Procedure Rules which 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 (emphasis court), **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.”**

10. What this court understood from the aforesaid Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 was that an applicant could be granted an order of stay of execution pending appeal if it satisfied the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules even where no appeal had been filed.

11. Having said so, this court looked at the Memorandum of Appeal that was filed herein and noted that the same was stamped 2nd October 2018 contrary to what had been stated by the Respondent herein. Bearing in mind that the Appellant was appealing against the decision that was delivered on 14th September 2018, this court was satisfied that the said Memorandum of Appeal was filed within the statutory period of thirty (30) days as provided in Section 79G of the Civil Procedure Act Cap 21 (Laws of Kenya).

12. Having determined that the present application was properly before the court, it proceeded to consider whether or not the same was merited.

13. 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.

14. 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. Order 42 Rule 6 (2) of the Civil Procedure Rules is couched in mandatory terms. It states that:-

“No order for stay of execution shall (emphasis court) **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.”

15. It was not clear from the present application or Memorandum of Appeal what the decretal sum in contention was. However, in its Replying Affidavit, the Respondent had enclosed the decree given on 24th September 2010 showing that the decretal sum was Kshs 398,874.60. The Notice To Show Cause (NTSC) given on 3rd July 2019 showed that the amount had increased to Kshs 649,105.88.

16. However, save for contending that it was a multi-billion company with branches all over the country and able to refund the decretal sum in the event the Appellant was successful in his Appeal, this court considered that difficulties in recovering the decretal sum after succeeding in an appeal could be deemed to amount to substantial loss.

17. 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.”

18. In the absence of proof that the Respondent would be able to refund the Appellant the decretal sum without any hardship, this court was satisfied that he would suffer substantial loss. The Appellant had thus satisfied the first condition of being granted a stay of execution pending appeal.

19. Turning to the issue of filing the application without undue delay, this court noted that the present application was filed almost one (1) year after the Memorandum of Appeal was filed. Be that as it may, it was the considered view of this court that whereas twelve (12) months was inordinately long, the present application was filed about a month after the Appellant was due to appear in court on 6th August 2019 in response to the NTSC. Purely in the interests of justice, this court determined that the present application was filed without undue delay. The Appellant had thus satisfied the second condition for the granting of an order for stay of execution pending appeal.

20. The Appellant had indicated that he was willing to abide by any conditions that were imposed by the court. This court was thus satisfied that he had demonstrated that he had complied with the third condition of being granted an order for stay of execution pending appeal.

21. Weighing the Appellant's right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if he was denied an opportunity to ventilate his Appeal on merit. It was therefore in the interests of justice that he canvasses his Appeal while there were preservatory orders herein.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 17th September 2019 was merited and the same is hereby allowed in the following terms:-

1. THAT there shall be an order for stay of execution of the Ruling of Hon W. Mburu that was delivered on 14th September 2019 in Nairobi Milimani Civil Suit No 2884 of 2008 Transwide Pharmaceuticals Limited vs Neonise Pharmacy Limited & Another 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 advocates and the advocates for the Respondent, the sum of Kshs 649,105.88/=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 22(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.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of September, 2020

J. KAMAU

JUDGE