



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 54 OF 2019

BEMUTA AGENCIES LIMITED.....APPELLANT/APPLICANT

VERSUS

JATOMY ENTERPRISES LTD.....1ST RESPONDENT

GEOFFREY GITAU.....2ND RESPONDENT

RULING

A. Introduction

1. The application dated 11/10/2019 seeks for orders for stay of execution of ruling in Embu CMCC No. 211 of 2011 delivered on 18/09/2019 pending hearing and determination of this appeal.

2. The application was premised on the grounds on the face of the application and those contained in the supporting affidavit of Benson Maingi Mutahi. In a nutshell, the applicant's case is that the trial court delivered the ruling dismissing the appellant's application dated 20/02/2019 seeking to set aside ex-parte judgment entered by the court on 26/09/2019. That the appellant was aggrieved by the said ruling and proceeded to file this appeal challenging the said ruling. The applicant is now apprehensive that the 1st respondent could proceed with execution and hence the instant application to prevent the appeal being rendered nugatory. The applicant further deposed that any loss which the appellant would suffer could be compensated by way of damages and further that the appeal had higher chances of success.

3. The 1st respondent opposed the application vide a replying affidavit sworn by Jackson Kibunyi Gerald, its Managing Director who deposed that the application was brought after undue delay having been brought after one month post the ruling by the trial court and which delay had not been explained and further that the application was based on untrue allegations by the applicant as to the taking of the hearing date and as such the application had no chances of success. Further that the decree was a money decree whose execution could not render the appeal nugatory and that the 1st respondent was in a position to refund the decretal sum in the event that the appeal succeeded and that the applicant had not proposed any security for due performance of the decree. As such, the 1st respondent prayed that the application be dismissed with costs.

4. The applicant in its further affidavit sworn by its Managing Director deposed that the trial court entered judgment in CMCC 211 of 2011 without considering the pleadings and evidence by the parties and further that the applicant was going through financial difficult times due to depressed economy and thus it would be hard for it to raise the decretal sum and still remain afloat.

5. The application was disposed of by way of written submissions and pursuant thereto, each party filed its submissions in support of its position in the pleadings herein.

B. Issues for determination

6. I have considered the application herein, the reply by the Respondent and the rival submissions filed herein and it is my opinion that the main issue for determination is whether the application is merited.

C. Applicable law and determination of the issues

7. The application herein is for stay of execution of the judgment in CMCC No. 121 of 2011. However, it is trite that such orders can only be made where there is pending appeal which exists herein with the memorandum of appeal having been filed on 2/10/2019.

8. The power to grant orders for stay of execution pending appeal is a discretionary power and must be exercised judiciously. The principles upon which the court may stay the execution have been settled in various cases and in line with the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the performance of the decree in the event the appeal does not succeed as was held in the case of Antoine Ndiaye vs. African Virtual University [2015] eKLR.

9. On substantial loss, the applicant in its further affidavit deposed that it was in financial hardships and that raising the decretal amount would be an uphill task. However, no bank statements were attached to the application or the further affidavit to support the averment. As it was observed in James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR: -

“the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

10. It was the respondents disposition that the appeal would not be rendered nugatory as the decree was a money decree and further that it had two well stocked supermarkets in Embu and Chuka and thus was able to refund the decretal sum if at all the Applicant’s appeal succeeded. In the Court of Appeal decision in the case of Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR) which was cited with approval by the High Court in Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR it was held that: -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.” (See also ABN Amro Bank NK V Le Monde Foods Limited, Civil Application No. 15 Of 2002 [NRB]).

11. In Kenya Hotel Properties Limited V Willesden Investments Limited [2007] eKLR, the Court of Appeal held that: -

“The decree is a money decree and normally the courts have felt 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. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all.”

The court proceeded to hold that: -

“.....It does appear to us that in considering the question as to whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind. We do agree with Mr. Nowrojee that to convince the Court to follow the decision in Reliance Bank case (supra), the applicant needs to do more than merely saying that it would experience hardship were it to be compelled to pay the decretal amount. The applicant needs to “put on the table” its financial position and how the same would be affected. Of course, we do not need to emphasize that this approach of weighing position of parties as was done in Oraro’s case (supra) is only available in cases where the decretal amount is acceptably large in the circumstances of the case.....(emphasis mine)..”

12. In the instant application, the applicant did not prove the allegations that it was in a financial hardship as alleged and neither did it even state that the respondent was not in a position to refund the decretal sum in the event that the appeal succeeds. In fact, the respondent deposed that it was in a position to pay the decretal sum in the event the appeal succeeds (and thus not a man of straw). It is my opinion that the decretal sum being Kshs. 343,115/= plus costs and interests does not warrant this court into take the “weighing position of parties” approach. As such, it is my opinion that the applicant failed to satisfy the condition as to it suffering irreparable loss.

13. As to the security for costs, the applicant deposed that it was ready to provide any security which the court would direct. However, in its further affidavit, the applicant deposed to the fact that it was in difficult financial times and thus would not be able to raise the decretal sum. The issue on security as to costs is discretionary power of the court and the court is never tied as to the amount it can order as security and can order payment of any amount provided it is satisfied that it suffices to secure the due performance of the decree. As such, as it stands, there is doubt as to the applicant’s ability to provide the security as to costs. In Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd (2019) eKLR, the court observed: -

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court

that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine....”

14. I am satisfied that the applicant is ready and willing to provide security on any terms this court may set. As regards the issue of delay, I note that the ruling which the applicant wishes to appeal against was delivered on 18/09/2019 and the application herein was filed on 11/10/2019. It is my opinion that there was no inordinate delay in bringing this application.

15. In applications of this nature, the court must strive to strike a balance between the competing interests of the parties to an appeal. The respondent being the successful litigant is entitled to the fruits of his judgment. The applicant on the other hand having been aggrieved by the judgment of the lower court is entitled to exercise his right of appeal and to have that right safeguarded by avoiding a situation where his appeal may be rendered nugatory.

16. It is my considered opinion that considering that the 1st respondent indicated as to its ability to repay the decretal sum in case the applicant's appeal succeeds to prevent the appeal being rendered nugatory, and further given the fact the applicant did not prove that it will suffer substantial loss, the applicant has not satisfied the conditions for stay of execution. As was held in Hassan Guyo Wakalo vs Straman EA Ltd [2013] eKLR: -

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

17. It is trite law that a winning party should not be denied his lawfully acquired judgment unless there are compelling reasons to do so and which conditions were never satisfied by the applicant to the standards required.

18. It is my finding that this application has no merit and is hereby dismissed with costs.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2020.

F. MUCHEMI

JUDGE

Ruling delivered through video link in the presence of: -

Ms. Machanga for J. Kathungu for 1st Respondent

Mr. Andande for Mr. Njeru Ithiga for Applicant