



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 266 OF 2003

OMAR SHARIFF.....PLAINTIFF

-VERSUS-

FREIGHT FORWARDERS LTD.....DEFENDANT

RULING

1. The judgment in this matter was delivered the 20/5/2019. On the 12/6/2019, the defendant having lost and was adjusted a judgment debtor obligated to pay the judgment sum in the sum of Kshs. 80,881.20 plus costs of the suit and interest thereon, felt aggrieved by the judgment and lodge a Notice of Appeal on the 22/5/2020 and followed with the notice of motion dated 11/6/2019 and filed on 12/6/2019. The judgment debtor on his part filed a motion dated 21/8/2019 seeking in the man that it be paid half of the judgment sum to meet his kin's treatment costs.

2. In the motion there was sought a substantive prayer that the court be pleased to grant to the applicant an order of stay pending appeal. The grounds advanced to found that application are that there had been filed a notice of appeal seeking to challenge the whole of the decision and that the intended appeal raises arguable points which would be rendered nugatory in that the decree-holder, being an individual operating a business name, will be difficult to trace and unable to effect a refund of the decretal sum once paid out. It was then offered that the award on damages be deposited in an escrow interest earning account in the joint names of the advocate of the parties.

3. In the affidavit in support of the application, the applicant exhibited, the Notice of Appeal, letters bespeaking certified copies of proceedings and judgment as well as the decree extracted together with the draft memorandum of appeal. In the affidavit, the applicant says that the plaintiff had not provided evidence of ability to refund the judgment sum should the appeal succeed.

4. With the leave of the court the applicant filed a supplementary affidavit in which the assertion by the Respondent in the Replying Affidavit are termed as either inaccurate or untrue. What was contended to be inaccurate or untrue included the fact that the interim stay sought was declined by the court for reasons that it was made too early and that an application for stay needed to annexed a draft memorandum of appeal which could only be crafted upon reading the judgment to be challenged. It was then reiterated that the failure by the plaintiff to provided any substantive evidence of ability to pay back was a clear proof of substantial loss in that the respondent having stipulated his dire need for money would speedily spend the sum on medication and be unable to pay in the event the appeal succeeds.

5. The application by the judgment debtor was resisted by the decree-holder by a Notice of preliminary objection dated 26/6/2019 and a Replying Affidavit sworn by the decree-holder. Both documents were filed on the 26/6/2020. The preliminary objection faulted the application for being an abuse of the process of the court on the basis that it was made after undue delay; failed to demonstrate substantial loss; a ploy to delay realization of the judgment sum and that the appeal had no prospects of success.

6. Those same facts were reiterated in the Replying Affidavit with an addition that should the court feel inclined to grant stay then it should order the payment of half of the decretal sum to the decree-holder with the other half being deposited in an escrow account. The deponent then asserted that he was a businessman against whom nothing was suggested to demonstrate inability to refund the sum in the event the appeal succeeds. Stress was then made of the fact that stay under order 42 Rule 6 was a discretionary matter and that the pre-requisites of grant had not been met.

7. There was an application by the decree-holder I have adverted to above seeking an order that the ex-parte orders granted herein be set aside and in the alternative half of the decretal sum be released to him to help with the medical bills for a daughter-in-law who suffered bodily injuries and needed to go to India for medication. It was said in that application that as a result of the road accident to the daughter in law medical bills in excess of Kshs. 5,000,000/= which had exerted financial pressure on him and his family. The ex-parte orders were on their part faulted for having been obtained without disclosure of the reasons for belief that he would be unable to refund the decretal sum.

8. When the parties appeared before the court on the 23/9/2020 and after the court heard submissions by the counsel, it was ordered that the

judgment debtor's application, the application by the decree-holder and the preliminary objection be heard together. That direction was informed by the fact that a decision on the judgment debtors application either way would impact, upon the decree-holder's application as well as the Preliminary objection. In giving those direction, the court took cognizance of the fact that whether or not the application was merited or merely vexatious as contended in the preliminary objection and whether or not stay was to be granted on terms including payment of part or deposit of the decretal sum, as contended in the application by the decree-holder, were all pertinent considerations in an application to stay pending appeal.

9. Consequently, I do consider that a determination of the judgment debtor's application, either way will address and determine both the preliminary objection and the application for release of the decretal sum. I will therefore determine the application and treat the preliminary objection and the application by the decree-holder as oppositions thereto.

10. Whether to grant stay pending an appeal is at the discretion provided that there is a pending appeal and further that the applicant meets the prerequisites mandated by Order 42 Rule 6 of the Rules.

11. Under the said provisions the applicant is obligated to show and prove that it has been prompt in bringing the application and that circumstances are such that unless stay is granted it stands to achieve no real benefit in the litigation in the event of the appeal succeeding in that the outcome, even if triumphant, will have been rendered nugatory or just academic.

12. The remedy in stay pending appeal is by nature and architecture intended to secure the object of litigation so that when ultimately the pending appeal is determined, the appellant or the person obligated by the decree, if successful, get a substantive remedy by the appellate decree not just an academic outcome. When the purpose and object of litigation cannot be obtained once the appeal is determined then the appeal is deemed to have been rendered nugatory and there emerges the need to avoid such an eventuality.

13. In the matter before me, the decree issued is in a sum that cannot be called insubstantial. That alone however does not change its character. It remains a monetary decree which the courts have said would not attract the consequences of an appeal being rendered nugatory merely because the decree is settled during the pendency of the appeal. The rationale is that money can always be restituted if the appeal succeeds and it then enjoines the applicant to satisfy the court that the decree-holder would not be in a position to effect refund.

14. In the context of this matter, the position taken by the applicant is that the decree-holder being an individual operating business, in his business name, would be unable to effect the refund of the decretal sum in the event the appeal succeeds. Counsel for the applicant stressed the point it does not concede that the respondent is entitled to any award against it and therefore contends that no payment should be ordered against it while the appeal pends. That allegation is resisted by the decree holder who insists that he continues to trade and he is not a man of the show even though he was befallen by a misfortune which exposed him to spend some Kshs. 5,000,000/= on medical costs and needs while they had to seek specialized treatment in India.

15. On that contested position the court has to determine if there is proof that if the decretal sum is paid out to the decree-holder and the appeal succeed, the judgment debtor will suffer substantial loss on account of the decree-holder being unable to effect refund. The duty to prove inability of the decree-holder in affecting a refund is upon the judgment debtor/applicant as the person making the allegations. In ***Kenya Shell Ltd Vs Kiburu & Another (1986-1989)1 EA 266***, the Court of Appeal, **Platt JA**, underscored the fact that it is not enough to merely allege substantial loss rather the same must be demonstrated to the satisfaction of the court. In his matter the evidence relied on by the applicant to assert inability by the decree-holder to effect a refund are the words of the judgment debtor that he incurred huge hospital bills on a daughter in-law who had suffered injuries from a road traffic accident. That I don't interpret to mean that the payment of the sum has rendered the respondent/decreet-holder a man of the straw. To the contrary I hold the view that he who can raise that sum on an emergency basis cannot in fairness be termed a man of the straw. To this court such a person is one of the few among average Kenyans in the bracket of multi-millionaires. Such is the person who should be able to make good a refund if the appeal succeeds. That a judgment creditor is of a lesser means compared to the judgment debtor is not a reason to grant stay and delay or obstruct him from accessing his property in the decree. See ***Kioko Peter v Kisakwa Ndolo Kingoku [2019] eKLR***

16. On the material placed before me I am not satisfied that substantial loss, which is the cornerstone of stay pending appeal, has been demonstrated. However, the judgment debtor has the inalienable right to approach the court of appeal unhindered. Not even by the fear that he would be chasing a wild goose. On that basis alone, am inclined to exercise my discretion in its favour by grant of stay pending appeal but upon terms. The terms I consider would suffice to balance the rights of the respondent to the judgment sum as opposed to the rights of the applicant to prefer and pursue the appeal, is that one half of the decretal sum be paid out to the respondent while the other half together with interest be deposited into an escrow account in joint names of the advocates for the parties. This term be satisfied within 30 days from today and in default the stay hereby granted shall stand lapsed.

17. A lot was said about the strength or otherwise the arguability of the appeal and its prospects of success. While that is indeed a consideration for an application before the Court of Appeal under Rule 5(2)b of the Court's Rules, it certainly not a consideration before me. The rational is that it can't be a consideration unless I was to be called to assess by own judgment which is the task of the Court of Appeal. On the same vain, I do not consider serious the submissions that after the informal request for stay was refused on the date the judgment was delivered, the applicant lost his right to seek stay formally.

18. In the end, I do allow the application dated 11th June 2019 on the above stated terms and order that costs be in the appeal.

Dated, signed and delivered online by MS TEAMS, this 17th day of November 2020

P J O OTIENO

JUDGE