



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 196 OF 2020

ASHUT ENGINEERING COMPANY LIMITED.....APPELLANT

VERSUS

ISSAC MUTUA MAKENZI.....RESPONDENT

RULING

1. In its Notice of Motion application dated 4th June 2020, the Applicant sought an order for stay of execution of the judgment delivered in Milimani **CMCC No 7895 of 2015** on 7th May 2020 pending hearing and determination of the Appeal herein. Its said application was supported by the Affidavit of its Director, Mehul R Shah, that was sworn on 4th June 2020.

2. It stated that it was aggrieved by the decision of Hon D. W. Mburu where he apportioned liability at 75%-25% against it in favour of the Respondent herein and further awarded the Respondent, a sum of Ksh 3,111,879.20 made up as follows. :-

General damages	Kshs 900,000.00
Loss of earnings	Kshs 3,246,172.80
Special damages	<u>Kshs 3,000.00</u>
	Kshs 4,149,172.80
Less 25%	<u>Kshs 1,037,293.60</u>
	Kshs 3,111,879.20

Plus interest and costs.

3. It averred that it intended to appeal against the said decision and had since applied for certified copies of the proceedings and the said Judgment. It pointed out that it had serious triable issues to be canvassed in its already filed Appeal and that it was only exercising its legal right of appeal but not snatching the fruits of judgment from the Respondent herein.

4. It said that it was apprehensive that in the event an order for stay of execution was not granted, then its Appeal would be rendered nugatory. It averred that it filed the present application without delay and thus urged this court to allow the same.

5. In opposition to the said application, the Respondent swore a Replying Affidavit on 1st July 2020. He contended that the Appellant had not met the threshold of being granted an order for stay of execution pending appeal. He averred that the Appellant's Appeal was not merited and having been brought in bad faith, it ought to be dismissed with costs to him.

6. He pointed out that in the event this court was inclined to grant the Appellant the orders it had sought, then it should order it to release half of the decretal sum to him and deposit the other half into an interest earning account in the names of his advocates and those of the Appellant because there was already a consent judgment on liability at 80%- 20% in his favour.

7. The Appellant relied on the cases of **Halai & Another vs Thornton & Turpin (1963) Ltd [1990] KLR 365**, **Juma Ali Mbwana & Another vs Umi Omar Musa [2014] eKLR** and **Iye Mohamed Bakari vs Maweni Estates Ltd & 2 Others [2006] eKLR** to support its

argument that it had met the threshold of being granted an order for stay of execution pending appeal. On his part, the Respondent placed reliance on the case of Absalom Dova vs Tarbo Transporters [2013] eKLR to argue that the Appellant had not met the said threshold.

8. Having considered the Written Submissions by both the Appellant and the Respondent herein, it was clear that they were both agreed on the conditions under which an order for stay of execution pending appeal could be granted. This was that a court could grant an order for stay of execution pending appeal if it was satisfied that an applicant had demonstrated that it had met the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The said conditions are as follows:-

- 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.**

9. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

10. The decretal sum herein was a sum of Kshs 3,111,879.20. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Means to demonstrate his ability to refund the Appellant the money in the event it was successful in its Appeal.

11. 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.”

12. 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 the Appellant would suffer substantial loss. The Appellant had thus satisfied the first condition of being granted a stay of execution pending appeal.

13. The above notwithstanding, the court addressed itself to the Respondent’s prayer to have half of the decretal sum released to him pending the hearing and determination of the Appeal herein in Paragraphs (17), (18), (19) and (20) of the Ruling herein.

14. Turning to the issue of filing the application without undue delay, this court noted that the decision the Appellant wished to appeal against was delivered on 7th May 2020. The present application was filed on 8th June 2020, the last date on which the Appellant was to file its Memorandum of Appeal. It filed its Memorandum of Appeal on 5th June 2020. This court found and held that the application was filed without undue delay and Appellant had thus satisfied the second condition of being granted of an order for stay of execution pending appeal.

15. The Appellant did not indicate its willingness and readiness to comply with the terms of the court regarding the security. That was not fatal to its claim as the court had power to order an applicant to furnish such security for the due performance of the decree as would be binding on him as stipulated in Order 42 Rule 6(2) (b) of the Civil Procedure Rules that provides that:-

“No order for stay of execution shall be made under sub-rule 1 unless such security as the court orders for the due performance of the decree has been given by the applicant.”

16. Weighing the Appellant’s right to have its 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 it was denied an opportunity to ventilate its Appeal on merit without an order for stay of execution being granted.

17. Going back to the issue of the release of half of the decretal sum to the Respondent, this court noted that there was no indication either in the Supporting or Replying Affidavit of what the nature of his claim was so as to help the court approximate what would have been fair quantum with a view to coming up with an assessment of what would have been adequate security in the circumstances of the case herein.

18. There was also some confusion as to what the apportionment of liability between the Appellant and the Respondent herein was. The Appellant had stated that the same was 75%-25% in favour of the Respondent while the Respondent contended that consent on liability was entered at 80%-20% in his favour. Suffice it to state that liability had already been apportioned and the Appellant could not therefore escape paying whatever quantum the appellate court would determine was payable to the Respondent herein.

19. As the Appellant had contested the award for loss of earning capacity, this court found and held that it could not order it to pay part of it to the Respondent. Determination of whether the same was payable or not would have to await the hearing of the Appeal herein.

20. As has been stated hereinabove, bearing in mind that the Appellant had been found liable for the Respondent’s claim to some extent, it could not escape from making some payment to him. Indeed the court noted that it had only wanted the amount that was awarded to him reduced. Taking into account the paucity of information regarding the nature of the Respondent’s claim as hereinabove stated, this court could not with certainty determine that half the decretal sum should be released to the Respondent herein pending the hearing and

determination of the Appeal herein.

21. Having said so, it found and held that it would be in the interests of justice that a reasonable sum of Kshs 100,000/= be released to the Respondent pending the hearing and determination of the Appeal herein.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 4th June 2020 and filed on 8th June 2020 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

1. There shall be a stay of execution of the decree in CMCC No 7895 of 2015 Isaac Mutua Makenzi vs Ashut Engineering Company Limited that was delivered on 7th May 2020 on condition that the Appellant shall pay to the Respondent a sum of Kshs 100,000/= and deposit into an interest earning account in the joint names of it counsel and counsel for the Respondent, the balance of the sum of Kshs 3,011,879.20/= within sixty (60) 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 17TH DAY OF DECEMBER 2020

J. KAMAU

JUDGE