



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 472 OF 2018

TONONOKA ROLLING MILLS LIMITEDAPPLICANT

VERSUS

JAMES KILONZO PETER.....RESPONDENT

RULING

1. The applicant, *Tononoka Rolling Mills Limited* filed a Notice of Motion dated 9th October 2018 under a certificate of urgency seeking stay of execution of the judgment and decree of the lower court in CMCC No. 6468 of 2016 in which the respondent was awarded general and special damages in the total sum of KShs.202,000 pending the hearing and determination of its appeal.

2. The application is anchored on the grounds stated on its face and the supporting affidavit sworn by *Ms Rina Welemba*, a legal officer with *APA Insurance Limited*, the appellant insurer.

3. In the grounds premising the motion and in the supporting affidavit, the applicant contends that it is aggrieved by the decision made in the lower court by *Hon. Mr. D. W. Mburu* (PM) on both liability and quantum and that if stay is not granted, the respondent will proceed with execution and this will render its intended appeal which is arguable nugatory; that if execution was successfully levied, not only will the appeal be rendered nugatory but the applicant will suffer substantial loss since the respondent is not possessed of means to refund the decretal sum if the appeal is successful; that if the application is allowed, the respondent will not suffer any prejudice that cannot be compensated by an award of costs. The applicant also expressed its willingness to provide such security as the court may direct as a condition for stay.

4. Though duly served with the application and a hearing notice notifying the respondent of the hearing date, the respondent did not bother to file any response to the application or to attend the court on the date the application was scheduled for hearing. Consequently, hearing of the application proceeded *ex parte*.

5. In his brief oral submissions, learned counsel for the applicant *Mr. Ochieng* urged the court to allow the application firstly because it was unopposed; Secondly, the application had merit as the applicant had met all the requirements for grant of stay as set out in *Order 42 Rule 6* of the *Civil Procedure Rules* (the Rules); and, thirdly, in his view, the applicant's appeal had high chances of success.

6. I have carefully considered the application, the depositions in the supporting affidavit and the submissions made by learned counsel *Mr. Ochieng* as well as the persuasive authority relied upon by the applicant namely, *Focin Motorcycle Company Limited V Ann Wambui Wangui & Another, [2018] eKLR*.

7. It is trite that the decision regarding whether or not to grant stay of execution pending appeal is purely in the discretion of the court but because this discretion must be exercised judiciously, *Order 42 Rule 6* of the *Rules* stipulates the factors which a court should consider in determining whether an applicant had established sufficient cause to merit orders of stay pending appeal.

8. *Order 42 Rule 6 (2)* is in mandatory terms. It provides that “*No order for stay of execution shall 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.

9. The foregoing provision shows that for an applicant to be entitled to orders of stay pending appeal, he must satisfy the court of the following:

i. that he will suffer substantial loss if orders sought are not granted;

ii. That the application was made without unreasonable delay;

iii. That he has offered such security as the court may ultimately order for the due performance of the decree or order appealed against.

10. In this case, the applicant has contended that it will suffer substantial loss if stay is not granted since it will give the respondent leeway to execute for the decretal sum and if this occurs, the appeal will be rendered nugatory as the respondent is a man of straw and will not be able to refund the decretal sum in the event that its appeal is successful. The decretal sum as stated earlier amounts to KShs.202,000. Though the award cannot be said to be colossal, it cannot be classified as a small amount considering the means of an average Kenyan citizen.

11. The law is that once an applicant expresses the view that the respondent is incapable of refunding the decretal sum when called upon to do so, the evidential burden shifts to the respondent to prove that he is capable of refunding the decretal sum if need be. The evidential burden shifts because the resources of a respondent is a matter which is peculiarly within his knowledge- See the Court of Appeal decision in *National Industrial Credit Bank Limited V Aquinas Jarius Wasike & Another, Nrb Civil Appln No. 238 of 2005* and *ABN Amro Bank NK V Le Monde Foods Limited, Civil Application No. 15 of 2002 [NRB]*.

12. As noted earlier, the respondent failed to respond to the application meaning that the application stands unopposed. This means that the respondent did not rebut the applicant's claim that he is a man of straw and that he will not be in a position to refund the decretal sum if the applicant's appeal is successful. In the premises, I am satisfied that the applicant has established that if stay is not granted, it will suffer substantial loss.

13. Turning to whether the application was filed timeously, I note that the impugned judgment was delivered on 21st September 2018; the memorandum of appeal was filed on 4th October 2018 and the current application was filed on 9th September 2018. It is evident that the application was filed about two weeks after delivery of the lower court's judgment. On these facts, I find that the application was filed without any delay.

14. On the requirement for provision of security, the applicant has offered to deposit KShs.200,000 in an interest earning account held jointly by counsel on record as security for the performance of the decree.

15. From the foregoing, I am in agreement with the submissions made by Mr. Ochieng that the applicant has met the threshold set by the law for grant of the orders sought. Consequently, I find merit in the Notice of Motion dated 9th October 2018 and it is hereby allowed on condition that the applicant shall deposit the entire decretal amount in an interest earning account held by counsel on record for both parties within the next 30 days in default of which the orders of stay shall automatically lapse.

16. As the application was not opposed, I will not make any order on costs.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 31st day of January, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Mwangi holding brief Mr. Ochieng for the applicant

No appearance for the respondent

Mr. Salach: Court Assistant