



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 414 OF 2018

GENERAL PLASTICS LIMITED.....APPLICANT

VERSUS

OUNGA WILLIS OKENYE.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 5th September 2018 and filed on 6th September 2018 was filed pursuant to the provisions of Order 42 Rule 6 of Civil Procedure Rules, The Judicature Act, High Court (Practice and procedure Rules) Vacation Rules 3 (1) and (2) and all other enabling provisions of the Laws of Kenya. Prayer No (1), (2) and (3) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. Spent.

4. THAT the court be pleased to grant a stay of execution on (sic) Milimani CMCC No 2769 of 2017 pending hearing and determination of the appeal against the Judgment made by the Honourable Peter Muholi on the 8th of August 2018.

5. THAT the costs of this application be provided for.

6. THAT any other orders that meets the ends of justice.

2. The Applicant's Written Submissions were dated and filed on 3rd October 2018 while those of the Respondent's were dated on 26th November 2018 and filed on 29th November 2018.

3. Parties requested the court to render its decision based on its Written Submissions which it relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPLICANT'S CASE

4. The Applicant's application was supported by the Affidavit of Rasluk Shah that was sworn on 5th September 2018.

5. Its case was that the entry of judgment against it in favour of the Respondent in the sum of Kshs 508,810/= was flawed hence its appeal herein which it said, had a reasonable chance of success.

6. It stated that if its application was not allowed, its appeal would be rendered nugatory as it was unlikely to recover the decretal amount if the same was paid to the Respondent.

7. It pointed out that it had assets and investments in the country exceeding over Kshs 100,000,000/= which was more than sufficient to satisfy the decree should its appeal not succeed.

8. It contended that it was in the interests of justice that the application be allowed and urged this court to allow the same.

THE RESPONDENT'S CASE

9. In response to the present application, on 21st October 2018, the Respondent swore a Replying Affidavit on 21st October 2018. It was filed on 24th October 2018.

10. He averred that the present application was an abuse of the court process, it was made in bad faith and it was aimed at delaying him from enjoying fruits of his judgment.

11. Without prejudice to the foregoing, he proposed that the Applicant be ordered to pay him fifty (50%) percent of the decretal sum being Kshs 254,405/= and the other half in the sum of Kshs 254,405/= be deposited in a joint account (sic).

12. The above notwithstanding, he urged this court to dismiss the present application with costs.

LEGAL ANALYSIS

13. The Applicant relied on the case of **Siegfried Busch vs MCSK [2013] eKLR** in which this very court held as follows:-

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of this judgment...”

14. It also placed reliance on the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR** and **Kenya Shell Ltd vs Kibiru & Another [1986] KLR** where the common thread was that an order for stay of execution will not be granted unless the conditions set in Order 42 Rule 6 (2) of the Civil Procedure Rules have been met.

15. It also referred this court to its own case of **G.N Muema P/A (sic)Mt View Maternity & Nursing Home vs Miriam Maalim Bushar & Another** where it held as follows:-

“...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.”

And further that;

“... This therefore left the court in a quagmire especially as regards the ability of the Respondents to pay back the decretal sum in the event the Appellant was successful in his Appeal herein. In the absence of proof of their ability to pay back the said sum, this court was satisfied that the Appellant would suffer substantial loss. He had thus satisfied the first condition of being granted a stay of execution pending appeal.”

16. It submitted that it had demonstrated that it had met all the conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules and hence it ought to be granted an order for stay of execution pending appeal.

17. On its part, the Respondent submitted that the damages that he was awarded followed an industrial accident that occurred on 24th April 2014. It was therefore its submission that this court had no jurisdiction to hear and determine this Appeal, the proper court being the Employment and Labour Relations Court (hereinafter referred to as “ELRC”).

18. He referred this court to the case of **Law Society of Kenya vs Malindi Law Society & 6 Others [2017] eKLR** where it was held that:-

“The High Court has no jurisdiction in respect of employment and labour relations dispute.”

19. He also relied on the case of **Samuel Kamau Macharia vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR** wherein it was held that:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

20. He argued that the Applicant had not demonstrated that it had met all the three (3) conditions for the grant of an order of stay of execution. He, however, admitted that since judgment was entered on 8th August 2018 and the application was filed on 6th September 2018, there was no unreasonable delay, in having filed the said application.

21. It was, however, his submission that the Applicant had failed to demonstrate the substantial loss it would suffer if the order it had sought was not granted. It added that the Applicant had also failed to give any security for performance.

22. He relied on the cases of Antonie Ndiaye vs Africa Virtue University [2015] eKLR, Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2015] eKLR amongst other cases to buttress his argument that the Applicant ought not to be granted the orders it had sought for having failed to demonstrate that it was entitled to an order for stay of execution pending appeal.

23. Having looked at the parties respective submissions, it appeared to this court that the issues that had been placed before it were:-

1. Whether or not this court had jurisdiction to hear and determine this matter; and

2. Whether the Applicant had demonstrated that he was entitled to the orders that it had sought.

24. The court deemed it prudent to address the said issues under different and separate heads.

I. JURISDICTION

25. Despite the Respondent having alluded to the lack of jurisdiction of this court to hear and determine the Appeal herein, he did not submit on the issue.

26. Nonetheless, this court opted to address the same as a preliminary issue because without jurisdiction, it had to down its tools forthwith as was held in the case of Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1 where the court rendered itself as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

27. Indeed, Article 162 (2) (a) of the Constitution of Kenya, 2010 stipulates as follows:-

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations.

28. Further, Article 165 (5) (b) of the Constitution of Kenya provides that:-

(5) The High Court shall not have jurisdiction in respect of matters—

(b) falling within the jurisdiction of the courts contemplated

in Article 162 (2).

29. As was correctly submitted by the Respondent, this is a position that is now settled by the Court of Appeal in the case of Law Society of Kenya vs Malindi Law Society & 6 Others (Supra).

30. Having said so, it is important to point out that the Respondent raised the issue of lack of jurisdiction of this court in his Written submissions. He did not raise any Preliminary Objection at the outset or furnish this court with documentary evidence so that it could see for itself the nature of relationship between him and the Applicant.

31. In the absence of such proof, this court was hesitant to say for a fact that it did not have jurisdiction to hear and determine this Appeal. The position will probably come out clearer when the Record of Appeal is filed as all the pleadings will now be available to the High Court. If it does appear to the court that the High Court will not be having jurisdiction to hear and determine the Appeal herein then, it shall down its tools forthwith.

32. However, in the meantime, this court was not persuaded that it should down its tools and refer this matter to the Employment and Labour Relations Court as the Respondent had not discharged his burden of proof on the issue lack of jurisdiction of this court.

II. GRANT OF A STAY OF EXECUTION ORDER

33. Turning to the issue of the granting of a stay of execution pending appeal, Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

“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.”

34. An applicant seeking a stay of execution must demonstrate:-

a. That he will suffer substantive loss if the order for stay is not granted;

b. That he had filing his application for a stay of execution timeously; and

c. That he was willing to provide security.

35. 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.

36. As was correctly pointed out by the Respondent, the Applicant’s application was filed within one (1) month of the delivery of the judgment. Since there was no undue delay in filing the same, the Applicant had satisfied the first condition under Order 42 Rule 6 (2) of the Civil Procedure Rules.

37. As this court found in the case of G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bushar & Another (Supra), the mere possibility of a party being unable to recover decretal sum it has paid to another if it succeeded in its appeal amounted to that party suffering substantial loss. The Respondent did not file an Affidavit of means to demonstrate that he was financially able to refund the decretal amount in the event the Applicant was successful in its Appeal making it difficult for this court to really state with certainty that he would be able to refund half of the decretal sum in the sum of Kshs 254,405/= that he had proposed should be released to him.

38. Going further, in the absence of details of the nature of injuries the Respondent sustained, this court faced difficulties in ascertaining if the sum of Kshs 254,405/= would still be fair compensation to him even if the Applicant was to succeed in its Appeal for the reason that he would still be entitled to retain the said sum irrespective of whichever way the Appeal herein was decided. This court was not therefore persuaded that it should order that half the decretal sum ought to be released to the Respondent with the other half being deposited in a joint interest earning account in the names of the parties’ advocates, if at all, pending the hearing and determination of the Appeal herein.

39. In this regard, it was therefore the considered view of the court that the Applicant had met the second condition in Order 42 Rule 6 (2) of the Civil Procedure Rules.

40. Turning to the issue of security, this court noted that the Applicant did not indicate that it was ready and willing to deposit security for the due performance of the order or decree. This did not, however, render the Applicant’s submission irrelevant. This is because Order 42 Rule 6 (2) (b) of the Civil Procedure Rules gives the court the power to order such security for the due performance of such decree or order as may be ultimately binding on an applicant seeking to be granted an order for stay of execution pending the hearing and determination of the Appeal.

41. Suffice it to state that in its Supporting Affidavit, it was categorical that it had assets and investments of over Kshs 100 million in Kenya. It should therefore not have a problem depositing the entire decretal amount in court.

42. This court was thus persuaded to find and hold that the Applicant had also satisfied the third condition in Order 42 Rule 6 (2) of the Civil Procedure Rules.

DISPOSITION

43. For the foregoing reasons, the upshot of this court’s Ruling was that the Applicant’s Notice of Motion application dated 5th September 2018 and filed on 6th September 2018 was merited and the same was hereby granted in terms of Prayer No (4) therein in the following terms:-

1. THAT there shall be a stay of execution of Judgment that was delivered by Hon Peter Muholi (SRM) in Nairobi CMCC No 2769 of 2017 Ounga Willis Okenye vs General Plastics Limited delivered on 8th August 2018 on condition the Applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondent, the sum of Kshs 409,000/= within sixty (60) days from the date hereof i.e. by 1st July 2019.

2. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 43 (1) hereinabove, the conditional stay of execution shall automatically lapse.

3. The Applicant is hereby directed to file and serve its Record of Appeal within sixty (60) days from the date of this Ruling i.e by 1st July 2019.

4. The Deputy Registrar High Court of Kenya Milimani Law Courts is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Applicant comply with Para 43 (3) hereinabove.

5. Either party is at liberty to apply.

44. Costs of the application herein shall be in the cause.

45. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2019

J. KAMAU

JUDGE