



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 22 OF 1998

KENYA REVENUE AUTHORITY.....APPLICANT

VERSUS

JACKSON RUIRU.....RESPONDENT

RULING

1. The respondent (**JACKSON RUIRU**) had filed a suit against the applicant in the lower court where on **27/10/1997**, claiming that the applicant had wrongfully seized his vehicle registration **No. KAG 031R**, as a result of which he suffered loss of business at the rate of **Ksh 20,000** per day from the date of seizure. He sought orders for release of the said motor vehicle and compensation for loss of business for 90 days. The dispute that led to the subject of this proceedings related to a consignment of sugar that was meant for export to the **Republic of Rwanda** whose **Value Added Tax (VAT) of KShs.81,600.00** had been remitted but was not exported. This led to the seizure of **Vehicle Registration Number KAG 031R** belonging to the Plaintiff. The Plaintiff was subsequently charged with the offence of diversion of uncustomed goods for which he was acquitted alongside other accused persons.

2. The trial court entered judgment in his favor as against **KENYA REVENUE AUTHORITY (the applicant)** for a sum of **Ksh 7,276,000/-**, made up of

- a) **General damages.....Kshs 500,000/-**
- b) **Special damages.....Kshs 6,660,000/-**
- c) **Refund of sum deposited in courtKshs 116,000**
- d) **Costs of the suit and the counter-claim**

3. The applicant was aggrieved by the said judgment and intends to file an appeal. He also filed an application dated **22.11.2017** under certificate of urgency seeking inter alia:

i. Stay of execution of the judgment and decree of delivered on 14.1.2017 as against the defendant/ applicant pending the hearing and determination of the intended appeal.

ii. That costs of this application be in the intended appeal.

4. The said application was premised on the grounds that the applicant has already filed a notice of appeal and due to the requirements of Public Financial Management Rules, it is currently undergoing financial and budgetary constraints which makes it difficult to meet the immediate payment of the decretal amount once the respondent extracts the decree.

5. In the supporting affidavit by **DAVID ONTWEKA** the respondent is not entitled to the amount awarded to him. That the intended appeal is arguable with a probability of success and unless an order of stay is granted the applicant is likely to suffer substantial loss and the intended appeal will be rendered nugatory. Further that the application was made without undue delay and the plaintiff/respondent had no known assets the respondent would use to recover the amount awarded in the event the appeal succeeded.

6. A further affidavit dated 17.4.2018 by David Ontweka was added that the respondent's bill of costs had not been taxed when this application was filed, but subsequently the bill had now been taxed at **Ksh 783,972/-** and there was apprehension that the respondent may proceed and execute both the decree and costs. The applicant pointed out that it is a government agency with perpetual succession and will be able to pay any amount that will be determined on appeal.

7. The respondent in his replying affidavit deposes that the application did not conform to Order 42 Rule 6. That in any case, he is a businessman owning several businesses, companies and assets in Kenya and he was entitled to the fruits of the judgment.

applicant's submissions

8. The applicant referred to **Order 42 rule 6(1)** to support his contention that the court to which the appeal has been referred to is at liberty to consider the application for stay, rule 6(2) provided for instance when order for stay shall not be granted. The respondent has in the Replying Affidavit annexed details of two motor vehicles Registration Numbers **KBR 902B and KBK 905X** to prove his worth. The Applicant has taken the view that the wear and tear of the vehicles, and that the copies of Records from the National Transport and Safety Authority have a disclaimer on details at the bottom "Note: Note copy of Records is a Not a Certificate of Compliance. Confirm Duty status from Customs Service".

9. The applicant maintains that the respondent has not demonstrated to this Court that he has assets from where the money can be recovered in the event the intended appeal succeeds.

10. The court is urged to find that the only available option in the circumstances is to grant orders of stay of execution of the Decree and the order for costs since the Government can guarantee payment of the decretal sum and costs should the appeal not succeed.

11. It is further argued that the decision which had been relied on to make a finding in favour of the respondent i.e. **Commissioner of Customs and Excise v. Hashmukh Shamji Halal & 2 Ors (2018) eKLR** had been set aside by the Court of Appeal

12. The defendant will suffer substantial loss if stay is not granted particularly because the Public Financial Management Act requires that all finances are spent well in the public interest since money is paid out of the consolidated fund citing where the Court took into account the fact that the money was to be paid from the public funds and the amount involved was so large that immediate payment of it might cripple the operations of the Ministry of Health. All these were legitimate factors taken into account when considering the question of whether an appeal would be rendered nugatory if a stay of execution or an injunction is not granted.

13. It is pointed out that the funds to be paid emanate from the consolidated fund from where the applicant draws its budget to pay such claims and it cannot be required to give security in the circumstances.

14. The court is also referred to **Bake 'N' Bite Ltd v. Daniel Mutisya Mwalonzi [2015] eKLR** and **Masisi Mwita v. Damaris Wanjiku Njeri [2016] eKLR** in seeking for orders for stay of execution pending appeal.

15. In opposing the application the respondent submits that under order 42 rule 6(2) the applicant had to demonstrate that substantial loss would ensue from a refusal to grant stay, a willingness to furnish security and that the application must be made without unreasonable delay. It is argued that the respondent has failed to show the loss they shall suffer and only stated that they were apprehensive the plaintiff may not be able to refund the cash in the event the appeal succeeds. In **Bake 'N' Bite (nr) Ltd v. Daniel Mutisya Mwalonzi [2015] eKLR** the court held that substantial loss was the jurisdiction for granting stay, the applicant has to demonstrate how the same is likely to occur. He maintained that he has demonstrated he has assets from where the money could be refunded, and there was no offer to furnish security.

16. The judgment in question is a money decree and the court was referred to **Kenya Hotel Properties v. Willesden Properties Ltd where the court stated as follows:**

"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."

17. In reply, the applicant submitted that the respondent is an individual and the exhibits he had produced in court were not authenticated by the **National Transport Authority** to verify the accuracy thus not conforming to section **35(4) of the Evidence Act**.

18. The defendant had judgment relied on an authority that its judgment had been set aside-since the issue at hand is on grant of stay and therefore this court shall not delve into the issue above, the same can be raised on appeal.

19. The conditions for the grant of stay of execution pending appeal has been set out in **Order 42 rule 6(2) of the Civil Procedure Rules. It provides,**

No order for stay of execution shall be made under sub-rule (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

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

c) Notwithstanding anything contained in sub-rule (2), the court shall have the power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

20. The court has the discretion to either grant or deny stay of execution. In **Absalom Dora v. Turbo Transporters (2013) eKLR** it was held

that

“the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, as such orders does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory, and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

21. Judgment in this case was delivered on 14.11.2017 and the present application was filed on 23.11.2017, just about a week and a half thereafter-which is not undue delay by any measure. The same was brought in a timely fashion.

22. The applicant is apprehensive that it would suffer substantial loss if the decretal amount is paid and thereafter the appeal succeeds, as it will be an uphill following up on the plaintiff to recover the money paid to him. On the other hand the plaintiff averred that he was a man of substance who was a businessman owning several companies. He went annexed copies of records to show ownership of two motor-vehicles namely **KBK 905X Lorry/truck and KBR 902B Lorry/truck**. This was disputed by the defendant who said the documents were not authenticated and therefore could not be relied on. Section 35(4) of the Evidence Act referred to is in regard to documents made by persons and whose admissibility is upon them coming to court to produce them, this is different in this case since, it is in the common knowledge that initially the defendant was in-charge of issuing logbooks but the same changed and the mandate was given to **National Transport and Safety Authority**. This court is referred to **Equity Bank Ltd v. Taiga Adams Company (2006) eKLR** the court held that, ***“the only way of showing or establishing substantial loss was by showing that if the decretal sum is paid to the respondent- that is execution is carried out in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse as he/she is a person of no means.”***

23. The annexures clearly indicate that if the applicant has any issue with the document a hotline is provided-which the applicant did not take advantage of. I have no doubt that the respondent owns the two vehicles, but the critical question is whether their total value would meet the decretal sum were the same to be paid out, and the appeal succeeds. There is no valuation report annexed and nothing to confirm the mechanical state of the vehicles, and the applicant’s apprehension is justified, taking into account the decretal sum awarded. Although the respondent cannot be described as a person of straw, he has not persuaded this court that the assets he refers to would adequately refund the sums if the appeal succeeds.

24. Apart from proving substantial loss the applicant needs to provide security. The plaintiff had stated that the court should disregard the fact that the defendant was a government institution and thus ought not to provide security. **Order 42 Rule 8** provides an exemption to the government to furnish security:

no such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

25. Section 3(1) of the Kenya Revenue Authority Act establishes the defendant as follows;

(1) There is established an Authority to be known as the Kenya Revenue Authority.

(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its corporate name of—

. (a) suing and being sued: ?Provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act (Cap. 40);

. (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

. (c) borrowing or lending money;

. (d) doing or performing all other things or acts for the furtherance of the provisions of this Act, which may be lawfully done or performed by a body corporate.

In regard to the above, the defendant is capable of being sued and to sue. The consequence of suing and to be sued is that either party can be asked to pay a certain amount of amount depending on the circumstances of the case. It is a body entity and thus cannot rely on **Order 42 Rule 8 of the Civil Procedure Rules**.

26. I find that there is reason to grant stay pending hearing of the appeal but this is pegged to a condition that the applicant deposits in court half the decretal amount as **security within 14 days from today**.

Delivered, Signed and Dated this 11th day of April 2019 at Eldoret

H. A. OMONDI

JUDGE