



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEL NO 332 OF 2018

SYNOHYDRO TIANJIN ENGINEERING CO LTD.....APPELLANT

VERSUS

MICHAEL ONYANGO ASOWA.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Nairobi by the Hon. K. Usui (Mrs), Senior Resident Magistrate delivered on 4th July 2018 in CMCC 5226 of 2016)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 6th August 2018 and filed on 10th August 2018 was filed pursuant to the provisions of Sections 79G and 3A of Civil Procedure Rules 2010, and all other enabling provisions. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT there be a stay of execution of the judgment and decree issued in this case and subsequent orders pending the hearing and determination of the Nairobi High Court Civil Appeal No 332 of 2018 or until such time as this court may order.

4. THAT the costs of this Application do abide by the outcome of the intended Appeal.

2. The Appellant's Written Submissions were dated 21st December 2018 and filed on 24th December 2018 while those of the Respondent were dated 15th January 2019 and filed on 21st January 2018.

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

THE APPELLANT'S CASE

4. The Appellant's present application was supported by an Affidavit of Lucy G. Kimunya that was sworn on 6th August 2018.

5. It submitted that it would suffer substantial loss as it would not be able to recover the decretal sum in case its Appeal was successful as the Respondent was not gainfully employed.

6. It added that it filed its application within time and there was no unreasonable delay. It pointed that it was ready to furnish the court with security.

7. It was its argument that it had met the threshold to be granted a stay of execution as set out in Order 42 Rule 6 of the Civil Procedure Rules and urged this court to balance its right to be heard on appeal and the Respondent's right to enjoy his judgment and allow its application.

8. It relied on the case of G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Bushar & Another [2018] eKLR where this court allowed the application for stay of execution.

THE RESPONDENT'S CASE

9. In opposition to the said application, the Respondent swore his Replying Affidavit on 28th September 2018. It was filed on 3rd October 2018. He contended that he was “disabled” due to the Appellant’s negligence and should therefore not be discriminated against on account of the said disability.

10. He contended that the Appellant had opined in its Written Submissions that he was entitled to a sum of Kshs 6,598,944/= on full liability basis and if this court was inclined to grant him an order, it could be granted a stay of execution on condition that it released to him the said sum of Kshs 6,598,944/= to him and deposited the balance of the sum of Kshs 883,258/= in a joint interest earning account (**sic**) within twenty one (21) days.

11. He relied on the case of Civil Application No NAI 252 of 2000 (UR 120 of 2000) where the Court of Appeal applied the balancing approach and urged this court not to allow the Appellant’s present application.

LEGAL ANALYSIS

12. 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.”

13. 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.

14. 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.

15. The Respondent conceded that there was no delay in the Applicant bringing the application herein. The Appellant had therefore met the first condition of being granted an order for stay of execution.

16. The Respondent admitted that he had been rendered “**disabled**” by the Appellant’s negligence and was no longer in gainful employment. It was the considered view of this court that any difficulties in recovering the decretal sum upon an appeal succeeding could be deemed to amount to substantial loss. As it was not clear how the Respondent herein, who had been the Appellant’s employee, would repay the decretal sum in the event the Appellant herein succeeded in its appeal, this court was satisfied that the second limb under Order 42 Rule 6 (2) of the Civil Procedure Rules had been satisfied.

17. Going further, what this court understood to have been the Appellant’s argument from its submissions tendered in the lower court was that in the event the Trial Court found it to have been to blame, then the Respondent ought to be awarded the monies it had proposed in its Written Submissions. It was not that it had submitted that the Respondent ought to be awarded a sum of Kshs 6,598,944/= as he had averred.

18. However, as the Respondent appeared to have sustained severe injuries leading to an above knee amputation and amputation of the small and 4th finger tips and the Appellant had suggested in its Memorandum of Appeal and Supporting Affidavit that the Respondent was **also** to blame, it was evident that it was conceding that it could not escape liability entirely.

19. Notably, no copy of the Decree was attached to the Affidavits that were placed before this court. The said Affidavits did not also allude to any figure. This court therefore encountered difficulties in ascertaining how much of the decretal sum it should order to be released to the Respondent and how much should be deposited in a joint earning account in the names of the Appellant’s and Respondent’s advocates as it did not have any evidence of what was awarded by the Trial court.

DISPOSITION

20. For the foregoing reasons, the upshot of this court’s Ruling was that the Appellant’s Notice of Motion application dated 6th August 2018 and filed on 10th August 2018 be and is hereby granted in terms of Prayer No (3) therein in the following terms:-

1. THAT the Appellant shall deposit into an interest earning account in the joint names of his advocates and those of the Respondent, the entire decretal sum less costs and interest thereon within the sixty (60) days from the date hereof i.e by 29th July 2019.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 20 (1) hereinabove, the conditional stay of execution shall automatically lapse.

3. The Appellant is hereby directed to file and serve its Record of Appeal within sixty (60) days from today i.e by 29th 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 Appellant comply with Para 20 (3) hereinabove.

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

6. Either party is at liberty to apply.

21. It is so ordered.

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

J. KAMAU

JUDGE