



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 36 OF 2018

TSUSHO CAPITAL KENYA LIMITED.....APPELLANT/APPLICANT

VERSUS

ANTONY MBUTHIA KIBURI (Suing as the legal representative and administrator of

the estate of the late ELIUD MWANGI MBUTHIA – deceased).....1ST RESPONDENT

MINISTRY OF INTERIOR SECURITY & COORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

R U L I N G

A. Introduction

1. The application dated 25th July 2018 seeks the following orders;

- a. That this Honourable court be pleased to stay execution of the decree in EMBU CMCC No. 218 of 2017 pending hearing and determination of the appeal herein.**
- b. That the costs of this application be provided for.**

2. The applicant was aggrieved by the decision of Embu Chief Magistrate delivered on 10th July 2018 dismissing the application dated 3rd April 2018 that sought to set aside ex-parte judgement entered against it on the 20th March 2018 and further sought that the applicant be allowed to file its defence.

B. Applicant's Case

3. It is the applicant's case that ex-parte judgement entered in EMBU CMCC 218 of 2017 was irregular for service was not effected on the right person as provided by the law.

4. The applicant further states that upon learning of the developments, it immediately instructed counsel to apply for orders to set aside the ex-parte judgement, an application which was dismissed by the magistrate's court thus denying the applicant a right to be heard and have the case determined on merit.

5. Further the applicant states that there was no evidence of service upon it that was availed to the court and this renders the entire judgement defective. The applicant further states that they have a valid defence which raises the defence of contributory negligence.

C. 1st Respondent's Case

6. The 1st respondents put forth his case vide a supporting affidavit dated 17th October 2018 in which he states that the applicant and his advocates have never bothered to attend court to prosecute their application for orders of stay since they obtained temporary orders.

7. The 1st respondent further states that he will continue to suffer prejudice if the temporary orders for stay pending hearing of this

application are not set aside. It was further argued that the appellant be directed to deposit the entire decretal amount in court pending the hearing and determination of this appeal.

D. Applicant's Submissions

8. The applicant submits that the trial court erroneously held that the applicant ignored the summons and plaint served upon it whereas no such evidence was adduced. The position is that the applicant had adduced evidence that there was inadvertence and an excusable mistake on its part in delaying to appoint an advocate.

9. It was further submitted that the applicant has a constitutional right to a fair hearing and the right to have its case heard on merit and that the court ought to exercise its best discretion in a manner that the appeal, if successful will not be rendered nugatory. The applicant relies on the Court of Appeal decision in **Butt v Rent Restriction Tribunal [1982] KLR 417** which gave guidance on how a court should exercise discretion in **granting or refusing an application for a stay of execution.**

10. The applicant further submits that it would suffer substantial loss and the appeal rendered nugatory if the 1st respondent proceeds to execute the decree and that the substantial loss doesn't necessarily have to be a lot of money as was held in the case of **G.N. Muema P/A (Sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR.**

11. Further the applicant submits that the 1st respondent has not demonstrated that he would be able to refund the decretal sum of Kshs. 2,814,661 given that his source of income is unknown if the current application is not allowed but the applicant proceeds to succeed in its appeal.

12. The applicant further submits that it is willing to provide security as condition for the grant of the orders of stay.

E. 1st Respondent's Submissions

13. The 1st respondent submits that the applicant admits at paragraph 2 of its supporting affidavit that they were served with summons to enter appearance in the primary suit. On the conditions preceding grant of an order for stay of execution, the 1st respondent relies on the case of **Teresia Kimani v Githere Investments Ltd – CA NO 944 of 2003** which discussed the grounds for stay of execution.

14. The 1st respondent submits that the applicant has failed to demonstrate what substantial loss they are likely to incur and conversely that in any case if the appeal succeeds, the deceased's estate will be able to refund the decretal amount to the applicant. He relies on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** and that of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** which provided that merely stating that one is likely to suffer a substantial loss is not enough but one must prove the same in specific detail.

15. It is the 1st respondent's submission that the deceased's estate continues to suffer pain and loss since he died and since the applicant has submitted that it is willing to furnish security as directed, it should deposit the entire decretal amount with half of it being held in an interest earning account and the other be released to the 1st respondent as was done in the case of **Francis Kirwa Magut & Another v Grace Agiso [2015] eKLR.**

F. Analysis & Determination

16. I have considered the application herein, the various affidavits filed as well as the submissions. This is an application that invokes the discretionary power of the court which powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending determination of the appeal.

17. **Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

c. 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.

18. 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"** with the connotation that all three (3) conditions must be met simultaneously for the application to be successful.

19. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** quoted by the applicant herein, gave guidance on how a court should exercise discretion and held that:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

20. The applicant herein urges the court to exercise its discretion in its favour as per the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal (supra)** where the Court held that discretion ought to be exercised in a manner that would not prevent an appeal.

21. According to the applicant, substantial loss would occur if its appeal succeeds and the respondent is unable to refund the decretal sum. The applicant contends that it is not clear whether the 1st respondent will be able to refund the decretal amount if the appeal succeeds. Conversely the 1st respondent states that in case the appeal succeeds the deceased's estate will be able to repay the decretal sum.

22. The applicant has deposed that the decree is for Kshs. 2,814,661/= which the 1st respondent has not shown that he is in a position to refund in the event that the appeal will be successful. Apart from stating that the deceased's estate will make good on a repayment of the decretal sum, the 1st respondent has not placed any evidence before this court to prove that he is a person of means. If the decree which is quite substantial is executed the appeal will be rendered nugatory as it is not likely to recover the said amount.

23. The authority of **Kenya Shell Limited -V- Kariga 1982-88 1 KAR** where the Court of Appeal held that, "*if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay*", is not in favour of the 1st respondent. A sum of Ksh. 2,814,661/= is no doubt a substantial amount. It is the loss which the applicant will incur.

24. The applicant need not go further after establishing that he is likely to suffer that substantial loss. It has been stated that substantial loss lies in the inability of the 1st respondent to refund the decretal sum. I have stated that the 1st respondent has failed to prove that he is in a position to refund. This was held in **Lucy Nyamu Kimani -V- Lawrence Mburu Muthiga [2006] eKLR: -**

"An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant."

25. The case of **Socfinac Company Limited -V- Nelphat Kimotho Muturi [2013] eKLR, and Van Den Berg (K) Limited -V- Charles Osewe Osodo [2015] eKLR** which stated that it is the applicant who has the burden to prove that the decree holder is a man of straw are persuasive decisions. Once the applicant alleges that the 1st respondent was a man of no straw who cannot refund the decretal sum, the evidential burden shifts to the respondent as stated by the Court of Appeal in the case of **National Industrial Credit Bank Limited -V- Aquinas Francis Wasike & Another (UR) C.A. 238/2005.**

26. The applicant has discharged the burden of proof that he is likely to suffer substantial loss. This is what has to be prevented by the Court by ordering stay of execution. It is the corner stone which determines whether the Court should exercise discretion to order stay.

27. The applicant has argued that the appeal has reasonable chances of success. All what the applicant needs to show are the three grounds under **Order 42 rule 6 Civil Procedure Rules (supra)**. The law does not require this Court to determine the application based on the merits or otherwise of the appeal.

28. The second consideration is security. The applicant has deposed that it is ready to provide security. It is the Court which determines the security upon ordering stay to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree. It is therefore sufficient to depose that he is ready to provide security. See the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR.**

29. The other consideration is whether there was undue delay. The judgment the applicant seeks stay over was delivered on 20th March 2018, after which the applicant filed an application dated 3rd April 2018 that sought to set aside the ex-parte judgement entered against it. The ruling on the application dated 3rd April 2018 was delivered on the 10th July 2018. The instant application and memorandum of appeal were filed on the 30th July 2018. This application therefore was filed without delay.

30. I have considered the request of the 1st respondent to be paid half of the decretal amount. It has already been established that the 1st respondent is not a man of means capable of refunding even half of the decretal amount. I take note that the 1st respondent did not personally suffer any physical injury or incapacity. For these reasons, I decline to grant this request.

31. The application has met the threshold for granting the order of stay. I therefore allow the application in the following terms: -

a. That stay pending appeal is hereby granted on conditions that the applicant deposits the whole decretal amount in an interest earning account in the names of the counsels on record for parties within thirty (30) days.

b. In default of the deposit within the period given the orders for stay will stand vacated.

c. The costs be in the cause.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Andande for Thuo for the appellant

Ms. Kungu for Mugendi for respondent