



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 86 OF 2017

RIFT VALLEY RAILWAYS APPELLANT

VERSUS

JACKLINE AKECH APINDE RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 7th November 2018 filed by the appellant *Rift Valley Railways* (the applicant) seeking stay of execution of the judgment and decree of the lower court in CMCC No. 2133 of 2012 pending disposal of its appeal filed in this court on 29th March 2018.

2. The application is premised on the grounds stated on its face and facts deposed in the supporting affidavit sworn on 7th November 2018 by *Rina Walemba*, a legal officer with APA Insurance Company Limited.

3. The applicant mainly contends that if the orders of stay are not granted, the respondent will levy execution for the decretal amount and this will occasion it not only substantial loss but will also render the appeal nugatory since the respondent's financial ability is unknown and she may not be in a position to refund the decretal amount in the event that its appeal is successful. The applicant also invites the court to note that the application was filed timeously and it is ready and willing to deposit the decretal amount in an interest earning account held jointly by the advocates on record as security for performance of the decree pending determination of the appeal.

4. The application is opposed. The respondent in her replying affidavit sworn on 14th January 2019 deposed that the application was frivolous and amounted to an abuse of the court process as it was aimed at frustrating or delaying realization of the fruits of her judgment which she obtained way back in January 2017; that the application was filed in bad faith since the applicant had previously sought time to settle the judgment sum but instead of doing so, it turned around and filed the current application; that the applicant's insurer is a deep pocketed company and considering that the decretal amount is KShs.251,500 which cannot be said to be colossal, the applicant is not likely to suffer substantial loss if the stay sought is not granted. The respondent urged the court to find that the application lacks merit and ought to be dismissed with costs.

5. By consent of the parties, the application was canvassed by way of written submissions which the parties duly filed and which I have carefully considered together with all the authorities cited.

6. I wish to start by addressing the respondent's submission that the application amounts to an abuse of the court process as the applicant had made a similar application in the lower court which was dismissed. The law governing stay of execution pending appeal is stipulated in *Order 42 Rule 6* of the *Civil Procedure Rules* (the Rules). *Order 42 Rule (6) (1)* states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

7. A reading of the above provision clearly shows that a person who is aggrieved by the decision of a lower court and who has filed an appeal can apply for orders of stay of execution of the judgment or decree appealed against in both the court which passed the judgment or decree and the court to which the appeal is filed. The provision leaves no doubt that if the application is filed in the court appealed to which in this case is the High Court, it will be considered and determined on its own merit notwithstanding the fact that a similar application had been filed in the lower court and was either allowed or dismissed. In the premises, I am unable to agree with the respondent's submissions that the instant application is an abuse of the court process just because a similar application had been dismissed by the lower court.

8. Turning to the merits of the application, *Order 42 Rule 6 (2)* of the *Rules* makes it clear that for an applicant to be deserving of the exercise of the court's discretion in his favour by being granted orders of stay pending appeal, he must satisfy the following three conditions namely:

- i. That he is likely to suffer substantial loss if the orders are not granted;
- ii. That the application was filed without unreasonable delay;
- iii. That such security as the court may ultimately order for the due performance of the decree had been given.

9. Starting with the question whether there was unreasonable delay in the filing of the application, I find that it is not disputed that the judgment appealed against was delivered on 20th January 2017. The appeal herein was filed out of time on 6th March 2018 but it was validated by the court in its ruling delivered on 27th March 2018. The instant application was filed on 9th November 2018 slightly over eight months later. The applicant in the supporting affidavit did not give any reason whatsoever to explain the long delay in filing the instant application.

10. The respondent has submitted that since judgement was delivered in her favour on 20th January 2017, she had not moved to commence execution proceedings because the appellant had promised to settle the decretal amount and has been seeking time to allow it organize payment for the same; that instead of doing so, the applicant filed the instant application with the aim of frustrating or denying her the right to enjoy the fruits of her judgment after waiting for over two years. The applicant did not file a supplementary affidavit to controvert the claims made by the respondent and consequently, the same stand unchallenged and must be deemed to be true.

11. In the absence of any explanation for the delay of about eight months, I am persuaded to find that the delay is inordinate and inexcusable. It gives credence to the respondent's assertion that the application was filed with the sole aim of further delaying the realization of fruits of her judgment.

12. It must be emphasized that justice is a two way street and in as much as the applicant has a right of appeal, the respondent also has a right to access the fruits of her judgment. The court exercises its discretion in granting orders of stay of execution where the applicant has established the existence of sufficient cause which includes a demonstration of each of the three preconditions for stay enumerated in *Order 42 Rule 6 (2)* of the *Rules*.

13. In my view, the applicant has failed to satisfy this court that the application was filed without unreasonable delay. Given the circumstances in which the application was filed as described by the respondent which are not disputed by the applicant, the respondent's claim that the application was filed in bad faith cannot be said to be farfetched.

14. Having reached the findings I have above, even without considering the other prerequisites for grant of orders of stay pending appeal, I am satisfied that the applicant is not deserving of the exercise of this court's discretion in its favour. It is thus my finding that the Notice of Motion dated 7th November 2018 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 24th day of May, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Atonga for the respondent

No appearance for the appellant

Mr. Salach: Court Assistant