



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCA NO. 1 OF 2019

EASY COACH LIMITED.....APPELLANT

VERSUS

JACOB JUMA SHAMAL.....1ST RESPONDENT

BLACKBOX KENYA LIMITED.....2ND RESPONDENT

PAK MUMTAZ MOTORS LIMITED.....3RD RESPONDENT

PAK MUMTAZ.....4TH RESPONDENT

[An appeal from the Judgment of the Principal Magistrate's Court at Eldama Ravine PMCC No. 52 of 2016 delivered on the 11th day of December, 2018 by Hon. J. Nthuku, SRM]

RULING

1. The standard of review of the exercise of discretion by a trial Court is long settled since **Mbogo v. Shah (1968)** EA 93 as follows:

“A Court of appeal should not interfere with the exercise of discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

The matter of stay of execution of judgment depends on clear principles and the Court has considered submissions and authorities cited by Counsel on the point.

2. The applicant seeks stay of execution of decree in the trial Court and for the setting aside of the order of the trial Court refusing the application for stay filed in the Court as follows:

1. THAT this application be certified as urgent and be heard ex-parte in the first instance.

2. THAT there be interim orders of stay of execution and/or further execution of the decree in ELDAMA RAVINE PMCC NO. 52 OF 2016 pending the hearing and determination of this application inter-parties.

3. THAT there be stay of execution and/or further execution of the decree in ELDAMA RAVINE NO. 52 OF 2016 pending the hearing and final determination of this appeal.

4. THAT the orders of the lower Court issued on 26th March, 2019 in ELDAMA RAVINE PMCC NO. 52 OF 2016 be set aside.

5. THAT costs hereof be costs in the Appeal.

3. The applicant's application is based upon grounds as follows:

i. THAT judgment was delivered on 11/12/2018 in favour of the Respondent and against the Appellant/Applicant, in the following terms:

a) Liability 100% in favour of the Plaintiff and against the Defendant

b) General Damages Kshs. 600,000/=

c) Special Damages Kshs. 41,260/=

Grand Total Kshs. 641,260/=

Plus costs and interest.

ii. THAT the Appellant/Applicant appealed to this Court against the aforesaid judgment, which appeal has very high chances of success and/or raises serious issues of law and/or arguable grounds hence the need to grant the orders sought.

iii. THAT the lower Court in its ruling delivered on 26th March, 2019 dismissed with costs the Appellant/Applicant's application dated 8th January, 2019 seeking stay of execution of the decree in ELDAMA RAVINE PMCC No. 52 of 2016.

iv. THAT there are no stay orders in place and the Respondent may execute the decree at any time unless the Court grants temporary orders of stay of execution sought.

v. THAT unless stay is granted, the Appellant/Applicant will suffer substantial loss and the appeal rendered nugatory if execution is affected.

vi. THAT the Appellant/Applicant is ready and willing to deposit the entire decretal sum in a joint interest earning account in the names of both advocates on record and/or give such security as the Court may order for due performance of the decree herein pending appeal.

vii. THAT there will be no prejudice suffered by either party should the orders sought herein issue.

viii. THAT this application has been promptly and in good faith.

ix. THAT this Court has powers to grant the orders sought herein in the best interest of justice and fairness.

4. The respondents objects to the application for stay "for reasons among others that the application is devoid of merit and he is in a position to refund the decretal sum dues plus costs in the highly unlikely event that the appeal is successful not to mention that the appellant/applicant has not demonstrated substantial loss it is likely to suffer."

5. The trial Court, in exercise of its undoubted jurisdiction under order 42 Rule 6 (1) of the Civil Procedure Rules, considered the application for stay of execution filed before it and ruled as follows (in material part).

*"In the case at hand, the Respondent has attached his pay slips and bank statement as well title deed to land to show that he is not a man of straw. **The Applicant has thus not established that it will suffer substantial loss if the intended execution is not stayed.***

*Was the application filed without unreasonable delay? **The application seeks to stay a judgment delivered on 14/9/18 and I perused this file from cover to cover and clearly this Court never delivered any judgment in this matter on the said date. So the applicant is seeking to stay a judgment which is alien to me. This is a matter deponed by counsel for the applicant yet the only judgment in this matter was delivered on 11/12/18 which had it been the one they are seeking to stay, I would say there was no inordinate delay on the part of the Applicant but I will not assume that was the intention of the applicant.***

In the circumstances, I find that the application dated 8/1/19 lack merit and I dismiss it with costs to the respondent.

Dated, signed and delivered at Eldama Ravine Court this 26th day of March, 2019."

6. With respect, I think that the Court was plainly wrong in finding that merely on account of the respondent's ability to refund the decretal sum, the appellant could not demonstrate substantial loss. Substantial loss is demonstrated when an applicant shows that it is required to outlay huge sums of money in compliance with a decree of the Court before its appeal, which it demonstrates has chances of success, is heard and determined. Substantial loss may be in the quantum of the decree and not merely in the inability of the decree holder to refund in event of successful appeal, and the Court does not accept, as urged by counsel for respondent, that the decretal sum of Ksh. 641,000/= herein is insignificant to the applicant.

7. In addition, the trial Court erred in failing to consider the prayers of the application and grounds thereof to determine the appropriate judgment appealed from and, consequently, whether there was an inordinate delay or not. The Court punished the applicant for the obvious error in Counsel's affidavit in referring to a judgment dated **14/9/18** which did not exist as the correct date was **11/12/18**. The applicant had, in fact, correctly set out the date of the judgment appealed from in the Notice of Motion dated 8/1/2019 before trial the Court as shown below:

1. THAT this application be certified as urgent and be heard ex-parte in the first instance.

2. THAT there be interim orders of stay of execution and/or further execution of the decree herein pending the hearing and

determination of this application inter-parties.

3. THAT there be stay of execution and/or further execution of the decree herein pending the hearing and final determination of the appeal in **KABARNET HCCA NO. 1 OF 2019**.

4. THAT costs hereof be costs in the Appeal.

WHICH APPLICATION is based on the **GROUND**S set out hereunder and upon the annexed affidavit of **ANNE HALWENGE ODWA** and upon such other and/or further grounds to be adduced at the hearing hereof.

i. THAT judgment was delivered on 11/12/2018 in favour of the Respondent and against the Appellant/Applicant, in the following terms:

a) Liability 100% in favour of the Plaintiff and against the Defendant

b) General Damages Kshs. 600,000/=

c) Special Damages Kshs. 41,260/=

Grand Total Kshs. 641,260/=

Plus costs and interest.

ii. THAT the Defendant/Applicant is aggrieved by the aforesaid judgment and has filed an appeal in the High Court which appeals has very high chances of success and/or raises serious issues of law and/or arguable grounds.

iii. THAT there are no stay orders in place and the Plaintiff/Respondent may execute the decree at any time unless the Court grants temporary orders of stay of execution sought.

iv. THAT unless stay is granted, the Defendant/Applicant will suffer substantial loss and the appeal rendered nugatory if execution is affected.

v. THAT the Defendant/Applicant is ready and willing to give such security as the Court may order.

vi. THAT there will be no prejudice suffered by either party should the orders sought herein issue.

vii. THAT this application has been brought promptly and in good faith.

viii. THAT this Court has powers to grant the orders sought herein in the best interest of justice and fairness.

DATED at ELDORET this 8th day of January, 2019

The applicant had offered at paragraph 8 of the Supporting Affidavit before the trial Court and before this Court to deposit the decretal sum in a joint interest earning account.

8. It does appear to this Court that the trial Court fell into error in failing to uphold substantial justice in accordance with Article 159 of the Constitution and deal with the substance of the application before it which was for stay of the execution of the judgment of the trial Court, the particulars whereof were set out in the grounds of the application. There cannot have been 2 Judgments in the matter, and the trial Court should have found that the application for stay of execution was filed timeously without delay.

Orders

9. For the reasons set out above I find merit in the Notice of Motion dated 29/3/19, which is allowed as prayed in prayers 3 and 4 thereof.

10. As security within the provisions of order 42 Rule 6 (2) of the Civil Procedure Rules, the appellant shall deposit into an interest earning account in the joint names of Counsel for the parties, to entire decretal sum of Ksh.641,260/= within 14 days from the date hereof, in default of which the stay order shall lapse and be of no effect.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Nyairo & Co. Advocates for the Appellant.

M/S J.M. Kimani & Co. Advocates for the Respondents.