



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVILL APPEAL NO. 2 OF 2016**

**PHRAMID HAULERS LTD.....APPLICANT**

**VERSUS**

**JAMES OMINGO NYAAGA.....1<sup>ST</sup> RESPONDENT**

**VINCENT KINYUA.....2<sup>ND</sup> RESPONDENT**

**GEORGE OLANDO.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. *Phramid Haulers Limited*, the applicant, took out a motion on notice dated 3<sup>rd</sup> May, 2019 seeking in the main stay of execution pending appeal. The motion also seeks leave to act in person and extension of time to file Notice of Appeal and record of appeal. The motion is brought under order 42 rule 6 of the Civil Procedure Rules 2010. The judgment sought to be stayed was delivered in CMCC No. 11 of 2007 and the appeal to this court was dismissed on 30<sup>th</sup> January, 2019. The applicant intends to appeal to the Court of Appeal against the decision of this court dismissing the applicant's appeal.

2. The application is supported by the affidavit of Peter Njenga the Human Resources manager of the applicant. It is also based on the grounds on the face of the motion. The grounds on which the motion is premised are that; the 1<sup>st</sup> respondent has instigated execution process against the applicant by making a demand for Kshs 1,050,076; that proclamation has already been done by auctioneers; that the intended appeal has high chances of success and that the amount of damages awarded to the 1<sup>st</sup> respondent was excessive.

3. In his affidavit in support, Peter Njenga deposed that the 1<sup>st</sup> respondent was prosecuted in the Magistrate's Court and upon his acquittal, he instituted civil suit No. 11 of 2007 and subsequently the applicant appealed to this court but its appeal was dismissed on 30<sup>th</sup> January, 2019. He deposed that the applicant was then represented by a firm of advocates and it had the impression that its advocates would lodge an appeal to the Court of Appeal which they later learnt was not done. He stated that they later learnt that auctioneers had proclaimed four of their tractors and other assorted goods to recover Kshs, 937,325 and auctioneers charges of Kshs. 112, 730/-.

4. The deponent further stated that they were shocked to realize that their advocates did not file an appeal and therefore they have applied to this court for not only stay of execution but also leave to file a notice of appeal and record of appeal out of time as well as leave to act in person. The deponent deposed that the applicant has a strong appeal with high chances of success and if stay is not granted, their intended appeal will be rendered nugatory.

5. The applicant filed a supplementary affidavit on 24<sup>th</sup> June, 2019 deposing that there were threats to execute which forced the applicant to pay auctioneers charges of Kshs. 170,000/- ; that on 20<sup>th</sup> June, 2019, the applicant filed an application in the Court of Appeal being Civil Application No. 183 of 2019 and that the applicant has suffered loss of Kshs. 670,000/- despite their effort to seek justice and fair play. He contended, therefore, that the applicant will suffer further prejudice if stay of execution is not granted.

6. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 9<sup>th</sup> May, 2019 and filed in court on 10<sup>th</sup> May, 2019. He deposed that the application is frivolous, vexatious and baseless; that although the judgment was delivered on 30<sup>th</sup> January, 2019, the present application was only filed on 3<sup>rd</sup> May, 2019 and therefore it has been made with inordinate delay.

7. The 1<sup>st</sup> respondent further deposed that the application does not meet the test under Order 42 rule 6 namely; that it is likely to suffer substantial loss; that the application was made timeously and that there are no extraneous matter being raised in the application. He contended that the application has been brought in bad faith and is an afterthought; that this court cannot determine whether or not the

intended appeal has high chances of success and that the draft memorandum of appeal attached is of no assistance to this court. He prayed that the application be dismissed with costs.

### **Submissions**

8. Peter Njenga who represented the applicant, urged the court to grant the application arguing that they wish to appeal against the judgment given on 30<sup>th</sup> January, 2019 affirming the award of Kshs. 937,325 and that they filed a notice of motion in the Court of Appeal on 2<sup>nd</sup> June, 2019.

9. According to Peter Njenga, the applicant had deposited Kshs. 500,000/- in a joint account in the joint names of advocates representing the parties, Messrs. Migosi Ogamba & Co. Advocates and Chigiti & Chigiti advocates and that they have subsequently paid a further Kshs. 70,000/- and auctioneers fees of Kshs. 100,000/-. He argued that if stay of execution is not granted, it will be difficult to recover the money once paid.

10. Mr. Musyoki, counsel for the respondent opposed the application, submitting that the money that had been deposited in the joint account was released to the respondent's advocates after the appeal was before this court was dismissed on 30<sup>th</sup> January, 2019 and that the money was released on 22<sup>nd</sup> February 2019 leaving an outstanding balance of Kshs. 367,000/-. Counsel contended that the application has been filed after an inordinate delay and that the applicant has not given a proposal on how to pay the balance. He also argued that the appeal has no high chances of success.

### **Determination**

11. I have considered the application, the response and submissions made on behalf of the parties. An application for stay pending appeal is guided by Order 42 Rule 6(1) and (2) of the Civil Procedure Rules 2010. The rules give this court a wide discretion to grant stay pending appeal. Such discretion is however to be exercised under well-settled principles. That, is the applicant must establish that if stay is not granted he/she will suffer subsequent loss; that the application has been brought without delay and that the applicant has offered security for the performance of the decree should the court require.

12. Order 42 rule 6 provides that;

**1. "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 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.**

**2. No order of stay 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 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. In considering the grounds for granting or reusing stay pending appeal, the Court of Appeal stated in **Butt v Rent Restriction Tribunal** (Civil App No. NAI 6 of 1979) that;

**"i. 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.**

**ii. 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.**

**iii. 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.**

**iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements."**

14. Although stay may be granted as a matter of discretion, the discretion must be executed judiciously and only as circumstances of each case may require. And from the wording of Order 42 rule 6, the guiding principle is that the applicant should show that he will suffer substantial loss if stay is not granted. As to what substantial loss is, has been the subject of consideration by Courts. In **James Wangalwa & another v Agnes Naliaka Cheseto** [2012]eKLR, the Court observed that;

**"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because**

***execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”***

15. In ***Equity Bank Ltd v Taiga Adams Company Ltd*** [2006] eKLR, the Court again stated that the only way to show or establish substantial loss is by demonstrating 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 or reimburse because he is a person of no means.

16. Further, in ***Machira T/A Machira & Co Advocates v East African Standard (No 2)*** [2002] 2 KLR 63, the Court went on to state that in attempting to convince a court that substantial loss is likely to be suffered, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance. The court was made it clear that it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory as that will not do.

15. In his submissions, Peter Kariuki stated that they may not be able to recover the decretal amount should their appeal succeed. However, he did not clarify this submission on why he thinks the respondent would not be in a position to refund the amount should their appeal succeed. He has not stated that the respondent is a man of no means or impecunious so that if the balance of the decretal amount was paid they would not have it back should their appeal succeed.

16. I have carefully read through the application and the supporting affidavits. The applicant has not at all attempted to establish that it will suffer substantial loss if stay is not granted. The applicant has not even alleged that the 1<sup>st</sup> respondent is a person of no means to the extent that if the intended appeal does eventually succeed, he will not be able to refund the decretal sum should execution proceed. In other words, the applicant has merely alleged that the appeal will be in vain. That is not the meaning of substantial loss as contemplated by Order 42 rule 6 and the authorities referred to above. The applicant was to do much more than merely asserting that there will be substantial loss in order satisfy the Court that it deserves the exercise of discretion in its favour.

17. The Court has duty to balance interests of both the applicant seeking a stay and those of the successful decree holder who has obtained a decree in his favour. The Court stated as much in ***Machira T/A Machira & Co Advocates v East African Standard (No 2)*** [ (supra) thus;

***“[I]o be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.***

18. There is a decree against the applicant for Kshs. 937,000/- out of that money, about 570,000 has been paid leaving a balance of slightly over Kshs. 360,000/-. Which the 1<sup>st</sup> respondent threatens to execute. The applicant is required to show to the satisfaction of the court that if the stay is not granted, it will suffer substantial loss given that already Kshs, 570,000/- has been paid. As already stated above, the application and affidavit do not show a trace of evidence that the applicant will suffer substantial loss and how.

19. Taking into account the facts of the application and the depositions in the supporting affidavit, and on the strength of the authorities cited above, I am not satisfied that the applicant has met the threshold for grant of the application on grounds of substantial loss.

20. On whether the application has been brought without delay, there is no doubt that though the judgment was delivered on 30<sup>th</sup> January 2019, the application was only filed on 3<sup>rd</sup> of May 2019 three months after the decision sought to be appealed against. The applicant has tried to justify this by contending that they had an advocate on record and had thought that the advocate would file the appeal which they did not do. Well, though the period of delay is about three months, the delay is excusable given the circumstances under which the applicant found itself that its advocates did not file the appeal though the applicant has not expressly stated that it had given instructions to appeal.

21. On security, the applicant has not offered any security in view of the fact that the amount deposited in the joint accounts of the party's advocates has been released. That alone would not hinder the court from making any orders it thought fit for the ends of justice.

22. The fundamental question this court must answer is whether it is appropriate in the circumstances of this case to grant stay of execution pending appeal. The applicant as I have already stated has not shown that it will suffer substantial loss if stay is not granted, but more importantly, the applicant has filed an application for stay in the Court of Appeal. Although this court can grant stay pending appeal and since the applicant has not filed a notice of appeal and this court cannot extend time within which to lodge appeal for purposes of appealing to the Court of Appeal, it is only appropriate to let the Court of Appeal deal with the issue. This is so because even if this court granted stay and the Court of Appeal declined to grant leave to file and serve Notice of Appeal out of time, the order of stay by this court would be in vain.

23. For the above reasons, I am not persuaded that the application should be allowed. Consequently, the Application dated 3<sup>rd</sup> May 2019 is declined and dismissed. Each party will, however, bear own costs.

**Dated Signed and Delivered at Kajiado this 26<sup>th</sup> Day of July 2019.**

**E C MWITA**

**JUDGE**