



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 604 OF 2018

SAFARICOM SACCO LIMITED.....APPELLANT

VERSUS

STEPHEN CHORIO KIAL.....RESPONDENT

THE HON. ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. In its Notice of Motion dated 7th January 2019, the appellant, *Safaricom Sacco Limited* (hereinafter the applicant) seeks orders of stay of execution of the judgment dated 9th November 2018 delivered in CMCC No. 4270 of 2014 and the attendant decree pending the hearing and disposal of the appeal. Further, the applicant also prays that the *status quo* obtaining on or before 19th December 2018 be maintained but did not disclose what constituted the alleged status quo.

2. The application is premised on the grounds on its face and the depositions made in the supporting affidavit sworn by *Cynthia Naisisiae Wagura*, its General Manager.

3. It is the applicant's contention that it is dissatisfied with the decision made by the trial court hence this appeal; that the respondent has commenced the process of executing the decree issued in the lower court as on 24th December 2018, its goods were unlawfully proclaimed and the same were to be attached and sold within 7 days if the decretal amount was not paid; that as execution was imminent, the applicant will suffer substantial loss if the stay orders were not issued; that its appeal which has high chances of success will be rendered nugatory if the orders sought were not issued; that the application was filed timeously. On these grounds, the applicant urged the court to find merit in the application and allow it as prayed.

4. The application is opposed. The respondent filed grounds of opposition dated 30th January 2019. The points taken in opposition to the application are mainly that the application lacked merit as the applicant had failed to satisfy the preconditions for grant of stay pending appeal; that the applicant has not established that it has an arguable appeal against the judgment of the lower court; that the respondent is entitled to enjoy the fruits of his successful litigation considering that the criminal trial took about 3 years to be concluded and the suit in the trial court was determined after 4 years; that the respondent will be prejudiced if the orders sought are granted.

5. By consent of the parties, the application was canvassed by way of written submissions. The applicant filed its submissions on 9th May 2019 while those of the respondent were filed on 3rd June 2019.

6. I have carefully considered the application, the supporting affidavit, the grounds of opposition filed by the respondent and the parties' rival written submissions as well as the authorities cited.

7. I wish to start by pointing out that the relief of stay of execution pending appeal is a discretionary remedy which should be granted to only a deserving party who successfully demonstrates that sufficient cause exists to warrant the grant of the orders sought. Sufficient cause can only be established if the applicant proves that he has met all the conditions for grant of stay pending appeal set out under *Order 42 Rule 6 (2)* of the *Civil Procedure Rules* (the *Rules*).

8. Under *Order 42 Rule 6 (2)* of the *Rules*, stay pending appeal will be granted if an applicant satisfies the following three conditions:

- i. That the application was filed timeously.
- ii. That he will suffer substantial loss if the stay sought is not granted.
- iii. That he was willing and ready to offer any security that the court may order for the due performance of the decree.

9. Turning to the first issue, I note from the record that the impugned judgment was delivered on 19th November 2018. The memorandum of appeal was filed on 19th December 2018 and the current application was filed on 8th January 2019. This was about three weeks after filing the appeal. I find that a delay of about three weeks is not prolonged or inordinate. It is excusable. It is thus my finding that the application was filed without unreasonable delay.

10. On substantial loss, I find that though all the three preconditions for stay are important, the requirement for demonstration of the likelihood of substantial loss occurring to an applicant if stay is not granted is the most crucial of the three requirements. This is the cornerstone of applications for stay pending appeal because if there is no evidence that the applicant is likely to suffer substantial loss if stay is not granted, there would be no justification for suspending the respondent's right to enjoy the fruits of his judgment.

11. The above position was succinctly enumerated by the Court of Appeal in *Shell Limited V Kibiru & Another, [1986] KLR 410* when it stated as follows:

“... 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 jurisdiction for granting stay. That is what has to be prevented. Therefore without this evidence, it's difficult to see why the respondents should be kept out of their money. ...”

12. In monetary decrees like the one sought to be stayed in this application, an applicant can only demonstrate occurrence of substantial loss if stay is not granted by proving that the respondent was impecunious and that if the applicant succeeds in his appeal, he is unlikely to recover the decretal amount if paid.

13. I fully associate myself with the view expressed in *Lalji Bhimji Sanghani Builders & Contractors V Nairobi Golf Hotels Limited, HCCC No. 1990 of 1995* where the court explained what constitutes substantial loss in monetary decrees and how it should be proved. The court expressed itself as follows:

“... for an applicant to satisfy this condition, he must persuade the court that the decree holder is a man of straw from whom it will be well nigh impossible, or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavit or other evidence on record. A bold statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matters I have alluded to carries no weight of persuasion in the mind of a judge.”

14. In the same vein in *Pamela Akinyi Opundo V Barclays Bank of Kenya Limited, [2011] eKLR*, the court held that:

“Unless there is evidence to show that the respondent cannot be trusted with the money in question and that he/she is likely to squander the same before the appeal is heard and determined, thereby rendering the appeal nugatory, there is no reason why a litigant should be denied the fruits of his litigation. An appeal cannot be rendered nugatory in a monetary decree if payment is made, and it is not just to deny a successful party the benefit of judgment merely because he is poor. In an application for stay of execution pending appeal, the burden lies upon the applicant to prove that the respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. It is only when the applicant tables evidence to show that the respondent will not be able to refund the same can it be said with any comfort that the appeal will be rendered nugatory.”

15. The onus of proving substantial loss lies on the applicant in line with the law of evidence which provides that he who alleges must prove. Proof of the loss likely to be sustained if stay is not granted must be by way of credible evidence not just mere averments. This position was well captured in *Machira T/A Machira & Company Advocates V East African Standard, (No 2) (2002) KLR 63* where the court stated that;

“...It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.

If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg appeal or intended appeal)....”

16. In this case, the applicant has not claimed that the respondent is a man of straw and that if execution proceeded, it will be difficult if not impossible to recover the decretal amount if it succeeds on appeal.

The applicant has only asserted in the grounds anchoring the motion and in the supporting affidavit that its goods have been proclaimed and that since execution was imminent, if stay was not granted, it will suffer substantial loss and the appeal will be rendered nugatory. I must point out that execution is a lawful process and the fact that it is threatened cannot be a basis for granting stay.

17. In the absence of any claim or evidence to prove that the respondent will be unable to refund the decretal amount if the appeal is successful, I have come to the conclusion that the applicant has failed to demonstrate that it is likely to suffer substantial loss if the application was dismissed. The applicant has also not offered any security for the performance of the decree which is one of the prerequisites for grant of stay under *Order 42 Rule 6 (2)* of the Rules.

18. Lastly, the applicant has claimed that its appeal has high chances of success. Whether or not the appeal has high chances of success is immaterial in the instant application. It is not one of the conditions which the High Court considers when deciding how to exercise its discretion in deciding whether or not to grant stay. The requirement to prove that an appeal has high chances of success or is not frivolous is only applicable to second appeals to the Court of Appeal under *Rule 5 (2) (b)* of the *Appellate Jurisdiction Act*.

19. In view of the foregoing, I am satisfied that the applicant has failed to establish sufficient cause to warrant the exercise of this court's discretion in its favour. It is thus my finding that the Notice of Motion dated 7th January 2019 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 OCTOBER, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Riru holding brief for Mr. Opolo for the applicant

Mr. Muhuni for the respondent

Mr. Salach: Court Assistant