



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS APPLICATION NO. 3 OF 2019

AMELI INYANGU & PARTNERS ADVOCATES.....APPLICANT

VERSUS

MILLENIUM MANAGEMENT LIMITED.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. AmeliInyangu for the Applicant

Mr. Fred Adhoch for the Respondent

RULING

On 23.10.2019 the applicant filed a notice of motion expressed to be brought under Section 1A, 1B, 3A and 3B and 63 of the Civil Procedure Act and Order 9 Rule 9, Order 42 Rule 6, Order 51 of the Civil Procedure Rules seeking the following orders:

- 1. This application be certified urgent and be heard ex-parte in the 1st instance.***
- 2. That the firm of AokoGithara& Company be hereby granted leave to come on record after Judgment on behalf of the respondent.***
- 3. That a stay of execution in Misc. Application 3 of 2018 be granted pending the hearing and determination of this application.***
- 4. That the court be pleased to grant a stay of execution on Misc. Application 3 of 2019 pending hearing and determination of the appeal against the Judgment made by the Hon. Mativo J. on the 10th day of September 2019.***
- 5. That costs of this application be provided for.***

The notice of motion referred to is supported with an affidavit deposed by **Sanargar Singh** a director of the applicant. The background of the present application can be traced from the records. Since the entry of Judgment dated 10.9.2019 by **Mativo J** in the sum of Kshs.10,674,571/=. That the applicant being aggrieved by the Judgment has opted to file an appeal against the decision and consequential orders. He now has approached this court to be granted stay of execution of the said Judgment until the intended appeal is heard and determined.

Mr. Fred Adhoch, for the respondent filed a replying affidavit vehemently opposed to the applicant as filed and grant of orders under the provisions of the Civil Procedure Act and Rules.

He deposed that the application is premature as no notice of appeal or any draft memorandum of appeal is annexed to the application. That from the history of this matter, the court has already made a determination to the same issues being canvassed by the applicant in the current notice of motion. That pursuant to Order 42 Rule 6 of the Civil Procedure Rules, the application lacks merit as there are no sufficient reasons to satisfy the test laid down by the Law.

Analysis and resolution

It is trite that under Order 42 Rule 6 of the Civil Procedure Rules, the power to grant a stay of execution is discriminating and must be based on the following conditions and sound legal principles:

- a). *The order of stay of execution shall be made without unreasonable delay.*
- b). *Unless the court is satisfied that substantial loss would result if stay is not granted.*
- c). *That such security for due performance of the decree is furnished by the applicant.*
- d). *It is also in addition envisaged that in the principles granting stay of execution as expressed depending on its own facts the appeal so referred to should not be rendered nugatory.*

It is now an established principles in case law that the applicant must discharge the burden of proof on the above grounds for the court to exercise discretion for stay to be granted.

The question which arises for consideration in this case is whether the applicant has satisfied the ground on substantial loss for the court to exercise jurisdiction to grant a stay of the operation of Judgment.

In the case of **Reoker Seas Aviations Engineering G. B. Ltd 1963 Ich 24 – at 39** Lord Denning said :

“Executions means quite simply the process for enforcing or giving effect to the Judgment of the court and it is “completed” when the Judgment creditor gets the money or other thing awarded to him by the Judgment.”

As stated under Order 42 Rule 6 of the Civil Procedure Rules the preamble is very clear, no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from by the aggrieved party, unless the three traditional threshold conditions are satisfied.

As was considered in the persuasive authority by the privy council in case of **Minister of Foreign Affairs Trade and Industry v Keenclels and supplies Ltd and another [1991] 4 ALL ER 65** it was held:

“A stay of proceedings was an order which put a stop to the further of conduct of proceedings in court or before a tribunal at the stage, then reached, the object being to prevent the hearing or trial Ruling taking place.”

The importance of it is to ensure that a successful litigant as a general rule is not denied or kept away from the fruits of his Judgment. It is obvious that a mere appeal or intention to appeal at a glance shall not operate as a stay of execution of the Judgment legally obtained from an independent court or tribunal.

That is the reason Order 42 Rule 6 empowers the court only to exercise discretion on terms of substantial loss, timely invoking of the jurisdiction of the court and providing security for due performance of the decree. From the outset as execution involves an existing Judgment the effect of substantial loss by its very definition and reasons has been adjudged to carry more weight in reference to grant or denial of stay orders of execution.

Faced with a similar situation in the case of **Kenya Shell Limited v Kibiru [1986] KLR 410** the court held:

“It is usually a good rule to see if order XL1 Rule 4 of the (42 rule 6) can be substantial. If there is no evidence of substantial loss to 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 a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondent should be kept out of their money. It is not sufficient by merely stating that the sum of Kshs.20,380.00/= is a lot of money and the applicant would suffer if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that the status quo should remain as it were before Judgment. What difference can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgment.” See also the principles in **Machira T/a Machira & Co. Advocates v East African Standard No. 2 [2002] KLR 63.**

In considering the test on substantial loss in the case of **Frachal Ltd v NAB Ltd [2000] 20 WRN 1055C and Fawehinmi v Akilu [1990] NWLR 460** the court sets out special circumstances to be taken into account in exercise of discretion which go to the enforcement of the Judgment and not those which go merely to its correctness to warrant stay of execution or denial to be:

- a). *That it would destroy the subject matter of the proceedings.*
- b). *Foist upon the court a situation of complete helplessness.*
- c). *Render nugatory any order or orders of the appellate court.*
- d). *Paralyze in one way or the other, the execution by the litigant of his constitutional right of appeal.*
- e). *Provide a situation in which even if the appellant succeed in his appeal there could no return to the status quo.”*

Having set out at length the issues in the notice of motion and the positions taken by the parties and further guidance from the applicable

principles, I am of the following conceded view. On the all, important aspect of the application for stay orders is predicated on the Judgment against the applicant by the respondent legal services provider related and connected with the applicant company.

First, as against the Judgment, the respondent moved the court for taxation of Advocate – Client bill of costs which on 3.1.2019 taxed the bill at Kshs.10,674,571.00/=.

Secondly, by an exercise of jurisdiction to give effect to the certificate of costs on 10.9.2019 **Mativo J** entered Judgment against the applicant pursuant to the taxation of 3.1.2019.

Thirdly, it is noted that at one point an agreement had been reached between the applicant and the respondent after the taxation to settle the bill of costs at Kshs.3,500,000/= on 12.3.2019.

Forth, in the circumstances the applicant in compliance with the agreement drew postdated cheques in favor of the applicant. It was the case for the respondent that some of the cheques on presentation were dishonored.

From the above the respondent moved the court to enforce the entire Judgment based on the certificate of costs by the Deputy Registrar. It is my considered opinion and beyond peradventure the decision made on 10.9.2019 by this court as pronounced entitled the respondent a property obtained valid Judgment on the liquidated claim. Several issues thereafter were raised before me on legal interpretation of the agreement deed and the entry of Judgment by **Mativo J** therefrom on grounds of fact and law. In my ruling dated 14.10.2019 on considerations of matters raised and careful appraisal of the particulars attended to the motion then I dismissed the reliefs sought as stated for want of merit.

In the instant motion the important issue emerging from the affidavit evidence is whether the court has the discretion to grant stay of execution pending an appeal yet to be filed or even making the intention known to the Court of Appeal. Whether on principle the applicant would ever file an appeal or not is a matter in the realm of unknown. Whether or not having regard to the Law and the affidavit evidence in support of the application an essential attribute of the condition on substantial loss under Order 42 Rule 6 of the Civil Procedure Rule has been discharged by the mover of the application to deserve the order on stay is undoubtedly unsubstantiated. On the authority of the **Kenya Shell case** there is no cogent averment that if the decretal sum is paid out to the applicant he will suffer irreparable harm in the form that is not compensable by adequate costs or refund of the decretal sum at the end of decision by the appeal court. It is not in doubt that the respondent had complied with the formal requirement of the Law in obtaining Judgment and consequential decree. While at the beginning the applicant argued that special provision be made on the basis of the agreement justice demands that who comes to equity must do equity.

The circumstances of this case in my view are such that the notice of motion dated 23.10.2019 on stay of execution is without legal support and the same must fail with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE

In presence of:

1. Mr. Onyango for Adhoc for the respondent