



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 372 OF 2018

BOLPARK TRADING COMPANY LIMITED.....APPELLANT

VERSUS

CHARLES NJOROG MUNGA.....1STRESPONDENT

ERICKSON MBUTHIA.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 8th April 2019 was brought pursuant to the provisions of Order 51 (sic) Order 42 Rules 6 and 7 of the Civil Procedure Act(sic) and all enabling provisions of the Law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the Proclamation dated and served on 4th April 2019, the Warrants of Attachment of Sale dated 2nd April 2019 and the Execution of the Judgment and Decree delivered on 24th July 2018 in MILIMANI CMCC NO 4031/16 CHARLES NJOROG MUNGA –VS- BOLPARK TRADING CO LTD & ANOR against the Applicant/Appellant herein be stayed pending the hearing of the main Appeal filed on 9th August 2018 in the High Court in NAIROBI HCCA NO 372 OF 2018 BOLPARK TRADING CO LTD & ANOR –VS- CHARLES NJOROG MUNGA & ANOR.

4. THAT costs of the application be provided for.

2. Its Written Submissions were dated 9th May 2019 (sic) and filed on 8th May 2019 while those of the 1st Respondent were dated 24th May 2019 and filed on 31st May 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's present application was supported by the Affidavit of its Managing Director, Shahbaz Khan, that was sworn on 8th April 2019.

5. It contended that the 1st Respondent proclaimed its assets worth over Kshs 660,000/= in a bid to execute the judgment and decree that was delivered on 24th July 2018 for Kshs 424,778.50. It pointed out that its appeal had raised triable issues and had overwhelming chances of success because it was not the owner of the Motor Vehicle Registration Number KAY 518Y (hereinafter referred to as "the subject Motor Vehicle") having sold the same over eight (8) years prior to the said accident to one Hulda Mwasela on 31st July 2007 and could not therefore have been vicariously liable for the acts of its driver.

6. It stated that it was willing to deposit half of the decretal amount in the sum of Kshs 212,389/= as security for costs in a joint interest earning account operated by the two (2) law firms pending the hearing and determination of the Appeal herein.

7. It averred that it filed an application seeking orders for a stay of execution pending appeal in the lower court but that the same was dismissed on the grounds that there was no execution so far.

8. It therefore urged this court to allow its application as prayed.

THE 1ST RESPONDENT'S CASE

9. In response to the said application, the 1st Respondent swore a Replying Affidavit on 30th April 2019. The same was filed on 2nd May 2019.

10. He was emphatic that the Appellant's application was heard and determined on merit and that the same was dismissed because it had not met the conditions for being granted an order for stay of execution pending appeal. He stated that the Appellant did not appeal against the said Ruling but instead filed the present application seeking similar orders and was thus guilty of forum shopping.

11. He averred that it had not demonstrated what substantial loss it would suffer if the orders it had sought were not granted. He was categorical that he was a man of means and was capable of refunding the decretal sum in the event it was successful in its Appeal. He added that it had neither furnished this court with any security not demonstrated that it was able to furnish the said security.

12. He opined that the present application had little chances of success as it failed to produce the said Hulda Mwasela as a witness or institute third party proceedings against her and consequently, it was still the owner of the subject motor vehicle.

13. It was his contention that it was only interested in frustrating him from enjoying the fruits of his judgment without justification of any irreparable damages it may suffer.

14. He further averred that in the event this court was to allow the present application, then the Appellant ought to be ordered to release half of the decretal sum to him while the balance be deposited in an interest earning account in the joint names of its and his advocates within a specific time preferably thirty(30) days.

LEGAL ANALYSIS

15. The Applicant submitted that it filed its application seeking a stay of execution pending appeal in the lower court on 13th August 2018 and that the same was dismissed on 21st February 2019. It submitted that it filed its present application on 8th April 2019 without undue delay and hence had satisfied one of the conditions for being granted an order for stay of execution pending appeal.

16. It added that the 1st Respondent proclaimed its assets worth Kshs 660,000/= to satisfy a decretal sum of Kshs 424,778.50 and because it had tendered evidence in the lower court that it had sold the subject Motor Vehicle at the material time of the accident, it had demonstrated that it would suffer substantial loss.

17. It pointed out that it was willing to give security on costs by depositing half of the decretal sum which was Kshs 212,389/=.

18. In support of its case, it relied on the case of **Stanley Karanja Wainaina & Another vs Ridon Anyangu Mutumbwa [2016]eKLR** where the court acknowledged the aforementioned conditions that have to be met before an applicant can be granted an order for stay of execution under Order 42 Rule (6) of the Civil Procedure Rules.

19. On its part, the 1st Respondent submitted that he was entitled to the fruits of his judgment. In this regard, he relied on the case of **Machira t/a Machira & Co Advocates vs East African Standard (No 2) [2002] KLR 63**. He also relied on the case of **Pamela Akinyi Opundo vs Barclays Bank of Kenya Limited [2011] eKLR** where it was held that unless an applicant demonstrated that the respondent could not be trusted with the money in question and was likely to squander the same thus rendering the appeal nugatory, there was no reason why a respondent should be denied the fruits of his judgment.

20. He also placed reliance on the case of **Bernard Khauka Wafula vs James Gachie Ngugi (suing as the father and next friend of Ruth Watere) [2019] eKLR** where the court directed that the respondent be paid half of the decretal sum while the balance was paid into a joint interest earning account in the names of counsel for the parties.

21. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless-

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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”.

22. This means that an applicant has to demonstrate:-

a. That he will suffer substantive loss if the order of stay was not granted;

b. That he had filed his application for a stay of execution timeously; and

c. That he was willing to provide security.

23. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

24. The Appellant was vehement that it was not the owner of the subject motor vehicle at the material time of the accident. This was a matter of fact which had aggrieved it. It was necessary that the court determines whether the Learned Trial Magistrate had arrived at the correct conclusion that the Appellant was vicariously liable for the actions of the 2nd Respondent. If this appellate court determined that the said Learned Trial Magistrate had arrived at the wrong conclusion, the Appellant would suffer substantial loss in the event it would have paid the 1st Respondent the decretal sum and it was successful in its appeal.

25. It was the considered view of this court that substantial loss did not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event its was successful. Failure to recover such decretal sum would render its appeal nugatory if it was successful.

26. Notably, the 1st Respondent did not file any affidavit of means to demonstrate that if he was paid the decretal sum and the Appellant was successful in its appeal, he would be able to refund it the said monies without causing it hardship.

27. In the absence of proof to demonstrate his ability to refund it the said sum, this court was satisfied that the Appellant would suffer substantial loss. It had thus satisfied the first condition of being granted a stay of execution pending appeal.

28. It was the considered view of this court that the present application was filed without undue delay because the Appellant’s application for a stay of execution pending appeal in the lower court was dismissed on 21st February 2019. It was irrelevant why the said application was dismissed.

29. This is because Order 42 Rule 6 (1) of the Civil Procedure Rules provides 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 (emphasis court), 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.”

30. It was therefore immaterial that the lower court had dismissed the Appellant’s application for an order for stay of execution pending appeal because it still had a life line in this court. A delay of about two (2) months could not be said to have been inordinate. In that regard, the Appellant had also satisfied the second condition of being granted an order for a stay of execution pending appeal.

31. The Appellant was willing and ready to deposit security for the due performance of the decree to be appealed from as would be binding on it. For the reason that the issue of whether or not the Appellant was vicariously liable for the actions of the 2nd Respondent would need to be determined and the fact that the 1st Respondent had not demonstrated that he would be able to refund the Appellant the decretal sum if it was successful in its appeal, it would not be prudent to release any monies to the 1st Respondent herein. The said monies ought to be deposited in court to safeguard the 1st Respondent’s interests in the event its Appeal was unsuccessful.

32. The mandatory compliance of Order 42 Rule 6(2) of the Civil Procedure Rules was well demonstrated in the case of **Magnate Ventures vs Simon Mutua Muatha & Another [2018] eKLR**. As the Appellant had met all the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, it was the considered opinion of this court that it ought to be granted the orders it had sought so that its Appeal could be heard and determined on merit and not rendered nugatory in the event it was successful.

DISPOSITION

33. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s application that was dated and filed on 8th April 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

1. THAT there shall be a stay of execution of the Judgment and Decree delivered on 24th July 2018 in Milimani CMCC NO 4031 of 2016 Charles Njoroge Munga vs Bolpark Trading Co Ltd & Another against the Appellant herein pending the hearing of the Appeal herein on condition the Appellant shall deposit into an interest earning account in the joint names of its counsel and counsel for the 1st Respondent, the sum of Kshs 400,000/= within the forty five (45) days from the date hereof i.e. by 24th February 2020.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 33(1) hereinabove, the conditional stay of execution shall automatically lapse.

3. The Appellant shall file and serve a Record of Appeal within sixty (60) days of this Ruling i.e. by 10th March 2020.

4. Costs of the application herein will be in the cause.

5. Either party is at liberty to apply.

34. The Deputy Registrar of High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings to enable the Appellant file and serve its Record of Appeal within the time lines given hereinabove and to also undertake all prerequisite process to ensure the hearing of the Appeal herein without any inordinate delay.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of December 2019

J. KAMAU

JUDGE