



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. 9 OF 2017

BATIAN FLOWERS LIMITED.....APPELLANT/APPLICANT

versus

JULIUS M'MARETE

DORCAS KARUTHU (Suing as the legal representatives of the estate of

ANDREW MUTHURI GITONGA (deceased).....RESPONDENT

RULING

1. An appeal has been filed herein by **Batian Flowers Ltd (Batian)** against the Ruling delivered on 10th August 2017 by the Chief Magistrate in case No. Nanyuki **CMCC No. 119 of 2016**.
2. Batian has filed a Notice of Motion (application) dated 29th September 2017 seeking stay of those orders made on 10th August 2017 (the orders) pending the hearing and determination of this appeal. This Ruling related to that application.
3. Both the appellant (Batian) and the Respondent have been of dis-service to this court. They failed to annex the pleadings before the Nanyuki Chief Magistrate's Court (the trial court) and the order made on 10th August 2017 by the Chief Magistrate to the application. As a consequence this court is left to gather the background information of this matter from the snippet of information referred to in the affidavits filed herein.

BACKGROUND

4. As I can gather, Julius M'Marete and another (hereinafter referred to as Marete) filed an action against Batian in case No. Nanyuki CMCC No. 119 of 2016 before the trial court seeking compensation, on behalf of the estate of Andrew Muthuri Gitonga (deceased), in respect to motor vehicle accident.
5. Batian were served with the summons in that matter but failed to enter an appearance or file a defence within the prescribed period. As consequence of that failure interlocutory judgment was entered against Batian.
6. Marete proceeded to formally prove the case against Batian and obtained judgment of Kshs.4,138,000.
7. Batian filed an application before the trial court seeking an order for setting aside of that judgment and an order for leave to file a defence out of time.

8. The trial court by its Ruling of 10th August 2017 granted the orders sought by Batian on condition that Batian within 30 days deposited in court or in a joint interest earning account half of the decretal sum amounting to Kshs. 2,069,000. In default Marete was granted leave to execute for the decretal sum.

9. Batian was aggrieved by the condition attached to the granting of the orders and therefore filed this appeal. Batian has by the application sought stay of the order made by the Chief Magistrate of 10th August 2017 pending the hearing and determination of this appeal.

BATIAN'S ARGUMENTS

10. By the affidavit in support of the application Batian deponed that its insurers are UAP Insurance Company Ltd. That insurer was the insurer of Batian as at the date of the accident which is the subject of the action before the Chief Magistrate. On behalf of Batian it was deponed that the Chief Magistrate's order for deposit of half the decretal sum was punitive since the said Chief Magistrate found that Batian had a valid defence to the claim.

11. That Marete on 28th September 2017 proceeded to execute for the decretal sum by auctioneers proclamation of Batian goods.

12. It was further deponed that Batian would suffer substantial loss because it doubted Marete's ability to refund it the amount of the decree.

13. Further Batian will suffer prejudice if required to pay the decretal amount because it would be denied the use of substantial amount of money for its trading. Accordingly that Marete should only be compensated by an award order of thrown away costs.

14. It was deponed that UAP Insurance Company Ltd was financially stable for many years and would be able to pay any judgement award that will be made against Marete before the Chief Magistrate's Court.

MARETE'S ARGUMENT

15. Marete opposed the application.

16. Marete by the replying affidavit dated 24th October 2017 deponed that Batian was mistaken to seek to stay the order of Chief Magistrate's Court of 10th August 2017 whereas Marete was not executing that order but rather was executing the decree of the trial court. Further that Batian had failed to deposit half the decretal sum within the period set by the Chief Magistrate by the order of 10th August 2017. That Batian was to blame for having failed to file its appearance and defence as required and therefore equity can only aid the vigilant. Finally that UAP Insurance Company Ltd was not party in the action.

ANALYSIS AND DETERMINATION

17. Batian filed this appeal because it was dissatisfied with the order by the trial court requiring it to deposit half the decretal sum as a condition of stay of the decree issued by the Chief Magistrate. It seeks by this appeal the conditional order be set aside.

18. Although Marete argued that Batian's prayers in the application are misdirected to the wrong orders in my view they are not. Although I must admit that Batian could have couched its prayers more precisely to avoid misunderstanding what I understand, however, is that Batian seeks by the appeal before this court and the application the vacation of the order of the Chief Magistrate that it deposit half of the decretal sum as a condition of setting aside *ex parte* judgment and as a condition of granting leave to defend that action. Batian in my view is not seeking to upset the order which granted it the order setting aside the *ex parte* judgment or the order granting it leave to defend the action. It follows that Marete did not fully appreciate what Batian seeks before this court.

19. Although Batian did not dispute that it has not deposited half of the decretal sum, as submitted by Marete; it need to be appreciated that this court by its order of 3rd October 2017 granted stay of the order of 10th August 2017 made by the Chief Magistrate. It follows therefore nothing turns on the submission by Marete that Batian failed the deposit half the decretal sum.

20. Batian, before the Chief Magistrate's Court failed to enter an appearance or file its defence within the prescribed period. The Chief Magistrate Court by the Ruling of 10th August 2017 accepted Batians explanation for that delay and proceeded to grant Batian leave to defend the suit out of time. That being so the argument that Batian had unduly delayed to file its appearance and defence is misplaced in this matter.

21. Clearly UAP Insurance Company Ltd is not a party before the Chief Magistrate or in this appeal. UAP Insurance Company Ltd by the affidavit in support of the application, sworn by its legal officer, explained that its interest in this action is that of being Batian insurers. In other words the award that will finally be made in against Batian, if any, will be settled by UAP Insurance Company. In that regard UAP Insurance Company Ltd is exercising its right under the doctrine of subrogation.

22. Order 42 of the Civil Procedure Rules sets out the conditions under which stay pending appeal will be granted. **Order 42 Rule 6(2)** provides those conditions viz:-

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

a. the court is satisfied that substantial loss my 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 the applicant.”

23. Justice Kimaru in the case **PETER ONDANE t/a SPREAWETT CHEMIS –V- JOSEPHINE WANGARI KARANJA [2006]eKLR**, discussing the provisions of that Order 42 Rule 6(2) and stated:-

“The issue for determination nation by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss my result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of executing without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

24. Batian fulfilled the first condition of granting a stay, that is it deponed it will suffer substantial loss if the amount of Kshs.2,069,000 is tied up in an interest earning account rather than being used in its trade; it further deponed that there was no evidence that Marete, if allowed to execute of the decretal sum, would be able to refund that amount in the event Batian successfully defended his claim.

25. Marete did not specifically respondent to those arguments advance by Batian.

26. The second condition of granting stay is that Batian should have filed its application without unreasonable delay.

27. None of the parties address their minds to this second condition and accordingly nothing turns on it. Batian filed the application before this court on 2nd October 2017 to stay the order 10th August 2017. There is also evidence that Batian had first filed an application directed against the order of 10th August 2017, before the Chief Magistrate's Court, dated 13th September 2017. That application before the Chief Magistrate's Court was withdrawn by Batian before it was argued and before the present application was entertained by this court. I do therefore find that there was no unreasonable delay in filing before this court the application for stay.

28. The third condition of stay is that there be security, as the court orders, for the due performance of the decree.

29. The Chief Magistrate ordered the security be deposit in an interest earning account, By Batian, of half of the decretal sum. That order of deposit of that sum is what provoked this appeal.

30. Although Batian submitted that the order for deposit of half decretal sum would lead to it suffering substantial loss; in balancing the interest of Batian not to suffer substantial loss, and the interests of Marete to eventually enjoy the fruits of his judgment there will be need for an order of security to be made. Although it was deponed UAP Insurance Company Ltd was a stable company – the fact remains that stable companies have been known to become insolvent.

31. Accordingly balancing those interests I do order that Batian do deposit at the Chief Magistrate’s Court a Bank guarantee to pay Kshs.2,069,000 to be paid to Marete in the event judgment will be entered in favour of Marete.

32. In the end the following are the orders of this court:-

a. There shall be stay of the order of 10th August 2017 made in case No. Nanyuki CMCC 119 of 2016 to the effect requiring Batian flowers Limited to deposit Kshs.2,069,000 within 30 days from 10th August 2017.

b. Order (a) above is granted on condition that Batian flowers Limited do file in Nanyuki CMCC No. 119 of 2016 within 30 days from today a bank guarantee to pay Kshs.2,069,000 in satisfaction of the judgment, if any, that will be passed in Nanyuki CMCC No. 119 of 2016. In default of filing such a bank guarantee this stay shall be vacated.

c. The Respondent is awarded costs of the Notice of Motion dated 29th September 2017.

d. In view of the orders granted above, a mention date will be given at the reading of this Ruling on which dated the Appellant will be required to indicate its wish to proceed with this appeal.

DATED and DELIVERED at NANYUKI this 31st day of JANUARY 2018.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue / Mariastella

For appellant

For Respondents:.....

COURT

Ruling read in open court.

MARY KASANGO

JUDGE