



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 152 OF 2016

MOTREX LIMITED.....APPELLANT

VERSUS

MUSA KANGOGO KIPKORIR

DANCAN AEGWO KIROR (Suing as the Legal

Representative Of the Estate of the late KANDIE MICAH KIPKORIR

(DECEASED))RESPONDENTS

RULING

The Application

The Appellant has appealed against the judgment delivered on 23rd November 2016 in **Machakos Chief Magistrate's Civil Case No.974 of 2014 – Musa Kangogo Kipkorir and Dancan Aegwo Kiror (suing as the Legal Representatives of the Estate of the late Kandie Micha Kipkorir(Deceased) vs Motrex Limited**, in which the trial Magistrate made an award of Kshs 2,333,100/= against the Appellant. The Appellant filed its Memorandum of Appeal herein on 19th December 2017.

The Appellant after filing the appeal subsequently filed an application by way of a Notice of Motion on 19th December 2016, which is supported by an affidavit of Richard Nyamai Mwaniki sworn on the same date. In the said application, the Appellant seeks that there be a stay of execution of **Machakos Chief Magistrate's Civil Case No.974 of 2014 – Musa Kangogo Kipkorir and Dancan Aegwo Kiror (suing as the Legal Representatives of the Estate of the late Kandie Micha Kipkorir(Deceased) vs Motrex Limited** pending the hearing and determination of the Appellant's Appeal .

The main grounds for the application are that the trial Magistrate erred in her judgment and the Appellant's appeal has a high chance of success, which may be rendered nugatory unless the order of stay of execution is granted and the Appellant will suffer substantial loss. The Appellant stated that he is willing to tender such security as the Court may order for due performance of the decree. That in the alternative, the Appellant is willing to pay part of the award taking into account the judgment on liability entered by the Court at 70% : 30% and based on the statutory minimum wage.

In response to the said application by the Appellant, the 2nd Respondent on 19th January, 2017 filed a Replying Affidavit sworn on the same date. The 2nd Respondent stated that the appeal does not have a high chance of succeeding , and that it would be in the interests of justice and fairness if the Respondents are paid the decretal sum or half of the same together with the costs.

According to the Respondents, the Appellant has not demonstrated the substantial loss it may suffer if the appeal succeed, and that the appeal is against a money decree. Further, that the application is not merited on the grounds that it is premature, its conduct is not *bona fide*, and the Appellant has not made a full disclosure of its financial status , has not shown its ability to pay or paid any portion of the monies due under the judgment.

The Determination

The Appellant's application was canvassed by way of written submissions filed by the Appellant's and Respondents' Advocates on 24th February 2017 and 8th March 2017 respectively. The issue before the Court is whether the judgment and decree issued in **Machakos Chief Magistrate's Civil Case No.974 of 2014 – Musa Kangogo Kipkorir and Dancan Aegwo Kiror (suing as the Legal Representatives of the Estate of the late Kandie Micha Kipkorir(Deceased) vs Motrex Limited** should be stayed pending the hearing of the appeal.

The Appellant submitted in this respect that the criteria for granting stay of execution pending Appeal as set out in Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules has been met, that the issues raised in the Appeal are arguable, and that if the orders for stay of execution sought are not granted, the Appeal will be rendered nugatory. The Respondents on the other hand submitted that the existence and/or filing of an appeal by the Appellant in itself cannot be the basis of the Court granting an order of stay of execution. Further, that in view of the fact that the Appellant did not adduce any evidence during the trial, the evidence of the Respondents remained uncontroverted and or unchallenged both on the issue of liability and quantum.

Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(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 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.

(2) 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

On the first condition for grant of stay of execution, the Appellant submitted that its appeal arises from the judgment of the trial Court rendered on 23rd November 2016, and according to section 79G of the Civil Procedure Act, an appeal to the High Court must be filed within 30 days. Further, that the Appellant's appeal was filed on 19th December 2016 and it also filed its application for stay of execution on the same date. Therefore, that the Appellant filed its Application without undue delay .

The Respondents did not controvert this averment in their submissions , and this Court finds that as the Appellant filed his application within thirty (30) days of issuance of the orders by the trial Court, the said period can be said to be reasonable, and the first condition for grant of stay has thus been met.

On the second requirement of substantial loss, the Appellant's Advocates relied on the decision in **James Wangalwa & Another vs. Agnes Naliaka Cheseto, Bungoma HC Misc Application No 42 of 2011** that to establish substantial loss, an 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.

It was in this regard urged that no evidence has been tendered by the Respondents to show that the Estate of the Deceased is capable of refunding any sum found by the Court to be refundable to the Appellant if the appeal succeeds, and that from the records in Court, the Respondents are alleged to have been dependants of the Deceased person . Reliance was placed on section 112 of the Evidence Act and the decision by the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Civil Application No. 238/2005**, for the position that the Respondents had the evidential burden to show what resources they have.

The bulk of the Respondents' submissions was that the Appellant had not demonstrated the substantial loss that will result to it, and has merely stated that it will suffer substantial loss that and its appeal rendered nugatory should the stay order be refused. The Respondents cited various judicial authorities in this regard, including **Mutera M'Limbutu vs M'Imathiu Mwaricha (2005) eKLR, Glencore Grain Limited - vs- Kabansora Millers Ltd, Misc Civil Case No. 400 of 2002 (UR), David Mwenja v Jubilee Insurance Co Ltd, [2005] eKLR and Kenya Shell Ltd vs Benjamin Karuga Kibiru & Others, (1982- 88) I KAR 1018.**

In this regard, I hold the view that an applicant should show what loss over and above the payment of the decretal sum he or she is likely to suffer in the event that stay of execution is not granted, which is the effect of the decisions cited by the Respondents and in **Antoine Ndiaye vs. African Virtual University [2015] eKLR**. I however find the Appellant's averments that the Respondents may not be able to refund the decretal sum in the event that its appeal succeeds, sufficient and specific enough as to the substantial loss that it will suffer if the application for stay is not granted, especially in light of the fact that the Respondents did not depone to the resources they have at their disposal to allay the Appellant's fears.

I am also guided by the position as stated by the Court of Appeal in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike, Nrb CA Civil Application No 238 of 2005** where it was held as follows:

“The court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act Cap 80 Laws of Kenya.”

Lastly, on the requirement of security, the Appellant urged the Court to allow their request to deposit the whole amount of the judgment sum in Court, or in an interest earning account in the name of both law firms representing the parties. The Respondents on the other hand submitted that that the stay order be

conditional upon the decretal amount being paid to the Respondents, and that there is no good reason why the Respondent ought not enjoy the fruits of his Judgment. Reliance was placed on the decision in **Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another, (2014) eKLR** where the Court found that the fact that the Plaintiff was unemployed was not a basis to deny her the enjoyment of the fruits of her judgment.

Provisions of security is a condition for stay of execution, as shown in the foregoing, and the Appellant is thus required to provide security if the orders it seeks are to be granted, and given that the judgment in favour of the Respondents has not been overturned. It is thus necessary if the Court is to grant the orders of stay, so as to balance the respective rights of the Appellant and Respondents. The Court also notes in this regard that the Appellant averred that he was willing to pay part of the decretal sum as a consent had been entered on the issue of liability in the trial Court.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 19th December 2016 is allowed on the following terms and conditions:

1. There shall be a stay of execution of the judgment and decree issued in **Machakos Chief Magistrate's Civil Case No.974 of 2014 – Musa Kangogo Kipkorir and Dancan Aegwo Kiror (suing as the Legal Representatives of the Estate of the late Kandie Micha Kipkorir(Deceased) vs Motrex Limited** pending the hearing and determination of the Appellant's appeal, only on condition that the Appellant shall within 45 days of the date of this ruling pay the Respondents the sum of Kenya Shillings One Million (Kshs 1,000,000/=), and deposit the balance of the decretal sum of Kenya shillings One Million, Three Hundred and Thirty Three Thousand and One Hundred (Kshs 1,333,100/= /)=) in a joint interest earning account in the names of the Advocates for the Appellant and Respondents on record.
2. Upon default of compliance by the Appellant, the stay orders herein shall stand vacated and the Respondents shall be at liberty to execute.
3. The costs of the Notice of Motion dated 19th December 2016 shall follow the costs of the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 19th day of February, 2018.

P. NYAMWEYA

JUDGE