



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES CASE NO. 27 OF 2016

Formerly High Court Civil Suit No. 110 Of 2010

VULCAN EQUIPMENT.....PLAINTIFF

VERSUS

SCHOOL EQUIPMENT

PRODUCTION UNIT.....1ST DEFENDANT/RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....2ND DEFENDANT/RESPONDENT

RULING

1. The 1st defendant/applicant filed the notice of motion dated 14th December 2017 under Order 51 Rule (1) (2) (3) civil procedure rules 2010, Rule 5 (1) (2); (b), 42 and 43(4) (5) (6) of the court of Appeal Rules, section 1A, 1B and 3A of the Act and all other enabling provisions of the law.

The main prayer is prayer (no c) which is:

“This honourable court do grant orders for stay of execution or judgment and orders of 7th December 2017 against the 1st defendant/applicant pending hearing and determination of the intended appeal.”

2. The said application is supported by the grounds on its face plus the supporting affidavit and further affidavit of Dickson Ole Keis sworn on 14th December 2017.

The 1st defendant argues that the judgment and sum of ksh.150,000,000/= plus costs and interest is a lot of money.

3. It has expressed fears of execution before the intended appeal is heard. It has also been indicated that the sum involved is public money which has an element of public interest which must be protected.

4. Broadly that is what the applicant supported by the 2nd defendant are saying besides the thinking that they have a good case with overwhelming chances of success.

5. The 2nd defendant filed two supporting affidavits by Cullen Simiyu Lunyolo in support of the application. She reiterates what has been sworn by Dickson L. Ole Keis.

6. The plaintiff/respondent filed a replying affidavit through its managing director one **Vishal Kochlar**. He averred that the applicant had moved the court under the wrong provisions of the law, and goes on to explain under what provisions of the law it should have been filed.

7. He depones that the application is premature since the execution process is far from being started. It is his contention that the applicant has not demonstrated any loss to be suffered by it if the money was to be paid.

8. All the counsels filed written submissions before the hearing of the application.

9. When the application came for hearing, **M/S Omwoke** for the 1st defendant/applicant submitted that the applicant promptly filed the application after delivery of the judgment.

She contended that the applicant has shown that there will be substantial loss if stay of execution was not granted. Finally that the applicant has an arguable appeal.

10. It is her submission that the decretal sum is huge and the plaintiff/respondent will not be in a position to refund it. There was fear that the plaintiff/respondent was facing bankruptcy proceedings and in the event of a successful appeal it may not be in a position to repay the money if paid.

11. She argued that even if the bankruptcy proceedings are contested the plaintiff/respondent had failed to show that he will be able to pay the money in the event of a successful appeal. She referred to the case of ***Johnson Mwiritu Mburu –vs- Samuel Macharia Nguire HCCA No. 716/03*** to support her argument.

12. She also argued that the money involved herein is public money and the 1st defendant is a government entity. She submitted that she had annexed a copy of the intended appeal and a request for typed proceedings had been filed.

13. She raised issue with the nationality of the plaintiff/respondent's directors' nationality. She requested the court (orally) to add Order 42 Rule 6(2) Civil Procedure Rule to the provisions they were seeking to rely on as this would not prejudice any of the parties.

14. **Mrs. Okwaro** for the 2nd defendant in support of the application submitted that the defect raised by the plaintiff/respondent was curable under section 1A and 1B of the Civil Procedure Act, and Article 159 of the Constitution. She relied on two cases namely:

(i) ***Mohamed Aden Abdi –vs- Abdi Noor Omar & 2 Others eKLR***

(ii) ***Mohamed Salim Balala and another –vs- Tor Allan Safaris Limited [2015] eKLR.***

She submitted that the two cases clearly stated that failure to cite the provisions relied on in a case is not fatal. It was her submission that the application is grounded on Order 42 Rule 6 Civil Procedure Rules and should be heard on merit.

15. On substantial loss, she submitted relying on the cases of:

(i) ***James Wangalwa & Another –vs- Agnes N. Cheseto [2012] eKLR***

(ii) ***Mukuma –vs- Abuoga [1988] KLR 645.***

(iii) ***John Gachanja Mundia –vs- Francis Muriira alias Francis Muthika & Another 2016 eKLR.***

It was her argument that the plaintiff/respondent had been cited in bankruptcy proceedings and the 1st defendant being a public entity was using public funds which could not be entrusted with the plaintiff/respondent.

On security she relied on Order 42 Rule 6 (2) (a), Rule 7 and 8 Civil Procedure Rules since this was a public interest matter.

16. **Mr. Mogere** for the plaintiff/respondent in opposing the application submitted that the application is defective having been brought under the Court of Appeal Rules. Secondly, he argued that there was no evidence of substantial loss to be suffered, the same not having been stated in the application nor affidavit. He referred to the case of ***James Wangala (supra)***. He further argued that the huge amount in itself is not reason to apply for stay of execution. He was of the view that the court should not lose sight of the origin of the claim.

17. Counsel submitted that the application in a sense was pre-mature and its effect was to delay the enjoyment of the fruits of the judgment by the plaintiff/respondent. He further argued that the costs and interest had not been computed and so execution could not be undertaken soon. Referring to the case of ***Johnson (supra)***, he said in that case a deposit of the entire decretal sum had been made.

18. On liquidation, he said the proceedings were yet to be decided and this court would not rely on it. He went on to submit that the plaintiff is a company incorporated in Kenya under Kenyan Laws. Further that the claim is not against the directors but the company.

19. In a rejoinder, M/s Omwoke reiterated that failure to include all provisions being relied on is not fatal. On loss, she submitted that the applicants' ground 7 talked of loss and damage. It states;

“That if the orders of stay are not granted, the plaintiff will execute against the 1st defendant which is a public institution, which will cause the government to suffer irreparable loss and harm. She stressed that the plaintiff/respondent would not be able to refund any money paid to it. She referred to the annexed decree from the plaintiff/respondent's former advocate.”

20. I have considered the application, affidavits, submissions and authorities filed. The issue for determination is whether the 1st defendant/applicant has demonstrated that it is deserving of the orders of stay of execution pending an intended appeal being sought. An issue was raised by the plaintiff/respondent saying that the applicant had moved the court under the wrong provisions of the law.

21. On perusal of the application, one notes that the applicant came under the Court of Appeal Rules and the Civil Procedure Rules and all other enabling laws. Order 42 Civil Procedure Rules which deals with appeals was however not cited. Is this fatal to the application?

22. The 1st defendant/applicant has in the body of the application clearly set out the order it seeks i.e. stay of execution of the judgment pending an intended appeal. The grounds upon which the application is premised have also been clearly outlined. Among them, are the grounds on loss and harm if execution takes place. It states that an appeal which has overwhelming chances of success has been filed.

23. Another ground raised is that the 1st defendant/applicant is a public institution which is run on public funds.

24. The 1st defendant/applicant has clearly set out its application showing the order it seeks and the grounds it is relying on. The application was filed soon after the delivery of the judgment by this court on 7th December, 2017. Being dissatisfied with the Judgment, the applicant filed a notice of appeal. The other parties were served.

25. It is therefore clear that the application for stay of execution pending appeal having been filed before this court is brought under Order 42 Rule 6 (1) Civil Procedure Rules which provides;

Rule 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 the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

26. In the case of Mohamed Aden Abdi –vs- Abdi Nuru Omar & 2 Others [2007] eKLR, the Court of Appeal held thus;

“We have looked at the application and in an appropriate case, this not being one, the court may strike out an application in which appropriate provisions are not cited. In the instant application, however, the prayers in the motion and the affidavit in support leave no doubt that the applicant was seeking an order pursuant to Rule 80 of the Court Rules.”

27. Further in the case of Mohamed Salim Balala (supra), the Court of Appeal further stated;

“However, failure to cite the proper order and rule or vice versa under which the application is made is in our view a non-fatal omission. From a plain reading of the application, there is no doubt as to the nature of the relief sought. When the court is able to discern the provision of law invoked from a reading of the application, then, it can proceed to pronounce its Ruling on merit, notwithstanding the omission. See Mohammed Aden Abdi –vs- Abdi Nuru Omar & 2 Others, Civil Appeal No. 190 of 2006 Court of Appeal at Nairobi 2007 eKLR in which this court, differently constituted faced with a similar scenario, stated as follows:”

28. Considering what has been held by the Court of Appeal in such a scenario as the present one and having looked at the application, prayers sought and the grounds in support, I find that it leaves no doubt in my mind that the current application is premised on Order 42 Rule 6 (1) Civil Procedure Rules. I will therefore not strike it out but proceed to consider it on its own merits.

29. In seeking stay pending appeal, the applicant must satisfy the following conditions;

- (i) That substantial loss will be suffered if the stay is not granted.
- (ii) The application must have been made without unreasonable delay.
- (iii) Appeal is arguable.
- (iv) Security to be provided for.

30. There is clear evidence that the application was made within seven (7) days of delivery of the judgment.

31. The judgment sum without costs and interest is Kshs.150,000,000/= which is a large sum. The applicant has argued that the plaintiff/respondent has bankruptcy proceedings filed against it. A decree in the sum of Kshs.695,019/= against the plaintiff/respondent was filed by the applicant as an annexure in the applicant’s further affidavit.

32. The 1st defendant/applicant is therefore fearful that if the plaintiff/respondent is paid the decretal sum and in the event of a successful appeal, it may not be able to refund the money which is public funds. In reply, the plaintiff/respondent has stated that the bankruptcy proceedings are contested. That in itself is not a satisfactory answer. The plaintiff/respondent has not said anything about the unsettled decree in favour of his former advocate. It has also admitted that there is a liquidation petition against it.

33. It is also a fact that the 1st defendant/applicant is a government entity and operates on public funds. The sum involved in the judgment herein is not small money. If it’s paid to the plaintiff/respondent and the same is not available in the event of a successful appeal, it would result in substantial loss and damage to the 1st defendant/applicant.

34. The plaintiff/respondent submitted that the applicant had not produced any bank statements or anything to show that the latter if paid, the decretal sum could not refund. It is true that no such documents were produced by the applicant. The fact is that the applicant has laid before this court a decree and pleadings in a liquidation petition against the plaintiff/respondent. At that point, the burden shifted to the plaintiff/respondent to show the court that in spite of all that, it was still liquid. It did not do so and the facts remain unrebutted.

35. I find the fears expressed by the applicant's liquidity to be real. The 2nd defendant is equally fearful about this as it too had filed a notice of appeal against part of this court's judgment.

36. On whether the intended appeal is arguable with overwhelming chances of success, I leave that to the Court of Appeal to determine.

37. Order 42 (6) Civil Procedure Rules makes provision for security to be given in the event of an appeal. Order 42 (7) Civil Procedure Rules exempts the government from giving such security. The defendants are public institutions and are covered under Order 42 (7) Civil Procedure Rules.

38. After doing the above analysis, I find that the applicant has satisfied this court that it is deserving of the orders sought. I however, wish to mention that this matter has been in court since 2010. The stay of execution should not be used by the 1st defendant/applicant to derail the matter any further. The proceedings have been typed and the defendants must move with speed.

39. In conclusion, I grant stay of execution of the judgment and orders of 7th December, 2017 pending the hearing and determination of the intended appeal. The stay shall however be limited to 15 months, for purposes of fast-tracking the appeal with leave to apply.

40. Costs will be in the cause.

Signed, dated and delivered this 20th day of **March, 2018** in open court at Nairobi.

HEDWIG I. ONG'UDI

HIGH COURT JUDGE