



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 145 OF 2018

KAPA OIL REFINERIES LIMITED.....APPELLANT

VERSUS

HARRISON KIMOTHO KAMAU.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 16th March, 2018, the appellant/applicant, *Kapa Oil Refineries Limited*, moved this court seeking stay of execution of the judgment delivered by *Hon. D. O Mbeja* on 14th February, 2018 in Milimani CMCC No. 4619 of 2015 and for costs of the application.
2. The application is expressed to be brought under *section 3A* of the *Civil Procedure Act*; *Order 22 Rule 52* and *Order 42 Rule 6* of the *Civil Procedure Rules*. It is premised on the grounds stated on its face and on the supporting affidavit sworn on 4th March, 2018 by *Milan Nemchand Shah*, the appellant's director.
3. In supporting the motion, the applicant contends that it is dissatisfied with the judgment of the lower court in which the 1st respondent was awarded KShs.500,000 general damages for malicious prosecution; that it has already filed an appeal and if stay of execution is not granted, the 1st respondent (the respondent) will execute the decree; that if the decree is executed, the applicant will suffer substantial loss as it will be impossible to recover the decretal amount from the 1st respondent if its appeal is successful; and, consequently, its appeal which has high chances of success will be rendered nugatory. The applicant further states that it is willing to abide by any conditions and terms as to security the court may deem fit to impose.
4. The application is opposed through a replying affidavit sworn by *Mr Julius Kitheka*, the 1st respondent's learned counsel. It is the respondent's case that the application is not made in good faith; that no reason has been given why the respondent should not enjoy the fruits of his judgment; that the application is not merited and ought to be dismissed allegedly because the applicant has failed to satisfy the preconditions for grant of stay pending appeal stipulated under *order 42 rule 6 of the Civil Procedure Rules*.
5. By consent of the parties, the application was canvassed by way of written submissions. Those of the applicant were filed on 20th April, 2018 while those of the respondent were filed on 2nd May, 2018.
6. I have carefully considered the application, the affidavits on record, the rival submissions made on behalf of the parties and all the authorities cited.
7. I would like to start my determination of this application by observing that the relief of stay pending appeal is discretionary in nature. But needless to say, that discretion must be exercised judiciously and not capriciously.
8. The legal parameters that guide the court in the exercise of that discretion are set out in *order 42 rule 6 of the Civil Procedure Rules*. An applicant must demonstrate that if stay is not granted, he is likely to suffer substantial loss; that he is willing to give such security for the due performance of the decree as the court may ultimately order and that the application was filed without unreasonable delay – See ***Housing Finance Company of Kenya V Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR***.
9. Applying the above principles to the instant application, I will start with a consideration of whether the application was filed without unreasonable delay. It is however important to note that what constitutes unreasonable delay varies from one case to another depending on the circumstances of each case.

10. In this case, the judgment appealed against was delivered on 14th February, 2018. A temporary stay of execution was granted by the lower court for 30 days which expired on 16th March, 2018. The memorandum of appeal together with the instant application were filed on 16th March, 2018. It is thus evident that the application was filed just about a month after the judgment was delivered. Though it cannot be said that the application was filed timeously, it is my finding that it was filed without unreasonable delay.

11. Regarding the requirement of establishing substantial loss if stay orders are not granted, the applicant has submitted that it will suffer substantial loss if stay is refused as the respondent is not a person of means and if execution issues, it might not recover the decretal amount in the event that the appeal succeeds. In support of this proposition, the applicant relied on the case of Masisi Mwita V Damaris Wanjiku Njeri, [2016] eKLR where *Mativo J* relying on the case of Equity Bank Ltd V Taiga Adams Co Ltd, [2016] eKLR stated thus:

“...in the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent – that is execution is carried out – in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

12. The decretal amount in this case is KShs.500,000. The applicant has claimed that if the decree is executed, the appeal may be rendered nugatory as it may be unable to recover the amount from the applicant if the appeal is successful.

The law is that once an applicant expresses apprehension about the respondent’s ability to refund the decretal amount, the evidential burden of proof shifts to the respondent to rebut that apprehension. This proposition was re-iterated by the Court of Appeal in ABN Amro Bank NK V Le Monde Foods Limited, Civil Application No. 15 Of 2002 [NRB] where it stated as follows:

“...in those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on...”

13. In this case, the applicant’s claim that the respondent is not a man of means and he may be unable to refund the decretal amount if the appeal is successful has not been rebutted by any evidence.

It is worth noting that the respondent did not swear any affidavit in response to the application. The replying affidavit on record was sworn by his counsel and it did not contain any averment regarding the respondent’s financial standing. In the premises, I am satisfied that the respondent has failed to establish that he is capable of refunding the decretal amount should the appeal succeed. As a corollary, I am persuaded to find that the applicant has demonstrated that it is likely to suffer substantial loss as defined by *Gikonyo J* in James Wangalwa & Another V Agnes Naliaka Chesoto, [2012] eKLR if the stay orders sought are not granted.

14. In the grounds supporting the motion and in the written submissions, the applicant has offered to provide security as the court may order in its discretion for the due performance of the decree. The respondent’s counsel in his submissions suggested that the decretal amount be paid to him to hold in trust for the decree holder pending hearing and determination of the appeal.

15. In applications of this nature, the court must strive to strike a balance between the competing interests of the parties to an appeal. The respondent being the successful litigant is entitled to the fruits of his judgment. The applicant on the other hand having been aggrieved by the judgment of the lower court is entitled to exercise his right of appeal and to have that right safeguarded by avoiding a situation where his appeal may be rendered nugatory.

16. Given the respondent’s failure to demonstrate his financial capability, I am persuaded to find that there is a risk that if stay is not granted, the applicant’s right of appeal may be rendered meaningless if its appeal is successful and the respondent is unable to refund the decretal amount.

17. The converse will be the case if stay is granted but on condition that the applicant deposits the entire decretal amount in a fixed interest earning account. In such a case, both parties are not likely to suffer any prejudice since the decretal amount together with all the interest accrued during the pendency of the appeal will be readily available to the successful party.

18. In view of the foregoing, I find merit in the application and it is hereby allowed on condition that the applicant shall within the next 30 days deposit the entire decretal amount in an interest earning bank account operated by counsel on record for both parties failing which the stay granted shall automatically lapse.

19. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of May, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr Kiprotich: advocate for the appellant

Mr Kitheka: advocate for the 1st respondent

N/A: for the 2nd respondent

Mr Hillary Kibet: Court Assistant