



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 201 OF 2010

GENERAL CARGO TRANSPORT LIMITED.....PLAINTIFF

VERSUS

TEXAS ALARMS KENYA LIMITED.....DEFENDANT

R U L I N G

1. On 2/12/2016, this court delivered its judgment by which it ordered that the defendant pays to the plaintiff the sum of Kshs.6,964,788.66 plus costs and interests.
2. That judgment dissatisfied and aggrieved the Defendant who did file a Notice of Appeal on the 16/12/2016. Costs were however taxed thereafter and certified on the 13/10/2017 consequent to which the plaintiff took out warrants of attachment and sale and on the 13/11/2017 Ms Jeneby's Auctions served a proclamation upon the defendant's movable assets including motor vehicles and office furniture.
3. That proclamation provoke the current application now due for consideration to be filed on the 22/11/2018. It seeks in the main an order for stay pending the hearing and determination of the appeal to the court of Appeal. The defendant contends that it has a strong appeal which will be prejudice if the proclaimed goods are seized and sold and the defendant will be exposed to substantial loss because the proclaimed goods are its tools of trade. For good measure the defendant applicant offers to give security as the court may order for the due performance of the decree should the Appeal fail but prefers a bank guarantee.
4. The Application was opposed by the Replying Affidavit sworn by ABDULRAZAK OMAR AL AMIN on the 12/2/2018. That affidavit largely faults the application for being overly late and made after undue delay and that there have not been displayed to court the proposed grounds of Appeal to enable the court assess the possible strength of the Appeal. To the decree holder the Application for stay is an afterthought calculated to impede the plaintiff from enjoying the fruits of its litigation.
5. The parties also field submissions and attended court to highlight same. The Appellants submissions and list of authorities are dated 8/3/2018 and 12/4/2018 respectively while the Respondents submissions are dated 1st March 2018.
6. Having read the record of the Application and the Reply thereto together with the submissions filed as well as the oral highlights by counsel, I do appreciate that went what I need to determine is whether the Applicant has met the thresholds of grant of stay of execution pending Appeal.
7. Whether or not to grant stay pending appeal is a matter for the discretion of the court to be exercised judiciously upon established principles and guided by the provisions of Order 42 Rule 6. The law is that a party who seeks stay must have an appeal pending determination and for an appeal to the Court of Appeal, a Notice of Appeal is deemed an appeal. In addition, the Applicant must demonstrate that it stands to suffer substantial loss unless stay is granted and lastly he must provide security for the due performance of the decree if the Appeal ultimately fails.
8. On my part those are well established principles and must continue to be guiding light but it must also be appreciated by courts that right to access courts even by way of an appeal is a constitutional one which this court is bound to honour, defend and protect. The protection expected from court is that such right need not be impeded but allowed not only to the extent that one is permitted to file a cause in court, but also the very substratum of such cause need to be safeguarded and protected so as to remain alive and valuable and not rendered academic or otiose. That right to access justice, I hold the view, is a matter that must ring in the mind of a judicial officer every time a litigant approaches a court and seeks an order seeking to preserve a status or subject of litigation. I hold that to be the major consideration and the rules have just broken it down into the broad limbs under Order 42 Rule 6.
9. The matter however, become a little uncomfortable when a litigant alleges that the appeal against the judgment of the Judge who passed the judgment has strong chances of success, which of course is, never a consideration under the rules but parties and counsel keep adverting

to same. Even then, a court takes cognizance that however convinced of the correctness of its decision, the appellate court has the duty and mandate to re-examine the record and evidence and come to own conclusions and such own conclusions include reversing the decision of the trial court.

10. I am fully conversant with all the foregoing and have taken note that the defendant has the undoubted right of Appeal which he has opted to exercise. He has equally offered to avail security by way of a bank guarantee, which to me is as good as cash provided the bank is reported to be of sound business standing. I have equally taken note that the decree holder has not alleged that it has the ability to refund the sum if paid to it and the Appeal ultimately succeed.

11. All considered, I hold that this is a case where there is justification to grant stay pending Appeal. I grant to the judgment orders but on the terms that the applicant files in court a bank guarantee, worded in terms approved by the decree holder advocates in the sum of the full decretal sum herein. That be done within 30 days from today.

12. If however there shall be a default to so avail the bank guaranteed the order herein granted shall stand lapsed and vacated and the decree holder will be entitled to execute.

13. I order that the costs of the application be in the Appeal.

Dated and delivered at Mombasa this 30th day of May 2018.

P.J.O. OTIENO

JUDGE