



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CIVIL APPEAL NO. 6 OF 2016

VISION BUILDERS LTD.....APPLICANT

-VERSUS-

ALEXANDER MUTEI WAMBUA.....RESPONDENT

(Being an appeal for stay of execution pending an intended appeal against the ruling and order of the Magistrate's Court at Kajiado in CMCC No. 26 of 2006 delivered on 25/2/2016 by Hon. Okuche – PM)

RULING

The applicant brought and filed a notice of motion under Orders 42 Rule 6(2), 43 Rule 1 (1) (x) and 63(e) of the Civil Procedure Act and Rules, 2010.

The applicant is seeking a stay of execution of the order of the lower court in CMCC No. 26 of 2006 given on 25/2/2016 pending the lodging and determination of intended appeal. This application is supported by an affidavit deponed by Jackson Omwenga, an advocate of the High Court.

He therein avers that parties to the suit had consented to withdraw the suit against the appellant herein. That pursuant to the agreement a consent was duly executed by the parties and filed in court. That it was also agreed and consented that the suit in respect of the 2nd defendant which had earlier been dismissed be reinstated and proceeds for trial on merits.

He further deponed that upon hearing the suit against the 2nd defendant and submissions made to enable the trial magistrate make a determination in the issues. That in accordance to the judgement delivered on 11/12/2013 the trial magistrate inadvertently entered judgement against the 1st defendant instead of the 2nd defendant in the suit.

The said judgement annexed and marked as **JO6** in support of the application. It is further deponed that the applicant filed an application for review of the trial court judgement.

In consideration of the matter it is averred that the trial magistrate dismissed the application for review, and thus exposed applicant to a risk of execution.

The applicant prayed therefore that the appeal has a very high likelihood of success and execution of the said judgement will render the appeal nugatory and prejudice his interest.

The respondent was served with the application but filed no response to the application. The application as a matter of course and procedural law is uncontested.

By virtue of the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 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 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.”

In the case of an appeal to the High Court as it is the case herein Order 42 Rule 6 (1) & (1) gives High Court discretionary powers to stay operation of the lower court decision or part of it pending the disposal of the appeal.

While exercising its discretion to stay or not to stay execution of the decree the high court is required to consider applicant has met the tests envisaged in Order 42 6(2) of the Civil Procedure Rules.

This is to consider whether a stay of execution for the purposes of securing the effectiveness of the proceedings and pending the determination of intended appeal.

In the present case is clear that the plaintiff/respondent as a holder of a judgement is or may proceed to execute the decree against the applicant.

In the event that action is invoked in a way substantial loss might result to the applicant notwithstanding that the decree may perhaps be set aside on appeal.

I consider this to be one of the situations for which the principle of granting a stay of execution is intended to secure.

The need to stay such order by this court is to present the status quo pending the outcome of the appeal and meet the interests of justice objective.

The question before this court is whether the application falls within the ambit of Order 42 Rule 6(1) (2) of the Civil Procedure Rules whereas this court can exercise it's discretionary powers.

Under Order 42 Rule (6) there are three tests which apply to demonstrate sufficient cause by an applicant seeking stay of execution.

The first test relates to the application being brought without undue delay.

According to the affidavit evidence application for review was dismissed on 25/2/2016 by the trial court.

The applicant moved to this court under certificate of urgency on 29/2/2016 seeking orders to preserve status quo pending hearing and determination of the present application.

In my view and from the record the application to stay execution was brought without undue delay. The test number one has therefore been complied with.

As regards the second test on substantial loss, the applicant has deponed the circumstances upon which application has been made.

The statement on oath by Counsel Mr. Omwenga for the applicant depones in paragraph 2 and 3 that by consent this suit against the applicant had been withdrawn.

The consent order dated 4.6.2008 was filed and adopted as a court order.

Under paragraph 5 of the affidavit the court had dismissed the suit against the applicant herein.

The gist of the affidavit evidence and the record is that the applicant was never party to the suit which culminated entry of judgement on liability and quantum dated 11.2.2013.

From the facts of this case the respondent/plaintiff filed suit seeking damages on account of injuries alleged by sustained in the cause of his employment.

The trial court on consideration of the matter entered judgement against the 1st defendant on liability at 10% : 90%.

In the second limb, the quantum was assessed at Ksh.270,000 with costs of the suit and interest.

The applicant argues that if the decretal amount is paid out to the plaintiff prior to the appeal being determined it's unlikely to recover the money.

That contention was not rebutted by the respondent since no reply was filed in response to applicant's application. It can be inferred from the record that the respondent is not a man of means to refund the decretal amount in the event the appeal is successful.

I agree with the applicant counsel and on examining the material placed before me and applicant's counsel affidavit, substantial loss may result to the applicant unless stay is granted.

Lastly the applicant has deponed and is ready to give security as the court may order for the performance of the decree.

The principles upon which this court has to be guided in exercising discretion were laid down in the celebrated case of **BUTT VS. THE RENT RESTRICTION TRIBUNAL CA No. 6 of 1979.**

Madan J (as at then was said:

“It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion – in a way so as not to prevent the appeal if successful from being nugatory.”

(BRELT LJ in WILSON VS. CHURCH (N.Z) 12 CH-D 1894 pg 454 to 459.)”

I have considered the application and also the judgement of the learned magistrate subject matter of this appeal. In the present application it would appear to this court, the main issue to be determined is whether the applicant, a party to the suit in CMCC No. 26 of 2006 in which judgement was entered against him if successful on appeal would he be able to recover the decretal amount if this court does not exercise its discretion and grant stay of execution.

Bearing in mind the well known principles governing the exercise of discretion under Order 42 6(1) & (2) of Civil Procedure Rules. I am of the conceded view that this is a proper case for this court to grant the relief sought. I find that applicant has satisfied the criteria set down in the case of **BUTT VS. THE RENT RESTRICTION TRIBUNAL (Supra).**

In conclusion, perusing the record, the affidavit evidence and submissions by counsel I make a finding that this application has merit.

Accordingly therefore, I allow the application and the orders being sought in the following terms:

a. That stay of execution of the judgement of the lower court made on 11/12/2013.

b. That the applicant do deposit security for due performance of the decree of Ksh.270,000 being the principal amount in a joint earning interest account in either Kenya Commercial

Bank Ltd or Cooperative Bank of Kenya in the names of both law firms to this court.

- c. That compliance with condition No. 2 be met within a period of 30 days from today's date.**
- d. That the record of appeal be prepared filed and served upon the respondent within 45 days from today's date.**
- e. Costs of the application to be in the intended appeal.**
- f. Parties be at liberty to apply and or proceed under Kajiado High Court Civil Appeal No. 6 of 2016.**

It is so ordered.

Dated and delivered at Kajiado on 22.4.2016

.....

R. NYAKUNDI

JUDGE

Representation

Mr. Momanyi holding brief for Mr. Omwenga for the applicant – present

The respondent counsel absent

Mr. Mateli Court Assistant - present