



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 327 OF 2014

MILIMANI LAW COURTS

CANNON ASSURANCE LIMITED.....APPELLANT

VERSUS

JULIET MORAA NYAMARI.....RESPONDENT

RULING

By a notice of motion dated 22nd August 2014 and filed on the same day, supported by the affidavit of Martha Mutoro sworn the same day, the appellant Cannon Assurance Ltd seeks from this court orders for stay of execution of Decree in Milimani CM CC No 5177 of 2013 pending hearing and determination of this appeal. It also seeks for costs of the application.

The application is premised on the grounds that:

- a. On 25th July 2014 the Honorable Ole Keiwa struck out the appellant's statement of defence and entered summary judgment thereon in favour of the respondent Juliet Moraa Nyamari (suing as legal administrator of the estate of Johnstone Jumanne Ongoro (deceased)).
- b. That being dissatisfied with the said ruling which in effect determined the Respondent's suit in her favour, the appellant filed this appeal.
- c. That an application for stay of execution was sought but the same was declined by the trial magistrate.
- d. –
- e. That the appellant has an arguable appeal with very high chances of success.
- f. That if stay is not granted the appellant's appeal shall be rendered nugatory and the appellant is poised to suffer substantial and irreparable loss.
- g. That the appellant is ready, willing and able to give such security as the Honourable court may deem fit and proper in the circumstances as a condition for the grant of the orders of stay, including giving a bond or depositing the decretal sum in court and/or in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal.
- h. That the application had been made without any unreasonable delay.

The 24 paragraph supporting affidavit sworn by Martha Mutoro, the legal officer of the appellant insurance company sets out the background of the proceedings in the subordinate court.

Briefly, that the Respondent sued the Appellant in a declaratory suit seeking for a declaration that the appellant was statutorily bound to satisfy the judgment and decree in Milimani CMCC NO. 7512 of 2009 dated 11th April 2013 and issued on 8th July 2013 respectively.

The appellant filed defence and the Respondent filed an application seeking to have the summary judgment entered against the appellant and its defence (as amended) struck out which application was opposed but was allowed by a ruling delivered on 25th July 2014 striking out the appellant's statement of defence and entering summary judgment as sought by the Respondent herein.

It is that ruling which prompted the appellant, being dissatisfied with it filed this appeal and sought stay of execution of decree therein pending the hearing and determination of this appeal.

The appellant sought stay in the trial court but as observed by Hon. Justice Onyancha J on 22/8/2014, the applicant/appellant waited until attachment before rushing to court and the trial court too took its time before considering and rejecting the application for stay.

The affidavit of Ms Mutoro reiterates the contents of the grounds in support of the application that the appeal has overwhelming chances of success, the application was filed timeously, the award was exorbitant, and the appellant shall suffer substantial loss if the decretal sum is paid and that unless the stay is granted, the appeal as filed shall be rendered nugatory. Further, that the appellant was ready and willing to deposit security for the due performance of decree.

The application by the appellant was opposed by the Respondent Decree holder. She filed her replying affidavit on 17/10/2014 sworn on 10/10/2014. The respondent deposes among others that the appellant's application for stay of execution in the lower court was granted conditionally but that the appellant failed to meet the condition of depositing the decretal sum in court hence, the stay was automatically discharged, prompting Moran Auctioneers on 15th August 2014 to attach and proclaim the appellant's property, which action was only taken after effecting service of the proclamation order upon the appellant's employee.

The respondent further deposes that the trial magistrate was correct in striking out the appellant's defence as amended and in entering summary judgment in favour of the Respondent as the said amended defence alleged that the plaintiff was a gratuitous passenger and not a fare paying passenger which contentions she deposes, is immaterial, as motor vehicle registration No. KAU 935 was covered under a comprehensive policy No. 01/07/01/0701/07 by the appellant hence the appeal has no chance of succeeding.

The respondent further contends that in the unlikely event that the appeal is successful, the said amount will be refunded and that she should not be denied the fruits of her lawfully obtained judgment. She concludes that the application lacks merit, is mischievous, misconceived, frivolous, and vexatious and merely aims at shielding the plaintiff/ Respondent from the ends of justice.

The parties advocates agreed to dispose of the application herein by way of written submissions with the appellant filing theirs on 20th November 2014 and the Respondent filing on 26th November 2014. The parties also filed authorities in support of their rival positions. The said submissions echo the grounds in support of the application, and the replying affidavit sworn by the respondent respectively.

I have carefully perused and considered the application, grounds, supporting affidavit, replying affidavit, and the written submissions as filed by both parties.

The only issue for determination is whether the appellant/applicant has made out a case for grant of orders of stay of execution of decree pending appeal.

What I gather from the appellant's lengthy submissions is nothing more than arguments in favour of the appeal being meritorious. At this stage, this court is not concerned about the merits or demerits of the appeal.

The conditions for stay pending appeal are clearly set out in the provisions of order 42 rule 6 of the Civil Procedure Rules which are to the effect that the applicant must satisfy the court that:

- i. Substantial loss may result unless the order of stay is made.
- ii. The application has been made without unreasonable delay.
- iii. Such security as the court orders for the due performance of the decree has been given by the applicant.

The merits of the appeal cannot be one of the grounds upon which this court can determine the application for stay as elaborated in pages 3, 4, 5 of the applicant's submissions, and neither can that in itself prove or quantify substantial loss to be suffered by the applicant in the event that the appeal as filed is successful.

Starting with the question of whether the appellant shall suffer substantial loss should stay be declined-

Substantial loss has been defined in **Kenya Shell Ltd Vs Kibiru (1986) KLR 410 by Platter Ag JA** (as he then was) that:

“It is usually a good rule to see Order XLI Rule 4 (now order 42 rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, It would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money.”

In the same appeal, **Gachuhi J.A.** (as he then was) stated that:

“It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be, in an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that the status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

Bearing in mind the fact that at this stage, the record of appeal is not compiled and filed, and the lower court record including the amended defence that was struck out, and the entire pleadings and proceedings have not been annexed to this application, it would be erroneous to imagine that this court can rely on the submissions that the appeal as filed has merits on the face of it and that it will be rendered nugatory unless stay sought is granted.

What the appellant is expected to demonstrate at this stage, as correctly submitted by the Respondents counsel, is to demonstrate what substantial loss the applicant is likely to suffer or that the appeal will be rendered nugatory. In addition, the appellant must demonstrate that the Respondent shall not be in a position to refund the decretal sum or such recovery cannot be attained from her without difficulty. It is not sufficient to allege, as espoused in **Soc Finac Co Ltd Vs Nelpha Kimotho Muturi (2013) eKLR** by Hon. Justice Odunga J that:-

“ the appellant’s belief that the respondent will be unable to repay the same is solely based on the appellant’s lack of knowledge as to the respondent’s financial capability does not give rise to the presumption that the respondent will be unable to repay the sum. There must be factors that led to that presumption”.

In the instant case, the appellant has not proved any factor leading to the presumption that if paid out, the respondent would not be in a position to refund the decretal sum should the appeal succeed. It is not sufficient to ***“reasonably discern”*** or that ***“considering that the decretal sum herein is manifestly high as it ranges in the tune of more than two million, five hundred thousand shillings”*** as deposed in paragraph 15 of the applicant's supporting affidavit as sworn by Martha Mutoro, then stay will be granted.

It should be noted that in declaratory suits of this nature of disputes the court does not assess any damages capable of being exorbitant or manifestly excessive. It simply declares that the defendant is bound to pay or settle decree as passed against the defendant's insured by a court of competent jurisdiction.

That being the case, the right forum to challenge the excessiveness of the damages would be by way of filing an appeal against the judgment or award by the court that made such an award. The court in a declaratory suit does not exercise appellate or discretionary jurisdiction. The court in a declaratory suit, like the one being challenged herein, has no discretion to increase or reduce the award given by the court in the original suit. That is the distinction that parties to this appeal must know.

Further, it is not financial inability of a decree holder that is reason for allowing stay of execution pending appeal. In **Vishram Ravji Hali Vs Thornton & Turpin Civil application 15/1990 NRB (1990) KLR 365**, the Court of Appeal held that the High Court's jurisdiction to grant stay pending appeal is fettered by the three conditions namely, establishment of sufficient cause, satisfaction of substantial loss and furnishing of security. Further, that the application must be made without unreasonable delay.

However, with the 2010 amendments to the Civil Procedure Act and Rules, no doubt, this court must take into account all the factors/ conditions in order 42 rule 6 (2) and the overriding objectives stipulated in sections 1A and 1B of the Civil Procedure Act so that this court is not just limited to the conditions set under the rules.

The overriding objectives are:

- i. The just determination of proceedings;
- ii. Efficient disposal of the business of the court;
- iii. Efficient use of available judicial and administrative resources.
- iv. The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

In this case, I have elaborated that indeed the applicant has not shown that any substantial loss will be suffered by it if the stay is not granted and the appeal if successful shall be rendered nugatory.

The other conditions concern the filing of the application within reasonable period. The ruling/ summary judgment was entered on 25/7/2014 and this application filed on 22nd August 2014. The same was filed within the period allowed for filing appeals from subordinate courts to the High Court as provided for under section 79G of the Civil Procedure Act. No doubt, the application was filed without any delay.

On whether the applicant has satisfied the condition for depositing security for the due performance of decree raised in the lower court following the summary judgment, the record shows that on 28/8/2014 the applicant in compliance with the order of Hon Onyancha J dated 22nd August 2014 did deposit into court kshs. 3,072,036.000 being the decretal sum inclusive of court collection fees & further costs as per warrant of attachment issued. As no decree is attached, this court is unable to decipher whether the decretal sum as deposited is inclusive of costs and interest. The applicant has nonetheless complied with the condition for depositing of security for the due performance of decree.

What remains for this court is, applying the overriding objectives of the Civil Procedure Act as espoused in sections 1A and 1B of the Act. I notice that although this is a money decree, the judgment as entered was summary in nature, the case having been heard through affidavits.

The appellant complains that the trial magistrate erred in striking out their amended defence which raised triable issues. Although this court has not had the advantage of seeing the said amended defence, nor the pleadings generally in the lower court as none of the parties took the trouble to annex them to their respective affidavits, this court employs the principle that the right to be heard on appeal is a fundamental constitutional right, to enable the appellant ventilate their grievances. In the respondent's view, their defence ought not to have been struck out. The matter ought to have been heard on merit.

Although the Respondent may be in a position to refund the amount of the decree as deposited in court should the appeal be successful and albeit the appellant has not demonstrated the kind of loss they would suffer if at all the decretal sum is paid to the Respondent should the appeal succeed, in my view, to require the appellant to settle decree in this case where judgment was entered summarily without a full trial before the appeal is heard would be tantamount to countermanding the appellant's right of appeal. This is not to say that summary judgment should not have been entered as it is allowed by law under Order 36 of the Civil Procedure Rules. In my humble opinion, however, I find it fair and just to grant an order of stay of execution pending appeal to accord the appellant an opportunity to exhaust their right to a fair hearing on appeal.

Nevertheless, the court has an unfettered obligation to protect the interests of both parties to the appeal. Consequently, in order to protect the interests of the Respondent, and so that the appellants can demonstrate that they are not just vexing the Respondent by filing this appeal, it is just to grant that order of stay of execution on terms.

In the end, I grant an order of stay pending appeal on condition that:

1. The amount of Kshs. 3,072,036 deposited in court on 28/8/2014 shall be deposited in an interest earning account in the joint names of the parties advocates in a reputable financial institution (Bank) within 14 days from the date of this ruling, which amount shall remain as security for the due performance of decree pending the hearing and determination of this appeal and or until this court makes further orders as to its disposal.
2. The appellant shall take all the necessary steps to facilitate speedy disposal of this appeal and in the event that processes for the hearing of the appeal are not completed within the next 90 days from this date the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court for sufficient and good reason to be demonstrated by the applicant.
3. That the applicant shall compile file and serve the record of appeal within 30 (thirty) days from the date of this ruling.
4. Costs of this application to the Respondent.

Dated, Signed and delivered at Nairobi this 18th March 2015

R.E. ABURILI

JUDGE

18/3/15

Coram- Aburili .J

CC- Kavata

Miss Ocholla for respondent

Miss Nyamwata holding brief for Kioko for appellant.

Court- Ruling delivered in open court as scheduled.

R.E. ABURILI

JUDGE

18/3/2015

