



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 111 OF 2009

LADY LORI (K) LIMITED.....PLAINTIFF

VS

TROPIC AIR LIMITED.....DEFENDANT

RULING

1. This matter comes before the Court on an Application by the Plaintiff Lady Lori (K) Ltd. The Application is made following Judgment given by Hon. Mr. Justice Havelock on 20th September 2014. The Application dated 27th October 2014 was heard by Hon. Mr. Justice Ogola under Certificate on the 28th October 2014. The stay sought was granted pending the inter-partes hearing listed on 6th November 2014.

2. The Interpartes Hearing came before me on 6th November 2014 but the Parties were not ready to proceed as the Defendant had not served its Grounds of Opposition and Replying Affidavit therefore directions were given and the orders made by Hon. Mr. Justice Ogola extended for 14 days to 20th November 2014. On 20th November 2014 there was insufficient court time to deal with the Application so it was not until 26th November that the application was heard.

3. The Application

1. The Applicant who is the Plaintiff (not the Defendant as described in the Certificate of Urgency is seeking a stay of the Judgment of the Hon. Havelock, Judge).

2. More specifically the Application seeks orders that:

(1) The Court Order a stay of execution of the Judgment, Decree and Warrants of Attachment pending hearing and determination of the application.

That Order was granted by ***Hon. Ogola Judge*** and extended on.

4. The Court do order a stay of “execution of the Judgment and Decree and Warrants of Attachment pending hearing of the Defendant/Applicant’s Appeal.” Again, it should be set out that the Applicant is the Plaintiff (albeit on the receiving end of a counterclaim) and not the Defendant as the Notice of Motion incorrectly states.

5. The Grounds on which the Plaintiff/Judgment Debtor Relies are that:

- (a) The Defendant/Respondent has proclaimed the Plaintiff/Applicant's movables, pursuant the Decree dated the 16th October, 2014 and Warrants of Attachment issued therefrom on the 22nd October, 2014 and served upon the Plaintiff applicant on the 23rd October, 2014.
- (b) In the absence of any order stopping them, the Respondents are at liberty to execute the Warrants of Attachment and levy execution against the Applicants;
- (c) in view of the astronomical decretal amounts, the execution thereof shall occasion immense loss and damage to the Applicants which losses shall not be recoverable by way of damages;
- (d) if the said stay of execution is not granted, the object of this application and of the intended appeal will be defeated and rendered nugatory;
- (e) the Defendant/Applicant is ready and willing to abide by any conditions and terms as to security as the court may deem fit to impose.
- (f) this application has been made without any unreasonable delay;
- (g) this application will not occasion any prejudice to the Defendant/Respondent;
- (h) this application should be granted in the interests of justice and fairness.

6. The Respondent Objects on the Grounds that:

- 1) The Applicant is guilty of inordinate delay which has not been explained at all.
- 2) This Honourable Court gave a 30 day stay of execution but the Plaintiff failed to lodge any formal application for stay or honour the decree of this Honourable Court.
- 3) The Application is without any merit whatsoever.
- 4) The Application does not meet the standard and requirements for the grant of stay of execution.
- 5) The decree is against a Plaintiff who dragged a Defendant to Court on a wholly unmeritorious claim and lost on a provoked Counterclaim.
- 6) The Plaintiff came before this Honourable Court seeking an award of US\$322,000 against the Defendant and now claims it cannot meet a decree issued against it for only US\$69,000.
- 7) The Plaintiff is an aviation company with a large fleet of aircraft and the decretal amount pales in relation to the Plaintiff's wealth and asset base.
- 8) The Defendant is a company of means with an annual turnover in excess of Kshs. 470,000,000 and can easily refund US\$69,000 in the event that the Plaintiff were to succeed on appeal.

7. There had been a Stay of Execution of 30 days. In relation to the first i.e. that a Decree and Warrant of Execution has been issued and the Defendant has proclaimed against the Plaintiff's moveables. In the Plaintiff's Supporting Affidavit, the deponent, explains that the Plaintiff is aggrieved by the decision of Hon. Havelock Judge. It is further stated that the decree was not served on the Plaintiff but a copy of the Decree is attached at 'AV 2' Warrants for attachment were issued and served between 21/10/2015 and 23/10/2015. It is said that the Decree was obtained from the Court.

8. Paragraph 7 deals with the real gist of the Application, namely that the 'Proclaimed Property' constitutes the Plaintiff's tools of trade, as a consequence the Plaintiff's business operations will be crippled and the goods placed beyond its reach. It is said that as a consequence the Plaintiff will suffer substantial irreparable and irredeemable loss not compensable by any award in damages.

9. The judgment Debt as set out in the Decree is;

1. “Judgement for the Plaintiff in the sum of US\$ 69,054.00.”

Interest was to run at court rates and there was no order for costs. The suit was instituted in 2009 and decided on 9th September 2014.

10. The sum to be recovered by the Warrant of Sale is US \$81,404.26 and KShs 2,450. The Warrant of Attachment sets out the Decretal Sum and how it is calculated. It is very noticeable that there is no allowance at all made for the US \$ 9,320.00 awarded to the Plaintiff but that point is not relied upon by the Plaintiff. Instead the complaint of irregularity relies on the omission of reference to an appeal.

11. The Decree was issued on 16th October 2014. The Warrants are dated 21st October 2014 and the Proclamation is dated two days later i.e. 23rd October 2014. The Warrant of Sale directs the auctioneers to give the Judgment Debtor 15 days notice prior to sale by auction. The timing of the proclamation suggests a disinclination to comply with that notice period. At this stage it cannot be put higher than that.

12. The Goods proclaimed are in the main office equipment and furnishings however items 10 and 11 are ‘helicopter No SY-GYN and motor or vehicle KAQ 148T. The Goods proclaimed were left in the safe custody of the Judgment debtor awaiting attachment.

13. In its Replying Affidavit sworn by Jaime D Roberts, the Defendant opposes the Application. The Deponent states that “the said application is without any merit whatsoever and amounts to a gross abuse of the process of the court.” That following the lapse of the Stay the Plaintiff obtained following the judgment and did not seek an extension.

14. In addition it is said that as a consequence of failing to extend the stay there has been an inordinate delay in filing the application and it should be struck out for that reason.

15. Sadly, the Deponent of the Replying Affidavit has not understood that the function of an Affidavit is to produce factual evidence and not legal argument.

16. The point as to delay seems quite illogical according to the Plaintiff as a Stay of warrant can only be sought after the warrant has been issued. The complaint about lack of service is made and addressed by the explanation that the Plaintiff’s advocates approved the draft decree on 9th October 2014 therefore the Decree about a week later could not be a surprise.

17. The Plaintiff was aware of the Judgment as well as the decree but chose not to take any steps until the attachment was effected.

18. There is reference to a vendetta by the Plaintiff against the Defendant but there is no evidence of that. Both Parties made inflated claims against the other and the evidence shows they were awarded only small fraction of the sums prayed.

19. The Defendant makes a valid point as to the Plaintiff’s use of superlatives namely that the sum awarded is astronomical and payment of that sum would render the Plaintiff impecunious. There is no evidence of that.

20. Further the Plaintiff has failed to adduce any evidence at all that the Defendant will not be able to pay back any sums due it will render the appeal is nugatory.

In addition the Defendant has had to wait for a trial process lasting as long as 5 years before even receiving its award.

21. In its advertising materials appearing at Exh “**JR 3**” to the Defendant’s Affidavit the Plaintiff claims

to be able to provide tailor made experiences with flexibility. That suggests ownership of more than one helicopter or vehicle. The other goods attached are not unique or special and can easily be replaced. They are generic office equipment. It is not clear from the arguments why they should be considered the tools of the trade.

22. If the Helicopter which features in the Advert Reg “5Y BVM” is different from that are appearing in the proclamations as “SY GYM” then that suggests the Plaintiff’s claim that its operations will grind to a halt without the stay is implausible.

Legal Arguments

The Defendant’s Submissions demonstrate the frustration felt at the Plaintiff’s conduct within the proceedings the criticisms brought to the Court’s attention are in particular within submissions and the Grounds of Opposition. In summary:-

1. That the Plaintiff began these proceedings with a vastly inflated claim.
2. The Plaintiff is guilty of inordinate delay which has not been explained.
3. The Plaintiff has already benefited from a 30 day stay.
4. The Application is completely without merit and does not fall within the requirements for such an order to be made.
5. The sums ordered are incorrectly described as astronomical and colossal or even onerous or oppressive as the decretal amount is not significant in the area of business that the Parties undertake.
6. There is no evidence that the Plaintiff is diligently prosecuting its Appeal.
7. The Submission that success at Appeal would be rendered nugatory is without basis or evidence.
8. The Plaintiff’s representatives have not followed appropriate procedures.
9. The Plaintiff has sought to change its case between Oral Submissions and Written Submissions.
10. The Plaintiff sought to delay matters by wasting Court time in Submissions lasting more than one hour and then resiling from them in writing.

Dealing first the question of delay. It is correct that Hon. Justice Havelock ordered a Stay of 30 days. It is also the case that the Plaintiff did not bring an application to stay within those 30 days. The Defendant then obtained a decree and again no steps were taken to pay during that process between 9th October and 21st October 2014. It is again correct that no explanation at all has been provided for that delay thereby not addressing Order 42 Rule 6(1) & (2). The current Application relates to all three steps. **Section 3A of the Civil Procedure Act** provides:

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

As to the criticisms that the Plaintiff and/or its Legal Representative have presented, they can be demonstrated. Firstly the Notice of Motion contains errors that confuse the Parties. It is in fact the **Plaintiff**, and not the Defendant applying. Secondly the Application does not include the supporting evidence one would expect from a properly prepared application, in particular, as identified by the Defendant of any financial evidence demonstrating allegations of lack of unpeccability on the part of both Parties. Again, it is correct that on 26th November 2014, the Applicant’s counsel addressed the Court for

more than one hour in submissions that were repetitious. Counsel appearing made concessions which were then withdrawn. The Parties were then directed to file Written Submissions, the Respondent filed theirs, the Applicant did not. The Direction was repeated and against the Plaintiff failed to comply the submissions were filed out of time and outside the parameter of the leave granted, i.e. limited to responding.

Even more surprising is that the Plaintiff's in its Submissions decided it was appropriate to refute evidence. It is not an advocate's function to give evidence, in particular when the Party has been given leave to file and serve one or more Affidavits.

The Plaintiff asserts that if it were made to pay the decretal sum that would collapse the business. That sounds like an admission of insolvency. It then claims to be a profitable going concern. Again, there is no financial evidence before the Court demonstrating either position. I adopt the reasoning of Hon. Musigu J. in ***Daniel Chebutul Rotich & 2 Others v. Emirates Airtimes Civil Case No. 368 of 2001*** – the Plaintiff has not demonstrated what Substantial Loss it will suffer if ordered to satisfy the decree. By contrast, the Defendant has filed financial evidence showing that it could make repayment if ordered to do so. It is noted that the Company named does not appear to bear the same name as the Defendant but an explanation is given for that discrepancy.

The Plaintiff submits that as a Limited Company the Defendant is likely to be wound up. There is absolutely no evidence of that before the Court. The same could be said of the Plaintiff. That Submission is unhelpful and adds to the delay further.

The Plaintiffs alleges “fraudulent misrepresentation” by the Defendant. Again no evidence of fraud is adduced and further time is wasted dealing with that allegation. In addition, perjury is alleged against “the Defendant” i.e. a Company and not the deponent. That said the accounts do refer to “**Tropic Air Helicopter Ltd**” a Company incorporated on 3rd February 2012.

The Plaintiff argues that a Stay of a Decree and Order cannot be made until the Decree or Order is in existence. In this case, the Order came into existence in September 2014, the decree was in contemplation from 1st October and on 9th October the Plaintiffs Advocates signed it off “for your further action”. Only one action would reasonably have been expected. However, the Order was in existence in September and a Stay had been sought and granted.

The Defendant correctly points out that in order to succeed the Applicant must:

- (a) Show “*evidence of pecuniary loss*” with “*proof of what is the extent of the loss it will suffer.*”
- (b) Exhibit “*specific details and particulars*” and show “*tangible loss.*”
- (c) Show “*the damages it would suffer*” by placing “*material before court.*”

The Defendant in its submissions raises the point that the Applicant has not felt itself bound by the directions of the Court. That is clear. It is also the cause of further delay in dealing with this matter. The Applicant should not be permitted to benefit from its own wrongdoing, in other words the absence of clear hands has implications when the Court exercises its discretion.

(1) Section 1A (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the

Court and to comply with the directions and orders of the Court.

1B.(1) For purpose of furthering the overriding objective specified in **Section 1A**, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

- (a) The just determination of the proceedings;
- (b) The efficient disposal of the business of the Court;
- (c) The efficient use of the available judicial and administrative resources;
- (d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) The use of suitable technology.

Principles and Practice

23. Order 22 rules 1-3

(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(4) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(5) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

24. Order 42 Rule (6) (1) and (2)

(1) No appeal or second appeal shall operate 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 by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 and that then application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such degree or order as may ultimately be binding on him has been given by the applicant.

25. I have considered the Parties Submissions and Lists of Authorities. Not all have been relevant to the issues or helpful. In the interests of brevity, I will not set out each one.

26. I have also considered carefully through the Application Preliminary Objection and the supporting affidavits. I base my decision on facts as they appear as a balance of probabilities taking into account that this is an interlocutory application and the evidence has not been tested. That said, I have discounted those facts put forward that are implausible. I note also that the Plaintiff's Supplementary Affidavit raising new points on irregularity not raised in the Application seek setting aside of the warrants.

27. I also take on Board the glass to ***Giella v. Cassman Brown*** provided by ***Amir Suleiman v. Amboseli Lodges*** namely, whether there are addition circumstances that, in the interests of justice, require the Court to make an order in particular way.

I take note of the acrimony between the parties and;

In Submissions the Plaintiff argues that the date of the decree was unknown to them. That is a surprising Submission as the date is (a) *Set out in the Grounds and (b) came about less than a week after the Applicant's Advocates wrote agreeing to the decree being issued (9th October 2015).*

The suggestion was that the Applicant was only aware of the Judgment, Decree and Warrant on 24th October 2014. That cannot be correct.

The Applicant offers to comply with any terms of security as this Court shall deem fit. The Applicant also offers to "deposit" security in its Oral Submissions. Mr. Kiplagat for the Respondent noted that was made very late in the day.

Although the Plaintiff says in evidence that if it is obliged to pay the decretal sum it will not be able to continue operations, but then goes on to suggest that it will be the Respondent not the Applicant that is likely to cease to exist before the matter is resolved. I find both these Submissions implausible without further evidence.

Mr. Samba for the Plaintiff relies on an "irregularity" in the Warrant. This is set out in Paragraph 5 of the Supporting Affidavit of Adi Venner. In summary the complaint is that the Application for a decree is not dated and it omits reference to the Notice of Appeal said to be lodged on 22nd September 2014.

It is not clear what prejudice the Plaintiff suffered by the Omission of a date. From 9th October 2014, the Plaintiff knew that the Application for the decree was imminent. As to the Notice of Appeal, there is no evidence before the Court that demonstrates if and when the Notice of Appeal was served on the Defendant and or whether it predates the Application for a decree.

In its Supplementary Affidavit the Applicant's deponent avers that the decretal sum is astronomical and colossal. These are relative terms depending on the wealth and value of the Parties involved as the authorities relied on show, whether an amount is significant etc depends on the particular circumstances of each case.

In this case there is no evidence against which to gauge whether the sums are astronomical or colossal. It is patently obvious that they are significantly less than the sums claimed in the Plaintiff and Counterclaim.

The Plaintiff has not made an application asking for the Decree to be reviewed under Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya.

Further, the Plaintiff relies heavily on the limb of significant harm that cannot be compensated in damages. What is said that the Applicant may have to lay off staff which will affect its earning capacity and profitability. That in turn will cut down the source of the Directions etc livelihood.

Profits and income can be easily quantified. As a liquid amount they can also be repaid. Therefore the loss alleged can be compensated by damages. As to the question of laying of staff, there is absolutely no evidence before the court save for unsubstantiated allegations in Affidavits that have not been tested by cross examination.

Decisions and Reasons

28. The Plaintiff is seeking a stay of execution of a Judgment Debt dated 9th September 2014.

29. A stay of execution was sought and granted. Following the lapse of the stay the Judgment Debtor (the Plaintiff) did not satisfy the Judgment and the Judgment Creditor – the Defendant sought execution by applying for a Decree. The Plaintiff's Advocates agreed the terms of the Decree. It should be noted that the Decree does not take into account the sums due to the Plaintiff.

30. Therefore the Plaintiff was aware of the timing and terms of the decree but no payment was made nor was an extension of the stay sought.

31. The matter dates back to 2009 and the warrant was executed on behalf of the Defendant who brought a counterclaim.

32. The Decree includes a significant amount of interest.

33. The Judgment Debtor has filed an Appeal. I have not formed a view on the prospects of success of the Appeal as there is insufficient information before the Court to do so.

34. The Plaintiff's case is that if the warrant is executed the Appeal will be rendered nugatory.

35. That argument does not address a number of issues namely:

(1) There was a counterclaim of a greater sum that if the Appeal succeeds

(2)The Defendant/Judgment Creditor is a going concern and there is no evidence produced suggests it is impecunious and/or unlikely to be able to satisfy.

36. The Plaintiff also suggests that the Goods Proclaimed are tools of their trade. The suggestion being that should they be proclaimed and auctioned off the Plaintiff will be unable to continue in business and that will cause irreparable harm. Details of irreparable harm have not been set out. The replacement of old office furniture is a loss that can be remedied in damages. Indeed each article has been given a value, which shows that the loss can be quantified.

37. The Plaintiff is a going concern and has been trading in a market which justifies glassy advertising according to the Exhibits produced by the Defendant. However, I have seen no financial evidence that suggests it will make payment in execution is delayed.

38. The Parties have an acrimonious history and it is alleged that the Plaintiff's is using these proceedings to "blackmail" the Defendant in a type of economic duress. It is correct that the Plaintiff made no offer of security until its Advocate's submissions.

39. I evaluate the evidence before me on the basis of the Affidavits and Exhibits. I have to decide where the balance lies between two competing interests, giving effect to the interests, giving effect to the interests of justice and fairness as enunciated by the overriding objective (S. 1A & 1B CPA Cap 210 and Article 159 of the Constitution tag with order 22 of the CPR 2010.

40. The Court has jurisdiction to stay the execution. The Plaintiff avers that it will comply with any conditions that the Court considers necessary.

In the circumstances, in the exercise of the Court's wide discretion and reasons set out above. I order that the execution be stayed on the following terms:-

(1) The Plaintiff shall pay the decretal sum into court within 14 days of today.

(2) On condition that the Plaintiff complies with paragraph (1) above, execution of the decree of 21/01/2014 be stayed for a period of 3 months.

(3) This Application be listed for a mention after 4 months to consider/review the progress and or outcome of the Appeal (excluding August).

(4) Should there be no Appeal filed and or prosecuted funds will be released to the Defendant.

(5) Plaintiff to pay Defendant's costs of the Application.

41. I am not satisfied at this stage that there are grounds for setting aside the warrant.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE, 2015.

FARAH S. M. AMIN

JUDGE

In the Presence of:

.....C/Clerk

.....For Plaintiff/Applicant

.....For Defendant/Respondent