



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO. 302 OF 2015

UAP INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

DAQARE TRANSPORTERS LIMITED.....RESPONDENT

RULING

1. The Respondent herein filed Milimani Commercial Civil Suit No. 3711 of 2010 against the Appellant. In that suit, the Respondent sought for recovery of alleged loss of 48000 litres of Jet 1-1 fuel said to be equivalent to KShs. 1,624,146/=. The basis of the Respondent's claim was an insurance policy that covered goods in transit alleged to have been taken by the Respondent with the Appellant. On 27th May, 2015, the trial court delivered a judgment in favour of the Respondent which judgment the Appellant has appealed against vide a memorandum of appeal filed on 19th June, 2015.
2. The Appellant has also filed a notice of motion dated 19th June, 2015 seeking for stay of execution of the judgment delivered on 27th May, 2015 pending the hearing and determination of this appeal. It is that motion that is before this court for determination. The motion is supported by the affidavits of Ruth Monyangi sworn on 19th June, 2015 and 6th July, 2015 respectively. The motion was opposed vide the replying affidavit of Willis O. Nyende sworn on 26th June, 2015 and Abdi Warsame sworn on 1st July, 2015.
3. I have given due consideration to the depositions and the submissions tendered on behalf of the parties herein. This is an application for stay of execution which is governed by Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. The said Rules stipulate as follows:-

“6.(1) No appeal or second appeal shall operate as a stay of 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 sub-rule (1)

unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and 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.”

4. When dealing with an application such as the one before me, the court in the case of **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** discussed the above provision and held inter alia as follows:-

“... For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

5. The Appellant lamented that judgment was scheduled for 24th April, 2015 but was postponed severally and later delivered on 27th May, 2015 without proper notice being issued to it. It was further expressed that the Appellant is apprehensive that execution may be levied upon it at any time. That the decretal amount is a large sum which if paid to the Respondent, the Appellant may be unable to recover. In submissions, it was contended that the Respondent's affidavits do not contain material facts to show its ability to reconstitute the decretal sum. That the schedule of the vehicles alleged to be owned by the Respondent is not dated and has no corresponding evidence. That the supplementary affidavit has however shown that the Respondent does not own some of the vehicles. The Respondent on the other hand contended that the Appellant was served with a judgment notice on 14th May, 2015. That judgment was meant to be delivered on 22nd May, 2015 but was later re-scheduled to 27th May, 2015 and notice was posted on the court door. That on 28th May, 2015, the Respondent's advocate wrote to inform the Appellant's advocates that judgment had been delivered. That the Appellant has not demonstrated how it will suffer substantial loss and that no evidence of the Respondent's financial hardship has been furnished. It was further stated that the Respondent has established that it is of good financial standing. It was stated that the judgment being a money decree, the Respondent is entitled to the fruits of the judgment. The Respondent provided an annual trading profits which was said to stand at KShs. 27 Million and assets at KShs. 91 Million. It was stated that the Respondent operate a fleet of 15 trailers and trucks valued at between KShs. 2 and 4 Million and further that it transports oil valued at KShs. 1.2 Million per trip.
6. On the issue of financial loss, the Appellant stated that he was not issued with proper notice. On the other hand, the Respondent contended that the notice was pinned on the door of the court room. It is my view that the Respondent did not tender sufficient evidence to prove that notice was issued to the Appellant. I notice that the date in the notice annexed by the Respondent has the date of 22nd May, 2015 altered and I find it difficult to rely on it since the alteration is unjustified. Secondly, the Appellant is apprehensive that the Respondent will be unable to refund the decretal sum in the event the appeal succeeds. On this point **I am fortified by the case of Rose Mbithe Ndeti v. Mathew Kyalo Mboju Civil Appeal No. 86 of 2008** where the Respondent rebutted not being a man of straw and proved his financial capability as has been done here. Considering my finding that the Appellant was not properly served with the notice of judgment, I find that he was prejudiced occasioning substantial loss.
7. Turning to the second limb, the judgement the Appellant seeks to appeal against was delivered on 27th May, 2015 and this application was filed on 19th June, 2015. Section 79G of the Civil Procedure Act, CAP 21, provides as follows with regard to the time for filing of appeals:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the

decree or order:..."

8. My interpretation of the above provision is that it is within the said thirty days that an application for stay of execution should be filed and an applicant who files an application outside the said time should seek extension of time. I have noted that this application was brought timeously.
9. For security, the Appellant herein has indicated its willingness to deposit security.
10. In view of the foregoing I find that the Appellant has satisfied the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. The application is thereby allowed as prayed. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 25th day of September, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the Respondent.