



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 18 OF 2013

DANEVA COMPANY LIMITED.....PLAINTIFF

-V E R S U S-

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

RULING

ON NOTICE OF MOTION DATED 4TH APRIL 2014

1. Judgment was delivered in favour of the Plaintiff on 20th March 2014 for Kshs. 2.5 million and mandatory injunction compelling Defendant to release motor vehicle KAY 246S to Plaintiff.
2. Defendant being aggrieved with that judgment filed a Notice of Appeal on 21st March 2014. By virtue of Order 42 Rule 6(4) of the Civil Procedure Rules an appeal to the Court of Appeal is deemed as filed once such a Notice of Appeal is filed.
3. Defendant's Notice of Motion dated 4th April 2014 seeks to stay this Court's judgment pending the hearing and determination of its appeal.

DEFENDANT'S ARGUMENTS

4. In the affidavit in support of the Notice of Motion Defendant deponed through the affidavit of its Head of Legal and Regulatory Affairs that its appeal is "**strong**" and is based on merit. The deponent then deponed-

"That it is not known whether the Plaintiff has known assets within the jurisdiction from which the Applicant (Defendant) can recoup in event the appeal is successful."

Defendant's said deposition was to support its contention that if stay of execution was not granted it would suffer irreparable loss. Defendant did offer to provide security if such stay was granted.

5. Defendant by its written submissions failed to address the application and instead went into great lengths to show that it has a merited appeal. Those submissions are not useful to the Court in determining the application.

PLAINTIFF'S ARGUMENTS

6. Plaintiff relied on the affidavit of its Managing Director dated 7th May 2014. That affidavit in sum total simply stated that the Defendant's proposed appeal has no merit and the stay of execution sought should not be allowed.

7. The Plaintiff also fell into the same error as the Defendant in delving wholly in its written submissions on the lack of merit of Defendant's appeal. On that ground alone Plaintiff sought that the stay of execution be dis-allowed.

ANALYSIS

8. The Plaintiff's case was that the Defendant wrongly detained Plaintiff's lorry registration No. KAY 240S from 18th February 2013.

9. Defendant's defence was that the said motor vehicle was detained by the Webuye Officer-In-Charge of Station (OCS) pending prosecution of the driver for carrying excess axle overload contrary to Section 55 of Traffic Act. The Defendant did not seek to take out third party proceedings against the said OCS.

10. After receiving parties oral evidence this Court delivered judgment on 20th March 2014 awarding the Plaintiff Kshs. 2.5 million as damages for wrongful detention of the motor vehicle and an order for release of that motor vehicle to the Plaintiff.

11. When the judgment was delivered on 20th March 2014 Defendant sought temporary stay of execution pending a formal application for stay. On that day Learned Counsel for Defendant stated-

“We seek stay in respect of the award of damages only.”

When the stay of execution application, now being considered, was filed Defendant did not address itself on whether it sought stay of the award of damages only or additionally sought stay of release of the motor vehicle. Looking at the draft Grounds of Appeal attached to Defendant's Notice of Motion it does seem Defendant is more aggrieved with the award of damages to Plaintiff more than the order of release of motor vehicle. There is no doubt that the vehicle belongs to the Plaintiff. There was no reason advanced by Defendant why that vehicle should not be returned to Plaintiff. There was no evidence adduced to show what substantial loss Defendant would suffer if stay of the release of the vehicle to Plaintiff was not stopped. It is for that reason I shall proceed on the premise that the stay the Defendant seek is the execution of the damages award of Kshs. 2.5 million.

12. In considering the application, in that restricted terms, I am guided by Order 42 Rule 6(2). Under that Rule the Court before granting an order of stay of execution has to be satisfied that the Applicant will suffer substantial loss if stay is not granted; has to ensure that the application for stay was filed without unreasonable delay; and the Court can order the Applicant to provide such security for the due performance of the decree.

13. The Defendant met the last two conditions because the application was made without unreasonable delay and the Defendant did offer to provide such security as may be required.

14. On substantial loss Defendant deponed that it feared that Plaintiff may be unable to refund the decretal amount if it succeeded in the appeal. On raising that fear, the Defendant shifted the burden of proving that it would not suffer substantial loss if the appeal succeeded. The burden squarely lay at the door of the Plaintiff. This was the holding in the case **COAST ACCIDENT & GENERAL INVESTIGATION LTD & ANOTHER -Vs- NAZERALI HASSANALI & 7 OTHERS [2013]eKLR** where the Court stated-

“The Bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the Bank has sworn that they are not aware of any assets owned by the

Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an applicant in the position of the Bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

15. The Plaintiff did not venture to shift that burden at all. There is therefore the very likelihood that Defendant would be put in difficulty to recover the monetary award if the appeal did succeed.

16. In my view however, the interest of justice would require the Defendant to provide security for the due performance of the decree. I will therefore order that Defendant do provide Kshs. 2.5 million which amount shall be placed in an account in the joint names of the Advocates in this matter.

17. In summary therefore these are the orders of the Court-

a. There shall be stay of execution of payment of Kshs. 2.5 million to the Plaintiff until the hearing and determination of the appeal by the Defendant on condition that the Defendant does within twenty one (21) days from this date hereof provide Kshs. 2.5 million which shall be deposited in an interest earning joint account of the Advocates representing the parties in this case. For the avoidance of doubt the stay herein granted does not relate to the mandatory injunction requiring the Defendant to release the Plaintiff’s motor vehicle registration No. KAY 240S.

b. The costs of Notice of Motion dated 4th April 2014 shall abide with the outcome of the appeal.

c. The Court assesses, as it had indicated it would do in this Ruling, the Defendant’s costs for attendance on 9th April 2014 at Kshs. 4,000/-.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE