



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 223 OF 2012

KENYA STEEL FABRICATORS LTD APPELLANT

VERSUS

TOM MOKI RESPONDENT

RULING

By a notice of motion application dated 17th May 2012 the appellant, Kenya Steel Fabricators Ltd seeks from this court orders to stay of execution of decree passed in Milimani CMCC No 5980 of 2009 on 17th April 2012 by **Hon. C. Obulutsa SPM**. The appeal challenging the said decision was filed on the 7th May 2012.

The application is supported by the grounds that the appeal as filed has chances of success and that if the stay of execution is not granted the appellant stands to suffer irreparable loss and prejudice. The appellant is also willing to deposit security as to the performance of decree in court. In addition it is stated that the respondent is a man of no known means and if the decretal sum is paid to him and the appeal succeeds, the appellant will not recover it. The application is supported by the affidavit of the Habil Asa Waseka which affidavit reiterates the grounds set out on the face of the application as expressed.

On the 18th May 2012, **Hon Justice Onyancha** granted a temporary stay conditional upon the appellant depositing the whole decretal sum into court within 30 days which order was complied with and therefore the stay is in force pending this ruling. The said sums were deposited on 31st May 2012 to the tune of Ksh 320,000/-.

The appeal challenges judgment and decree of the Senior Principal Magistrate both on liability and quantum. There are no pleadings or judgment or even proceedings from the lower court to indicate even scantily the basis for the award by the subordinate court.

That aside, the respondent who was the plaintiff in the lower courts opposes the application for stay. He filed his replying affidavit sworn on 4th July 2012 urging this court not to grant stay as it would prejudice him having a lawful, regular judgment. Further, that he does business and his wife is a civil servant hence the amount as decreed if paid out to him would be recoverable and that he is willing to provide a bank guarantee for the decretal sum so that should the appeal herein be successful, the bank can release the said sum within 14 days.

The parties' advocates argued the application orally before the me on 17th November 2014 with Miss

Mushilla appearing for the appellant, while Mr. Kaburu represented the respondent. They reiterated the contents of the application and replying affidavit respectively. None of them relied on any authority.

I have considered the applicant/appellant's application for stay of execution pending appeal as filed, the supporting affidavit, replying affidavit and counsels' rival submissions in court on 17th November 2014.

The issue for determination in this application is whether the appellant/applicant has satisfied the conditions set out in Order 42 Rule 6 for grant of stay of execution pending appeal. The said provisions of the law state:

“(1) No appeal or second appeal 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 and to make such order thereon as it may 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 I unless:-

- a. ***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.”***

The applicant contends that their appeal is meritorious with high chances of success. This contention endears itself to the court pursuant to the principle that if an appeal raises arguable points, the court should grant stay of execution sought for sufficient cause shown. It is further argued that unless the orders sought are granted, the appellant will suffer irreparable loss and that as the respondent has no known means of income, he will be unable to compensate the appellants should the appeal be successful.

No doubt, the decree appealed from is a monetary one to the tune of Ksh 320,000/-. The applicant has not in any way demonstrated that if paid out to the respondent, he will not be in a position to refund the same should the appeal succeed. No impecunious circumstances have been demonstrated against the respondent's deposition that he is a businessman and that his wife is a civil servant and he has even offered to give a bank guarantee for the said sums of money. The law is clear that the incidence of the legal burden in respect of a particular allegation of impecuniousness of the respondent in this case lies upon the appellant party for whom the substantiation of the particular allegation is an essential of his case. See **Halsbury's Laws of England Vol.17, Paragraph 14** and **James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR.**

In the **James Wangalwa case (Supra)** the court in considering an application after stay of execution of decree held that:-

“Sufficient cause being a technical as well as legal requirement will depend entirely on the applicant satisfying the court that:

- a. ***Substantial loss may result to the applicant unless the order is made,***
- b. ***The application has been made without unreasonable delay and***
- c. ***Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”***

The court in the above case further stated that the above three conditions are the essence of Order 42 Rule 6 of the Civil Procedure Rules which conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution.

I am in total agreement with the above position and principles as espoused in the law.

As I have stated, there is no proof that the appellant shall suffer substantial loss if this money decree, which purported loss would render the appeal nugatory.

The respondent in my view, has countered the allegation of inability to repay the decretal sum if the appeal is successful, which deposition on oath has not been rebutted in any way.

On the second condition of unreasonable delay, this application was filed just one month after the judgment impugned was delivered which was within the statutory period given for lodging an appeal to the High Court. In my view, there was no delay in filing the appeal which can be deemed to occasion any prejudice to the respondent. However, counsel for the respondent took issue with the appellant who has not been keen on having the said application and even the appeal prosecuted in time. The record shows that upon obtaining an interim stay and depositing the decretal sum in court the appellant took no steps to prosecute the same and the respondent had to wake them up by filing an application for dismissal of the appeal for want of prosecution on 13th March 2013.

The said application was withdrawn on 17/11/2014 before the hearing of this application for stay was argued. In the respondent's view, the delay in prosecuting the application has been prejudicial to him as he is being denied the opportunity to enjoy the fruits of his lawfully obtained judgment.

The law, however, is clear that delay applies to the time taken from the date of judgment to lodge the application for stay. As regards the succeeding period, it is expected that the respondent takes steps to have any orders of stay issued in the interim discharged or have the appeal dismissed for want of prosecution so that he can have the monies released to him or execution proceed; which initiative they took but did withdraw their application paving way for this application to be heard on merit. See the **Benson M. Kibia & 2 Others – Vs - Francis Maina Kanumbi & 2 Others [2014] eKLR.**

On security for the due performance of the decree, this court did give a conditional interim stay which was complied with by the appellant who deposited Ksh 320,000/- into court. The appellant is also willing to abide by any other order made by the court regarding security pending hearing and determination of the appeal.

The said condition is therefore satisfied, as I have stated earlier, and as espoused in the authority of **Feisal Amina Janmohamed – Vs - Shami Trading Co. Ltd [2014] eKLR** and **Mukuma – Vs – Abnoga [1988] KCR 645**, substantial loss has not been proved, and neither has the appellant proved that the respondent is so impecunious that he will not be in a position to refund the decretal sum if paid and therefore that the appeal shall be rendered nugatory if successful.

In **Sankare Ole Kantai t/a Kantai & Co Advocates – Vs - HFCK Ltd (2014) eKLR**, the court held as follows:

“.....Given the finding of this court that the applicant has not shown it will suffer substantial loss, is it necessary to order provision of security? I am not sure where the court finds that no substantial loss would occur, it will still be feasible to order security to be furnished. Except, however, in peculiar exceptional circumstances of a case the court may still order a stay of execution and call for securing from the applicant even where it has found that there is no substantial loss which will occur. This is not uncommon and it happens where the court nonetheless orders half of the decretal sum to be paid over to the respondent and the other half to be deposited as security or to be secured by such security as the court may order. The type of security to be given depends on the circumstances of the case and the judicious exercise of the judicial discretion based on defined legal principles.”

Applying the above holding to this instant case, I find that although the applicant has not shown that substantial loss will occur if the stay is not granted, this being a monetary decree passed in 2012, and examining the record, and as I find no alacrity on the part of the appellant to prepare the appeal for

expeditious disposal, and in the interest of justice, I order that there be stay of execution of decree pending hearing determination of the appeal herein conditional upon ½ of the decretal sum being released to the respondent in the sum of ‘s sh160,000/-. The balance thereof to be deposited in both counsels joint interest earning account in a bank of their choice until the appeal is heard and determined.

I further order the appellant to compile and file and serve a record of appeal within the next 90 days from the date of this ruling failure to which this order of stay lapses automatically and execution to ensue.

This holding is in line with the decision in **Machira – Vs - East Africa No. 2 (2002) KLR 63** that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or... mention so far of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion the courts must have its sight firmly fixed on upholding the overriding objectives of the rules of procedure for handling civil cases in courts, which is to do justice to both parties in accordance with the law and prevent abuse of the court process.”

In my view, in the absence of any demonstration that the appeal as filed has such overwhelming chances of success on both quantum and liability and that there is no window of opportunity for the respondent to get any portion of the decretal sum awarded, it will be unjust and unfair to deny the respondent the whole decretal sum arising from a regular and lawful judgment. As the decretal sum is lying in court, the above orders as to the disposal of the security shall be implemented within 14 days from the date hereof.

Costs of this applicant shall be in the main appeal.

Dated, signed and delivered at Nairobi this 18th day of December, 2014 as scheduled.

R.E ABURILI

JUDGE

18/12/2014