REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 635 of 2007

BEUTTAH ANSELIMO MAALI....................................PLAINTIFF/RESPONDENT

VERSUS

ETHIOPIAN AIRLINES ENTERPRISES....................DEFENDANT/APPELLANT

RULING

By its Notice of Motion dated 17thSeptember 2012 expressed to be brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Order 42 Rule 6 of the Civil Procedure Rules and all enabling Provisions of the Law, the Plaintiff/Applicant (sic) seeks the following orders:

1. That the Honourable Court be pleased to certify this application urgent.

2. That the Honourable Court be pleased to hear the application *exparte* in the first instance due to the said urgency.

3. That the Honourable court be pleased to grant a stay of execution of its judgement and decree given on 28th August 2012 and all consequential orders pending the *inter parties* hearing and determination of this application.

4. That the Honourable court be pleased to grant a stay of execution of its Judgement and decree given on the 28th August 2012 and all consequential orders pending the hearing and determination of the appeal.

5. That the Honourable Court be pleased to provide for the costs of this application.

The application is premised on the following grounds:

a) That the Plaintiff (sic) is aggrieved by and dissatisfied with the judgement and decree given on the 28th August 2012 and has filed a Notice of Appeal against the said judgement.

b) That the Applicant has an appeal with good chances of success.

c) That the interim orders of stay are due to lapse.

d) That the judgement debtor will suffer irreparable loss and damage if he succeeds on appeal as the Plaintiff/Respondent will not be able to refund the decretal sum.

e) That the appeal will be rendered nugatory if stay is not granted and the Applicant's appeal

succeeds.

f) That the Defendant/Applicant is ready and willing to abide by any terms and conditions that may be made by this Honourable Court.

The application is supported by the affidavit sworn by**Solomon Mekonnen,**the applicant's Area Manager on 17th September 2012. According to him on 28th August 2012 the Court entered judgement against the applicant in the sum of Kshs 9,723,387.50 plus costs and interests and the applicant being desirous of appealing against the whole judgement has already filed a Notice of Appeal and has applied for certified copies of proceedings towards the said purpose. According to the applicant's legal advisers, the applicant has a strong and arguable appeal and is ready and willing to abide by any terms and conditions of stay of execution. According to the deponent, the respondent has no means and has been unable to satisfy some monetary Court decrees against him. Therefore it is deposed that it will be in the interest of justice to grant the stay pending appeal.

In opposing the application the respondent filed a replying affidavit sworn by him on 1st October 2012. According to him there is no proper Notice of Appeal since the Notice of Appeal that is annexed was filed out of time and without leave and no extension of time has been sought. Further the letter requesting for proceedings was not served upon the respondent's advocates. In the respondent's view the consideration of strength or arguability of the appeal is not within the mandate of this Court. Since the decree herein is monetary it is the deponent's view that no irreparable damage can be caused to the Applicant if the application is denied. According to him he has never been served with any decree or Notice to Show Cause since his advocate handling the case referred to by the applicant has never informed him of the decree passed against him. He however deposed that he was in the process of having a meeting with his advocates on record in the said case for briefing. Therefore it is his view that the applicant has not come to court with clean hands and has lied on oath. Since the execution proceedings have not commenced the deponent does not see the necessity for this application. As judgement herein was based on the evidence adduced, it is his view that the trial judge cannot be faulted and the grounds relied on are a mere afterthought as no objection was taken to the reading of the judgement. Since the applicant has failed to annex relevant documents such as the judgement, this application is unmerited and should be dismissed with costs.

The application was prosecuted by way of written submissions. According to the applicant, since there is evidence in the form of Notice to Show Cause that the plaintiff has had difficulties in settling his debts, if the decretal sum herein is released to him the applicant's appeal may be rendered nugatoryif it succeeds. It is further submitted that since the trial Judge lacked jurisdiction and competence to deliver the judgement following the finding of unsuitability of the learned Judge to continue holding office, the applicant's chances of succeeding on its appeal are good. Apart from the foregoing, it is the applicant's position that the intended appeal similarly has high chances of success since the applicant had good grounds for dismissing the respondent and was duly notified of the same. Apart from the foregoing the respondent's suit was time barred and further the sum claimed in the plaint was not particularized. With respect to the Notice of Appeal, it is deposed that the same having been filed 10 days after judgement, the same was filed within time. In the applicant's view, the applicant has met the principles and requirements for stay and the application should be allowed.

On behalf of the respondent on the other hand, the contents of the replying affidavit is reiterated more particularly with respect to the respondent's denial that there is a decree against him. It is further submitted that there is no evidence that the Plaintiff has no means hence the allegation of lack of means cannot be relied upon. Consequently it is submitted that no good ground has been advanced to merit the grant of the stay sought. Since there is no decree on record, it is submitted that no execution can take place. There mere fact that the applicant is desirous of appealing, it is submitted, is no ground for granting stay. According to the respondent this Court cannot decide on the chances of the appeal succeeding having entered judgement. It is further reiterated that the Notice of Appeal was filed out of time and that the applicant has not shown that it will suffer any irreparable loss. Since the decree herein is a monetary decree a stay cannot be granted on an application based on false allegations and reliance is placed on **Kenya Shell Limited vs. Benjamin KarugaKibiru and Another Civil Application No. Nai.97 of**

1986.

I have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties. **Order 42 rule 6(1) and (2)** of the Civil Procedure Rules provides as follows:

"(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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."

However in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court's exercise of discretion is nolonger limited to the consideration of the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(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" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. In **Stephen BoroGitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009,** **Nyamu, JA** on 20/11/09 held *inter alia* thatthe overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

The same Judge in**Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfill them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective.

An issue has been taken with respect to the competency of the Notice of Appeal. With due respect it is not within the jurisdiction of this Court to determine whether or not there exist a competent Notice of Appeal since the legal position is that this court is not competent to consider the competency or otherwise of the Notice of Appeal in determining whether or not to grant the stay sought. What is required at this stage under Order 42 rule 6(4) of the Civil Procedure Rules is the giving of a Notice of Appeal and not a ***valid Notice of Appeal***.

I further agree with the respondent's submissions that the chances of success of the intended appeal ought not to take centre stage in an application for stay of execution by the High Court of a decision of the same Court pending an intended appeal to the Court of Appeal. Whereas a Court is perfectly entitled to grant an injunction pending an intended appeal to the Court of appeal against a decision of the same court dismissing an application for injunction, in recognition of the fact that the appellate court do overturn such decisions, the same cannot be true when it comes to the issue of the prospects of success of an intended appeal where a matter has been heard on merits. To ask the court to determine an application for stay of its orders based on the chances of success of an intended appeal would amount to asking the same court to interrogate its decision an action which in my view is not contemplated under Order 42 rule 6 of the Civil Procedure Rules. The Court of Appeal, however, being a Court of superior jurisdiction is perfectly entitled, in an application for stay of execution of a decision of the High Court pending an appeal to that court to consider the chances of success of the intended appeal. Similarly, it is my view that where the High Court is hearing an application for stay of execution of a decision of a subordinate court pending an appeal to the High Court, the latter is perfectly entitled to consider the chances of success of the intended appeal.

With respect to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilachvs. Nation Media Group & 2 Others Civil Application No.Nai.168 of 2005** the Court of Appeal citing **Oraro&Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No.Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00. However, in this case it is not contended that the applicant is not in a position to pay the said sum or that if made to pay the same it is likely to find itself in some financial embarrassment. To the contrary it is contended that it is the respondent's financial position that is disturbing since there is evidence that the respondent has been unable to meet its financial obligations. That the amount involved is by no means smallish is not in doubt.

The law however is not that in monetary decrees a stay of execution is not to be granted. What the Court stated in ***Kenya Shell Case*** was that **normally** in such decrees the appeal is unlikely to be rendered nugatory. However Order 42 rule 6 recognises that there may exist**sufficient cause** even in such decrees. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement.See **Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru& Another** (supra) **;Mukuma vs. Abuoga [1988] KLR 645.**

As was stated by **Kuloba, J** in **Machira T/A Machira& Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention 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 ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin KarugaKibiru and Another** (supra).

Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No.Nai.344 of 1999.**

The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant 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 is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to be aware of. 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. See **Kenya Posts & Telecommunications Corporation vs. Paul GachangaNdarua Civil Application No.Nai.367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this case it is contended that there is a Notice to Show Cause issued against the respondent in HCCC No. 12 of 2007 for payment of Kshs 219,980.00. That the said case exists is not contested by the respondent. The respondent has however feigned ignorance with respect to the said notice. In his replying affidavit the respondent deposed that he would seek further information from his advocate on record in respect of the said matter. What became of the said information if indeed it was sought was not disclosed to the Court. Accordingly, the only information available to the Court is the information contained in the said Notice. If the respondent is unable to settle the sum contained in the said Notice, that would be *prima facie* evidence that similarly he is likely to find difficulties in repaying the decretal sum herein if the same is paid over to him. Faced with such evidence the evidentiary burden shifted to the respondent to adduce evidence of means that in fact he is in a position to repay the decretal sum herein a burden which in my view he failed to discharge.

The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. However, as already stated above the Court must similarly consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **NduhiuGitahivs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter,

which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so…The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein on condition that the defendant deposits within **Thirty**(30) days a sum of **Kshs. Six Million Only** (Kshs. 6,000,000.00) in a joint interest earning account in the names of the advocates for the parties herein. In default of compliance this application shall be deemed to have been dismissed with costs and the plaintiff will be at liberty to execute.

The costs of the application are awarded to the plaintiff.

Dated at Nairobi this 24thday of January 2013

G V ODUNGA

JUDGE

Delivered in the presence of

Mr. Muli for Mr. Simiyufor Applicant

Mr. Were for the Respondent