REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 164 of 2000

TOIYOI INVESTMENT LIMITED::PLAINTIFF

VERSUS

UCHUMI SUPERMARKET LIMITED:::DEFENDANT

R U L I N G

The application before me was brought by the Defendant, through a Notice of Motion filed pursuant to order 42 rule 6 of the Civil Procedure Rules.

The defendant was the defendant in this case, whilst the respondent was the plaintiff.

On 31st October 2012 the High court delivered its judgment. In its said judgment, the court found in favour of the plaintiff and awarded them compensation in the sum of Kshs. 37,251,960/-. The trial court further ordered that out of the said award, Kshs. 12,369,952/- was to be paid by the defendant , to **KENINDIA ASSUARANCE COMPANY LIMITED,** in settlement of a subrogation claim. The balance of Kshs 24,882,008/- was ordered to be paid directly to the plaintiff.

The award was to attract interest at court rates from the date of filing suit until payment in full.

The trial court also ordered the defendant to pay the costs of the suit to the plaintiff.

Being dissatisfied with the judgment, the defendant filed a Notice of Appeal on 13th November, 2012.

Thereafter, the defendant filed the application herein, asking for stay of execution pending the hearing and determination of the appeal which it was pursuing before the Court of Appeal.

It is the defendant's contention that they have an appeal whose prospects of success were good.

The defendant also asserted that if there was no stay of execution, they would suffer substantial loss.

Finally, the defendant declared that they were prepared to offer security for the payment of the decretal amount, so that if their appeal was unsuccessful, the plaintiff would readily get the sums due to them.

The Company Secretary of the defendant swore an affidavit in support of the application.

She indicated that the defendant used to be a tenant in the premises owned by the plaintiff. The premises was built on **L.R NO. ELDORET MUNICIPALITY/BLOCK 3/46.**

On 29th November, 2012 the defendant conducted an official search against that title, which revealed

that it was charged to **KENYA COMMERCIAL BANK LIMITED,** for Kshs. 133,000,000/-.

In the light of that fact, the defendant was apprehensive that if this court did not stay execution, and if the defendant, therefore, paid the decretal amount to the plaintiff the latter would be unable to reimburse the defendant, if the appeal was successful.

On the other hand, the defendant emphasized that it was a public company which operates 19 supermarkets in Kenya.

The defendant also pointed out that they were ready to provide security in the nature of an Insurance Bond from UAP Insurance Company, Limited.

In answer to the application, the plaintiff's director swore a replying affidavit.

He stated that the defendant's appeal was frivolous,lacked merit and was contrived to deny the plaintiff its rightful fruits of the judgment.

The plaintiff asserted that the trial court was right to have rejected the defendant's application for an adjournment as the defendant had displayed a lack of seriousness in prosecuting its defence.

In any event, the evidence adduced by the plaintiff was deemed to have been overwhelming. Such evidence was said to have been supported even by the defendant's own witness.

The plaintiff said that because the defendant was a ***" multi billion***

retail chain operating in the East African region"

It would suffer no irreparable harm if it paid the decretal amount.

It was also the plaintiff's position that because it had a substantial property portfolio and a long lease with the Nakumatt retail chain, it was capable of refunding the decretal amount, if it became necessary to do so.

The security of an Insurance Bond was also described as un-acceptable, because it was backed by the defendant's insurer, who failed to meet the cost of the defendant's fire risk, when called upon to do so.

Another concern raised by the plaintiff was that the case had already lasted 12 years. During that time the plaintiff had suffered substantial loss when it had to re-build the part of the premises which were destroyed by fire.

In those circumstances, this court was told that the defendant's appeal would not be rendered nugatory, if execution was not stayed.

Finally, the plaintiff asserted that the principle of proportionality operated in its favour, as there was need to place the parties on an equal footing.

It is common ground between the parties that for a stay of execution to be granted the:

(a) Application should be made without undue delay;

(b) The application should demonstrate that it would suffer substantial loss it stay was not granted;

(c) There was sufficient cause for the grant of the relief; and

(d) the applicant was ready, able and willing to provide such security as the court may order,

for the due performance of the Decree.

Is it a requirement of the law that an applicant seeking stay of execution must place before the court a copy of the judgment which he was appealing against.?

IN ORUBA MATERNITY & NURSING HOME & OTHERS VS PURSHUTAM N. PATEL, CIVIL APPLCIATION NO. 133 OF 1996, the Court of Appeal held that in an application for stay pending appeal a copy of the judgment or a photocopy thereof should be included in the application.

I have no doubt at all that that is the correct legal position when an application for stay of execution is made before the court to which the appeal has been filed. I say so because that appellate court would need to have sight of the judgment, if that court is to be in a position to make an informed assessment of the strengths or weaknesses of the pending appeal.

In this case, the application is before the court which gave the judgment which the applicant wants to challenge before the Court of Appeal. Therefore, the judgment is actually inside the very same file as the one in which the application has been filed. In the circumstances, there was no need for the applicant to annex a copy of the judgment to the application.

In **HZ COMPANY LIMITED VS SAMUEL M. NJARIA,CIVIL APPLICATION NO. 214/2000,** the Court of Appeal held that if the judgment appealed from and the Notice to show that the applicant intends to appeal are omitted from the record, the application is incompetent and should be struck out.

Again, as earlier stated herein, that would be the correct position when the application for stay of execution was made to the court which the applicant intended to appeal to.

As the stay was being sought pending the hearing and determination of an appeal, it could not stand when there was no appeal.

In this instance, the applicant filed a Notice of Appeal on 13th November, 2012. Secondly, the judgment is in this very file. Therefore, the application for stay of execution is not incompetent.

The respondent has invited this court to take into account the applicant's healthy financial status. Because of that status, the respondent feels that the applicant will not suffer much if it paid out the decretal amount pending the hearing and determination of the appeal.

It is an interesting observation. I say so because the respondent appears to be acknowledging that the applicant would have little difficulty in meeting the decree, if it is ultimately required to do so.

On the other hand, the applicant pointed out that the only asset which is known by them, to belong to the respondent, was charged to secure a bank facility of Kshs. 133,000,000/-. for that reason, the applicant fears that if it paid out the decretal amount, and later won the appeal, the respondent may be unable to refund the money.

This court would have expected the respondent to respond to that contention by displaying its ability to repay the money to the applicant.

The respondent said that it has a ***" substantial property portfolio and has a long term lease with Nakumatt retail chain" .***

In my considered opinion that response falls short of demonstrating the respondents ability to refund the decretal amount, as the bold statement is not backed by factual material.

I also find that the applicant's appeal was not frivolous, as suggested by the respondent. However, I choose to say no more on that issue, as the appeal is before a court higher than this one. I cannot therefore arrogate to myself the task of evaluating, in any substantive manner, the strengths of the pending appeal.

But should not the fact that the Decree herein was for payment of money, mean that the court should be hesitant to grant an order for the stay of execution? According to the respondent, the answer to that question is in the affirmative.

In **MADHUPAPER -VS- CRESCENT CONSTRUCTION, CIVIL APPLICATION NO. 60 OF 1990,** the Court of Appeal held that it was not normal for the court to grant stay in monetary decrees.

However, in **KENINDIA ASSURANCE COMPANY LIMITED VS PATRICK MUTURI CIVIL APPLCIATION NO. NAI 107 of 1993,** the Court of Appeal re-visited that issue and addressed itself thus;

"For sometime now, the erroneous impression had been given by some of the decisions of this court, that no stay of execution would be granted by this court in respect of monetary decrees but that is not the true position. As was recently succinctly put, and it bears repetition.....

'As to whether the appeal, if successful, will be rendered nugatory, that will undoubtedly be the consequence because once the money is paid over to the Decree Holders, it will be beyond the reach and control of the applicant.....

We would like to point out that once these conditions (for granting stay) are satisfied, the court will normally grant an order for stay of execution without making any distinction between money and other decrees"

I cannot say it any more plainly than that.

But the respondent feels that if stay is granted, it shall lock up the fruits of the judgment.

Of course, in **GEORGE ORARO V KENYA TELEVISION NETWORK CIVIL CASE NO. 151 OF 1992,** Aluoch I. (as she then was) held that the court does not a practice of depriving the successful litigant the fruits of his litigation, by locking up the fruits to which the applicant was, prima facie, entitled, pending appeal.

But it is equally true that the court is required to ensure that an appeal was not rendered nugatory. In **ABN AMRO BANK N.V VS LE MONDE FOODS LIMITED, CIVIL APPLICATION NO. 15 OF 2002,** the Court of Appeal said;

" As we pointed out in the NDARUA Case, the court must safe guard the interest of both parties. The respondent has in his favour and is entitled to the fruits of the High Court judgment. The bank is also entitled to have his interests secured so that in the event of its intended appeals succeeding the over Shs.30 million it is required to pay to the respondent would not have disappeared into thin air" .

Those words apply, with equal force, to the matter before me.

I have weighed the interests of both parties in this matte. I concluded that;

(a) The application for stay was brought without any undue delay.

(b) The respondent's ability to repay the decretal amount, in the event that the applicant's appeal was ultimately successful, is doubtful.

(c) The applicant would therefore suffer substantial loss if the execution of the Decree was not stayed.

(d) The interests of justice demands that execution be stayed.

(e) The security offered by the applicant is reasonable and I find it to be appropriate.

I therefore order that there shall be an order for the stay of execution of the Decree herein. However, as a condition for such stay, the applicant shall procure an Insurance Bond from UAP Insurance Company Limited within the next FIFTEEN (15) DAYS. The said Bond shall be for the payment of the Decretal amount in full, inclusive of interest; and shall therefore be for not less than Kshs.40 million.

If the bond is procured, it shall be made available to the respondent and to this court.

In order to ensure compliance, the case will be mentioned before this court on a date to be set by the court.

The costs of the application shall abide the outcome of the Appeal. In effect, if the appeal succeeds, the costs of this application will go to the applicant. But if the appeal fails, the costs of this application will be awarded to the respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET
THIS 29TH, DAY OF APRIL, 2013

FRED A. OCHIENG
JUDGE