



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 276 of 2012

Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate court case*

Ksh. 800,000/- claim contract

- 2.1 *Debting Ksh. 800,000/- to respondent original plaintiff's account without cause.*
- 2.2 *Ksh. 800,000/- due to fine imposed by the Kenya Revenue Authority for adulterated petrol.*
- 2.3 *Fine passed on to respondent/original plaintiff.*
- 2.4 *Trial court gave judgment to respondent/original plaintiff of Ksh. 800,000/-*
- 2.5 *Respondent original plaintiff issues proclamation through auctioneers on 31st May 2012 that applicant original defendant's goods would be sold.*
- 2.6 *Application for stay of execution filed 5th June 2012.*

3. *Application*

Stay of Execution

- 3.1 *That decree was approved by both parties.*
- 3.2 *Costs by auctioneers excessive*

3.3 *Decree does not agree with judgment.*

3.4 *Stay of execution.*

4. *In reply:*

4.1 *The respondent/original plaintiff, a person of means.*

4.2 *Condition of stay of execution has been met.*

5. *Held:*

5.1 *Application for stay of execution granted on terms.*

5.2 *The decretal sum be deposited of Ksh. 800,000/- in an interest earning accounting alternatively banker's guaranteed cheques.*

6. *Case Law:*

By Applicant

a) **Tobias Ong'any Auma & Others**

Vs

Kenya Airways Corporation

HCCC 4434/92 (2001 eKLR)

Mbogholi Msagha J

By Respondent:

b) **Charles Muthamia Gikundi & Another**

Vs

Helena Wangechi Njoroge

CA 499/09

Okwengu J

c) **Union Bank of Nigeria Plc**

Vs

Aminu Ishola

CA/IL/M97/99

(Nigeria Weekly law Report)

7. *Advocates :*

- i) *M/s G. Karungo instructed by Walker Kontos & Co Advocates for appellant/original defendant*
- ii) *M/s S.M. Kimani instructed by J. Maluki & Co Advocates for respondent/original plaintiff*

TOTAL KENYA LTD APPELLANT/ORIGINAL DEFENDANT

VERSUS

DAKAWOU TRANSPORT LTD RESPONDENT/ ORIGINAL PLAINTIFF

(Being an appeal from the judgment of the Chief Magistrate in Civil Case No. 1407 of 2005 delivered on 18th may 2012 at Milimani Commercial Court)

R U L I N G

Application for Stay of Execution

Dated 5th June 2012

I. BACKGROUND

1. The parties herein have business dealings with each other in petroleum. The respondent/original plaintiff, M/s Dakawou Transport Limited Kenya limited found a sum of Ksh. 800,000/- having been debted in its account by the appellant original defendant. The sum so debted was due to adulteration of petrol involving the respondent's motor vehicle KAE 802S and two petroleum stations in Chania and Nkubu.
2. This allegation by the respondent/original plaintiff was denied. Being aggrieved that a sum of Ksh. 800,000/- was debted into their account, the respondent/original plaintiff sued, the appellant original defendant. They were successful in their quest of having a refund of the said sum. The Hon. Trial Court gave award of the said sum to them. (18th May 2012.)
3. The appellant/original defendant M/s Total Kenya Ltd filed appeal against this decision on the 5th June 2012. An application Notice of Motion 5th June 2012 under a certificate of urgency was duly filed on the same day seeking stay of execution of the decretal sum, the subject of this ruling.

II STAY OF EXECUTION 5TH JUNE 2012

4. The applicant, appellant had auctioneers come and then goods proclaimed on the 31st May 2012. This meant that a seven day's notice was issued ending 7th June 2012 for the decretal sum now accrued to Ksh. 1,610,258/80. The auctioneer costs Ksh. 195,789 being the sum alleged due to the respondent/original plaintiff.

5. The applicant/appellant argued that this decretal sum does not agree with the judgment given. The auctioneer's costs was in excessive and extortionable.

6. They prayed that a stay of execution be granted. They relied on the case law of

Tobias Ongany Auma & Others

(suing on behalf of ex Kenya Airways employees)

Vs

Kenya airways Corporation

HCC 4434/92 (2001 eKLR)

In which Mbogholi Msagha J argued that stay of execution order does not deprive a decree holder of the fruits of the said decree [but] merely delays such an execution in the event the appeal does not succeed." The delay of such a decree can only be compensated by an award of interest.

7. The respondent argued by relying on the case law of

Charles Muthamia Gikundi & Another

Vs

Helena Wangechi Njoroge

CA 499/09 (2009 eKLR)

Okwengu J

In which the principle for stay of execution was considered

- i) *Where the court is satisfied that substantial loss will result, unless the stay of execution is issued.*
- ii) *The application has been made without unreasonable delay*
- iii) *The applicant has provided or is ready to provide such security as the court may order for due performance of the decree.*

The court held no substantial loss was shown therefore declined to issue orders of stay of execution on 27th October 2009.

8. The case law of

Union Bank of Nigeria Plc

Vs

Aminu Ishola

Court of Appeal

ILORIN Division

CA/ILM 97/99

(Muritala Aremu Okunola (P)

Patick Ibe Amaizu

Walter Samwel Nkanu Onnoghen JCA)

The appeal application was for stay of execution pending appeal. the Hon. Judges outlined the principles guarding the grant of stay of execution. That there must be exceptional circumstances to granted the orders.

9. Generally, when a respondent is well off and the appellant has not shown that the respondent will not be able to pay back the judgment debt, the court would be reluctant to grant a stay.” (5th June 2000)

10. The court was asked to consider that a victorious party should not be deprived of the fruit of its victory unless there are special or exceptional circumstances.

11. The respondent prayed that the application be dismissed.

III OPINION

12. The issue before me as to stay of execution really involves the method undertaken by the respondents to execute. Judgment was said to have been delivered on the 18th May 2012. 13 days later the auctioneers proclaimed the goods. The complaint by the applicant appellant is that the decree had not been forwarded to them for approval. The decree does not agree with the judgment.

13. In the subordinate court there is a set scale on how the decree are approved. Nonetheless there is an allegation that the respondent had failed to comply with the approval of the decree.

14. It is under the civil rules that before execution is undertaken a ten days clear notice has to be issued in which the applicant was to be notified of such execution. The 13 days lapse from judgment to execution may be and or is unregularly undertaken.

15. As to the suspected sum being a fine imposed on the respondent and the debt passed into the appellant applicant, the issues raised in the appeal questioning the trial court’s reasoning of coming to the decision. This is part of the main appeal yet to be heard.

16. Each case is taken on its merits on issues of application for stay of execution. In Kenya, this is a discretionary matter before the court, looking at what substantial, loss may occasion unreasonable delay in not brining in the application and to provide security are matters considered. Exceptional circumstances are discretionary to Kenya but there is nothing to stop these courts from considering such issues.

17. In this application, I would find that it was made without unreasonable delay. The applicant has agreed to put in a deposit as security in the event this appeal is not successful. The substantial loss may occasion if the issues raised in the appeal are upheld by the appellate court.

18. The application for stay of execution is hereby granted. There will be orders of stay of execution pending the hearing of this appeal. The applicant is to deposit Ksh. 800,000/- in an interest earning going account by both parties in a reputable bank or alternative to provide a banker’s guarantee of the like sum within 60 days.

19. There will be costs in the appeal/application.

DATED THIS 22ND DAY OF JUNE 2012 AT NAIROBI

M.A. ANG’AWA

JUDGE

Advocates:

i) *M/s G. Karungo instructed by Walker Kontos & Co Advocates for appellant/original defendant*

ii) *M/s S.M. Kimani instructed by J. Maluki & Co Advocates
for respondent/original plaintiff*