



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPLICATION 129 OF 2006

EASTERN PRODUCE (K) LTD.....APPELLANT

VERSUS

PATRICK JUMA MAINA..... RESPONDENT

(Being an appeal from the judgment and decree of Mr. Njoroge, Senior Resident Magistrate dated 26.9.2006 in Kapsabet PMCC No. 170 of 2003)

RULING

By Notice of Motion Application dated 19th March 2007 brought under Order XLI Rules 4 of the Civil Procedure rules and Section 3A of the Civil Procedure Act the Appellant prays for the following orders:

- 1. That this application be certified as urgent and be heard ex-parte in the first instance.**
- 2. That there be stay of execution and or further execution of the decree in Kapsabet PMCC No. 170 of 2003 pending hearing inter partes and/or pending the determination of the application herein.**
- 3. That orders of the Court in Kapsabet PMCC No. 170 of 2003 refusing stay dated 8/3/2007 be set aside.**
- 4. That there be stay of execution and/or further execution of the decree in Kapsabet PMCC No. 170 of 2003 pending hearing and determination of the appeal herein.**
- 5. That costs be provided for.**

This application was filed under certificate of urgency on the 21st day of March 2007 and the Court granted interim stay of execution pending the determination of the application herein. Therefore prayers 1 and 2 of the application are spent.

There is a supporting affidavit to the application sworn by Charles Orina who is the Management Accountant of the Appellant. He deponed that the Respondent sued the Appellant claiming injuries he allegedly sustained while working for the Appellant. That the claim was totally denied. That the Subordinate Court on the 26/9/2006 entered Judgment in favour of the Respondent on 90% basis at Kshs. 63,000 plus costs. That they promptly instructed their advocates to appeal and also apply for stay of execution. That the court dismissed their application for stay and the Respondent has already commenced

execution. That the Respondent is unlikely to refund the Appellant if the money is paid to him. That the Appellant is ready to deposit the principal sum and costs in joint interest earning account in the names of the parties advocates pending determination of the appeal. That if the order for stay is not granted the appeal will be rendered nugatory and the Appellant will suffer substantial loss.

The Respondent has filed grounds of opposition dated 2nd may 2007. The grounds are that the application is res judicata; the application is incompetent and fatally defective; the application does not satisfy the prerequisites for orders sought; the Appellant is guilty of laches and the application is frivolous, vexatious and an abuse of the court process.

Counsel for the parties presented their oral submissions on the 11.12.2007.

Learned Counsel Mr. Kuloba for the Appellant submitted that the decretal sum plus costs is kshs. 85,305. That the Appellant will be unable to recover the money and the Respondent has not shown that he is in a position to repay. He prayed that the order of dismissal be set aside. The appeal is against liability and the Appellant was ready to deposit the entire amount as security.

Learned counsel Mr. Omondi for the Respondent opposed the application. He submitted that the application was res judicata. That the grounds for stay were the same ones that were heard and determined by the Subordinate Court. In support he cited the case of **Uhuru Highway Development Ltd VS. Central Bank of Kenya Civil Appeal No. 367 of 1996.** That principle of res judicata applies to applications as in suits. That an application to set aside could only be made if the orders were granted but in this case the application was dismissed.

Counsel further argued that the burden is on the Appellant to prove that they shall suffer substantial loss.

I have considered the application, affidavits in support and Grounds of opposition and the submissions by counsel.

This is an application for stay of execution and the court is guided by the provisions of order XLI Rule 4. There are 2 requirements which needs to be satisfied by the Applicant under sub rule 2 which are:

- a) That 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.**
- b) Such security as the Court orders for due performance of such decree or order as may untimely be binding on him has been given by the Applicant.**

The Respondent contends that the application is res judicata. I will first deal with this issue before going to the merits of the application. It is not contested that there was an application before the Subordinate Court for stay. It is agreed by both parties that the application was dismissed. Can the Appellant bring a similar application before this court for stay orders?

The answer to this can be found in **Order XLI Rule 4(1)**. It reads:

“ 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 an 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”.

It is crystal clear from the above provisions that the denial of an order for stay by the Subordinate

court is not a bar to the Appellant from making a second application to the Appellate court. Therefore the arguments of res judicata does not arise and I overrule the same.

However I am in agreement with the submissions of the Counsel for the Respondent that the prayer No. 3 of the Application against the decision of Principal Magistrate dismissing the Applicants application for stay cannot be set aside because the same was a negative order you cannot set aside a negative order.

Having considered the Appellants submissions that the Respondent may not be able to refund the money paid to him and the Respondent having not tendered any arguments that he is in a position to refund the said money in case the appeal successful I am convinced that the Appellants have satisfied the requirements for the grant of stay orders.

I therefore make the following orders:

1. That there be a stay of execution of execution and/or further execution of the decree in Kapsabet PMCC No. 170 of 2003 pending hearing and determination of the appeal herein.
2. THAT the Appellant shall deposit the sum of kshs. 85,305 in a joint interest earning account of the parties advocates within 30 days from the date of delivery of this ruling.
3. THAT the costs of this application shall be in the appeal.

Dated and delivered at Nairobi on this 22ND day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 19TH day of SEPTEMBER 2012.

F. AZANGALALA
Judge

In the presence of:

Ms Khayo for the appellant and Mr. Magare holding brief for Mr. Omondi for the respondent.