REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILMANI LAW COURTS

Civil Case 2757 of 1996

ROY TRANSPORTERS LIMITED.....PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY.....DEFENDANT

RULING

The Plaintiff has a judgment in its favour delivered by this court on 20.11.07. The defendant became aggrieved by the said judgment and desires to appeal against that decision. In pursuance of their desire to appeal, they took measures towards the same by filing a notice of appeal dated 3rd December, 2007 annexture Rm/1 to the supporting affidavit. They applied for proceedings but the letter asking for the said proceedings has not been annexed to enable this court to know exactly when the said proceedings were applied for.

A perusal of the record reveals the presence of a typed copy of the proceedings, but there is no indication from the deponements of the applicant in the supporting affidavit to show that these have been collected, that the record of appeal has been prepared or that it is under preparation, or that a certificate of delay to show when the proceedings were ready for collection has been issued.

The foregoing not withstanding it is common ground that indeed the applicant put into practice their desire to appeal against the said decision of this court, by filing a notice of appeal to the court of appeal. It is also common ground that the life span of a notice of appeal to the Court, of appeal, is 60 days during which the applicant ought to have filed the record and set down the appeal for hearing. It is not disputed that the record was not filed in time.

This default has led to two processes to take place in the Court, of Appeal. One by the decree holder who has filed an application in the said Court of Appeal, to strike out that notice. A copy of that application has not been annexed but its existence in the Court of Appeal is not in dispute.

The current applicant judgment debtor on the other hand has filed an application to the said same court of appeal dated 12th June 2008 and filed on 11.7.2008 seeking enlargement of time within which to lodge the record of appeal. The Court has been informed that both applications are pending hearing in the said Court of Appeal. None of which has a definite date.

It is this uncertainty as to when the two applications will be disposed off by the Court of Appeal that has prompted the applicant to move to this court, to seek stay of execution pending appeal, because the Plaintiff decree holder has taxed its bill of costs, whose ruling is coming up for ruling on 3.10.08 and there after the decree holder will be at liberty to execute if stay orders are not granted.

It is the stand of the applicant that he has satisfied the well known ingredients for seeking stay namely:-

(a) They have presented the application in the first instance to the Court that passed the decree.

(b) They have taken steps to show that they are desirous to appeal.

(c) They have demonstrated that they will suffer irreparable loss if stay is not granted and the decretal sums paid over to the decree holder.

(d) They have demonstrated that they are willing to abide by any conditions that may be set by the Court, as regards offer of security for the due performance of the decree. On their part they are willing to deposit a portion of the decretal sum in a joint interest earning account held by Counsels of both parties as this court, may deem fit to order.

(e) The present Counsel on record has moved with uttermost speed to present both the application and the necessary steps to progress the appeal. Any delay were caused by the former advocate on record and as such the applicant is blameless.

The decree holder respondent, has opposed the application on the basis of objection dated 4th August, 2008 and filed on the 6th day of August, 2008. They are seven in number and there is no harm in setting them out here, namely:-

(1) The application is untenable and incompetent as can only arise if there is a valid notice of appeal which is not the case herein as an application was made on 26th March 2008 to strike the same out.

(2) That in any event the application for extension of time cannot lie until the application to strike out the notice of appeal has been heard and determined.

(3) A stay cannot be granted in a money decree.

(4) Vague assertions that the applicant is reasonably apprehensive that it will not recover the decretal sum is not tenable in law.

(5) The Plaintiff/Respondent should not be denied the fruits of justice of its case filed in l996 that is 12 years ago.

(6) That there is no proof that the alleged delays herein have been occasioned by the defendants/applicants previous advocates.

(7) There is nothing in the application enabling this honoruable court to exercise its judicial discretion in favour of the applicant who have not come with clean hands to court.

In his oral submissions to Court, Counsel for the respondent reiterated the grounds of objection and then stressed the following points namely:-

(1) As at now there is no pending appeal in respect of which a stay of execution be ordered by this court.

(2) They have applied to strike out the said in valid notice of appeal and until that is determined there is no appeal on the basis of which stay can be issued.

(3) The proceedings relate to a money decree in respect of which stay of execution is discouraged.

(4) There is no justification shown for asking this court, to withhold the enjoyment of the fruits of the judgment in favour of the decree holder.

(5) It has not been shown that if executed and the applicant succeeds on appeal the applicant will have difficulty recovering the said decretal sum.

On case law the court was referred to the case of **BARRY KULICK VERSUS PAYLESS CAR HIRE AND TOURS LTD, NAIROBI HCCC NO. 644A OF 2004** decided by Alnasir Visram J. on 14th July 2005. At page 2 line 1 from the top the learned judge observed thus:-

"*the principles and requirements outlined in Order 41 Rule 4 of the Civil Procedure rules governing the grant of stay, of execution are intended, in my view to balance the interests of both the parties. The security ordered by the Court, is not intended to be punitive of the applicant, rather it is to secure, as reasonably as is possible, the decree holder in the event of an unsuccessful appeal. Accordingly it would not be just to ask the applicant to deposit the sum of Kshs 6 million as security when there is a major issue about the validity of part of the judgment as it relates to interest to do so would be highly punitive….".*

Also referred to the court, is the famous case of **KENYA SHELL LTD VERSUS BENJAMIN KARUGA KIBIRU AND RUTH WAIRIMU KENYA [1982 – 88] 1 KAR 108,**

It concerned stay of execution sought under rules 5(2) of the Court of Appeal rules. After due consideration the Court of Appeal held thus:-

(1) under rule 5(2) the Court, must consider whether the proposed appeal would be rendered nugatory unless payment of the decretal sum was stayed.

(2) There was no evidence on the record to justify a finding that the respondents were not likely to repay the decretal sum if the appeal was successful.

(3) Although there is no requirement under rule 5(2) that an applicant for stay shall give security for the due performance of the decree, it was usual for the Court, to require such security.

(4) It is not normal in money decree for the appeal to be rendered nugatory if payment is made.

Due consideration has been made by the Court, as regards representation of both sides on the applicants application for stay of execution pending appeal. The same have been considered in line with the principles of case law, cited, and the ingredients required to be established by the applicant if he/she were to earn the stay orders and to be ousted by the respondent if the stay orders sought were to be refused and the court, proceeds to make the following findings.

(1) It is a now settled law the yardstick for stay pending appeal is found in the ingredients set out in Order 41 rule 4(2) Civil Procedure Rules. These are:-

(a) The court should be satisfied that unless stay has made, substantial loss will be occasioned to the applicant. Apart from alleging it, and being apprehensive that execution will issue at any time after the ruling on taxation has been read, there is no demonstration made of the substantial loss, that the applicant is likely to suffer. The proceedings in the courts, knowledge involves a civil money debt between two companies. The fact that liability is disputed is no ground to justify withholding of the same from the successful company. More so when it has not been demonstrated that the decree holder does not have sufficient assets with which to compensate the applicant should the applicant win on appeal.

(2) There is requirement that the application be presented without undue delay. The judgment debtor herein was pronounced on 20.ll.2007. No oral application for stay was even made upon pronouncement of the judgment. The application has been presented in July of the following year almost 8 months after judgment. Blame has been laid on previous counsel. No affidavit has been sourced from this counsel to offer explanation for the delay. However there is no dispute that during the time the said Counsel was on record, no application for stay was presented.

The current counsel on record presented the application for change of advocate dated 23rd April, 2008 and filed on 25.4.2008 and orders in respect of the same were granted on 2.4.2008. The application was presented 2 months and 22 days later. Although there is no explanation for the delay the court, is satisfied that moving within a period of less than three months cannot be said to be an unreasonable delay as the other period is attributed to the counsel formerly on record. Although the applicant has a duty to make a follow up on the progress of his/her/its case, it is now trite law, that counsel on record has ostensible authority to pursue the interests of the client, and where an omission and commissions are committed by the said counsel as regards the prosecution of the said matter, these should not be visited on the client. Declaring that the application has been presented after undue delay will amount to penalizing the litigant. Despite there being no explanation from the outgoing counsel as to why no action was taken the court, is satisfied that the delay herein is excusable by reason of the fact that it was counsel by the outgoing counsel.

(3) As regards security, the applicant has offered to secure a portion of the decretal sum.

The court, is a live to the fact that the measure of the security is a matter of discretion on the part of the court, seized of the matter, whose only fetter is that it must be exercised judiciously and with reason.

In normal circumstances, where a money decrees is involved, and a fact that this court, has judicial notice of, is that the following factors have to be considered namely:-

(a) Inconvenience caused by the decree holder if the judgment sums were to be withheld.

(b) Decree holder had ability to refund the same should the appeal succeed.

(c) The inconvenience likely to be encountered by the applicant to pursue recovery of the same should he succeed on appeal.

This court, has considered the above in the circumstances of this case and it is of the opinion that issue of adequate security for stay herein is intricately tied up with the issue of existence of an arguable appeal and it is therefore a proper candidate for consideration by the Court of Appeal.

This Court is aware that the Court of Appeal has already become seized of the matter by virtue of the provisions of rule 4(1) (4) which reads: "*For the purposes of this rule an appeal to the court, of appeal shall be deemed to have been filed when under the rules of that Court, notice of Court of Appeal has been given"*.

Indeed the rules require that a stay order be sought in the court appealed from first before moving to the Court, appealed to.

The applicant as at now cannot move to the court, appealed to because of the problem mentioned of the validity of the notice of appeal. The court, has been informed that there are two opposing applications pending determination by the Court, of appeal whose outcome will have a bearing on the outcome of an application for stay of execution. In that if the enlargement of time is declined by the Court of appeal, which is the Court appealed to, then that will be the end of the appellate journey for the applicant. There will be no need to pursue stay pending appeal.

On the other hand if enlargement of time is granted, then there will be necessity for an order of stay pending appeal either to be granted or to be refused. This court is not in a position to predict the outcome of those applications in order to enable it make a final determination of stay pending appeal. It is better for this court, not to try and preempt the outcome of those applications by declining to make a final determination on the stay order sought.

However since the applicant is handicapped in that it cannot avail itself of the appellate procedures on stay, as at now until the status of its appeal is determined, it is necessary in the interests of justice to both parties that some interim precautions be made in addition to the parties being urged to move and obtain

quick disposal of the pending applications to pave the way for determination of stay issues. In the opinion of this court an order for a temporary stay order will serve the interests of justice to both parties.

In the premises, the court, makes an order that stay of execution herein is granted for a period of 60 days only from the date of reading of this ruling pending the applicant pursuing the same in the court appealed to.

(2) The decree holder respondent will have costs of the application.

DATED, READ, DELIVERED AT NAIROBI ON 30TH SEPTEMBER, 2008

R.N. NAMBUYE

JUDGE