REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1493 of 2002

MPAKA ROAD DEVELOPMENT LTD ……..……...…… PLAINTIFF

VERSUS

BHARAT RACH alias SAILESH RACH ……..…….. 1ST DEFENDANT

AVNI RACH ……..……..…… 2ND DEFENDANT

RULING

In this application dated 16th August, 2005, made under Order 41 Rule 4 of the Civil Procedure Rules, the Defendant/Applicant seeks to stay execution of the Judgment of the high court in Nairobi HCCC No. 1493 of 2002 made on 12th July, 2005 pending the hearing and determination of this Appeal.

From the limited information that I am able to discern at this time, mainly from the affidavit in support of the application, and the Memorandum of Appeal, summary judgment was entered against the Defendant/Applicant on 12th July, 2005 following an application made in that regard by the Plaintiff. The Applicant has filed an appeal to the Court of Appeal and for now wants stay of execution. In a long affidavit in support, the applicant argues that he has an arguable appeal, and that the appeal would be rendered nugatory should this application not be allowed. Be that as it may, as this application for stay is made under Order 41 Rule 4, I am not obliged to inquire into depth on the merits of this appeal, or whether it is arguable, and whether the proposed appeal would be rendered nugatory unless stay was granted, as the Court of Appeal would have been, if this application was made before it under Rule 5 (2) (b) of the Court of Appeal Rules.

What I am required to ascertain is whether the Applicant has complied with Order 41 Rule 4. That is the Rule that governs this application and its outcome. It is also the rule that "fetters" my discretion in this matter, as clearly my discretion is not absolute [See ***Visram Ramji Halai vs Thornton Turpin (1963) Limited*** {***Civil Application No Nairobi 15 of 1990 (U R)***}].

Order 41 Rule 4 (2) of the Civil Procedure Rules states as follows:

"***(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."

For the Applicant to succeed in this application he must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that he has filed this application without delay; and that he is willing and able to give such security as is ordered by the Court for the due performance of the decree. That is the plain reading of the Rule, and the onus is on the applicant to satisfy **all** the conditions through his deposition, and not through bold statements from the bar.

Now, let us examine if the Applicant has satisfied all the three conditions outlined above.

First, and not necessarily in that order, has this application been made without unreasonable delay? Judgment was delivered on 12th July, 2005, Notice of Appeal was filed on 25th July, 2005, and this application was made on 17th August, 2005, within almost three weeks of the filing of the Notice. **So, for the purposes of Order 41 Rule 4 (2) I must find that the Applicant has made this application for stay without unreasonable delay**.

Now, going to the issue of substantial loss. Has the Applicant demonstrated that he will suffer substantial loss if the Order for stay is not granted?

Although the Applicant has not specifically averred in her affidavit that she fears that if called upon to satisfy the Judgment at this time, she might not be able to recover the same in the event of a successful appeal, she has expressed the difficulty in making payment and how devastating it would be to make full payment at this time.

In paragraphs 20 to 22 of her affidavit the Applicant avers as follows:

"***20. THAT after the placement of the (principal debtor) into receivership, our business basis collapsed and currently I am employed by the supermarket company while my husband is working abroad also under employment. It has been rough making our ends meet. My income, together with my husband is approximately Kshs.150,000/= a month, which caters for my needs and upkeep of myself and the family. Copies of our payslips are attached and marked 'AR4'.***

21. THAT I verily believe that it we are called upon to pay the entire decree before the Appeal is heard, it will be devastating to me and my family for an indefinite period.

22. THAT I verily believe that if the colossal judgment entered herein is colossal (sic) and if it were to be executed against my husband and I personally it would drive my family and I into bankruptcy and destitution and would derail and the strain, stress and loss in (sic) unimaginable and substantial."

Mr Kilonzo Junior, Counsel for the Applicant, cited the case of ***Inder Singh Gill Ltd vs Njoroge Gichara (HCCC No. 2411 of 1999)*** arguing that the applicant had an arguable appeal, that Judgment herein was "summary" and not based on a full trial, and that the interests of justice demanded that "status quo" be maintained pending the determination of appeal.

Mr Oyatsi, Counsel for the Respondent, acknowledged that he had not filed a replying affidavit, but relied on the grounds of opposition. He argued that a stay order is discretionary, and cannot be given where the application is an abuse of court process (See ***Inder Singh*** case supra). He then attempted to point out contradictions in the Applicant's affidavit with the defence filed by the Applicant to demonstrate "abuse of court process". Because the Respondent has not filed a replying affidavit, it cannot be heard on "facts" from the bar. It must confine its submissions to points of law.

In the ***Inder Singh*** case, Pall, J (as he then was) emphasized that the Court had discretion to order stay "for sufficient cause". The object, he said, was "to ensure that ultimately the successful party gets not merely a barren success but is able to reap the fruits of his judgment". He then cited Madan, J A (as he then was) in ***M M Bhatt and Rent Restriction Tribunal (C A No Nairobi 6 of 1979)*** as follows:

"**If there is no overwhelming hinderance, a stay ought to be granted so that appeal if successful may**

not be nugatory".

"Substantial loss" may be demonstrated in various forms, as Platt, J A observed in the leading Court of Appeal authority of ***Kenya Shell Ltd vs Benjamin Karuga Kibiru & Others*** ***(1982 – 88) I KAR 1018***. He said as follows:

"***An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in Order 41, Rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts." (underlining provided).***

Although the application for stay in the ***Kenya Shell*** case was based on Rule 5 (2) (b) of the Court of Appeal Rules, Platt, J A observed that:

"***Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."***

Platt, J A held in that case that because there was no evidence of substantial loss and as such loss cannot be "inferred" he would not grant stay of execution.

In the case before me, the Applicant has demonstrated the difficulty she would find herself in, if payment is made at this time.

I, therefore, find that the Applicant has made out a good case for "substantial loss", especially in the absence of any evidence to the contrary. The respondent has chosen not to file a Replying Affidavit, and the only evidence before this Court is the deposition sworn by the applicant.

Finally, with regard to the last ingredient of Order 41 Rule 4 namely "security", the applicant has already deposited a bank guarantee of Kshs.1 million for the due performance of the decree, and has indicated her willingness to increase the same, should this Court so order.

The interest of justice demands that I make every effort to balance the interests of both the parties, pending determination of the appeal, and I believe it would be fair to increase the level of security provided by the Applicant – to Kshs.2 million by way of an acceptable bank guarantee.

Accordingly, I allow this application, and grant stay of execution pending appeal on condition that the Applicant shall deposit with this court a bank guarantee in the sum of Kshs.2 million within the next 30 days, failing which these orders shall lapse.

Dated and delivered at Nairobi this 8th day of November, 2005

ALNASHIR VISRAM

JUDGE