



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT

AT KISUMU

PETITION NO. 19 OF 2019

BETWEEN

HARJOT SINGH DHANJAL.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT/APPLICANT

RULING

INTRODUCTION

Kenya Railways Corporation (**hereinafter referred to as the applicant**) has filed an application dated 20th July 2020 premised on order 22 Rule 22, Order 51 of the Civil procedure rules 2010, and section 39 of the Civil Procedure Act). The applicant prays that there be ex parte interim orders of stay of execution of this Honorable Court's ruling granting costs to the Harjot Singh Dhanjal (**hereinafter referred to as the respondent**) pending the hearing and determination of this application inter parte. That there be a temporary stay of execution of the Honorable Court's ruling dated 15/03/2020 pending hearing and determination of the intended appeal to the Court of Appeal. That there be a stay of taxation proceedings before the Honorable Court pending the hearing and determination of the intended appeal at the Court of Appeal. Costs be provided for.

The Grounds of Application are that the applicant has filed a notice of appeal in respect of the Honorable Court's judgement issued on the 29th April 2020 and the appeal has a high likelihood of success. The applicant stands to suffer irreparable damage should the ruling be executed as the petitioner has commenced taxation proceedings. The judgement was delivered by email during the present Covid pandemic and the applicant was not instructed in time to seek interim stay.

The applicant laments that he will suffer substantial loss and damage if the order sought herein are not granted and further the appeal will be rendered nugatory.

According to the applicant, the respondent will not be prejudiced in any way if the orders sought are granted. It is in the interest of justice that the execution of the ruling and/or decree herein be stayed to pave way for the hearing and determination of the appeal. The applicant is willing and able to abide by the forms and conditions for allowing the application.

The respondent's response to the application was by way of Replying Affidavit and Submissions whose import is that the respondent is entitled to the fruits of the judgement as a successful litigant. The Court should not bar a successful litigant from taxing his bill of costs arising from a concluded matter as costs follow the event.

The respondent states that applicant is required to satisfy the conditions set out under *Order 42 Rule 6(a) and (b) of the Civil Procedure Rules* before he can be granted orders of stay and taxation of bill of costs, which threshold the applicants have failed to satisfy.

On this, the respondent relied on the cases of *Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others –Civil Appeal No. 291 of 1997* and *Butt v Rent Restriction Tribunal [1982] KLR 417*

The applicant has not alleged that should it pay the costs as would be taxed, then the money would not be refunded in case the intended appeal would eventually succeed. The applicant has not described what hardship or loss it would suffer if it were to be forced to settle costs before the intended appeal is heard and has therefore not proved the substantial loss it stands to suffer if the application for stay is denied whereas it has recourse to file a reference to the High Court once the taxation is determined. On this, the respondent relied on the cases of

The application has been premised on a misapprehension of the law by citing order 22 Rule 22 of the Civil Procedure rules as the basis for seeking stay whereas the said law is not applicable in this case since no decree has been sent to this Court for execution. The application lacks merit for not disclosing any justifiable cause to stop or stay taxation of the party and party bill of costs.

ANALYSIS AND DETERMINATION

1. Whether the Applicant has met the requirements to warrant stay of execution of the Court's ruling issued on 15th March 2020 pending appeal;

The order/ruling for which the applicant seeks stay and which has been appealed against is that '**Costs incidental to the Petition to the petitioners as the respondents did not follow due process in their quest to recover the Land**' The application has been brought under Order 22 Rule 22 which specifically provides for stay of execution of a decree by a Court to which the decree has been sent for execution. It is clear that the same is not applicable as a decree is yet to be extracted in this matter. The applicable law is **Order 42 Rule 6** which provides for stay in cases of appeal.

Order 42 Rule 6(2) particularly provides that:

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.

The said conditions were discussed by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** (quoted in the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** and also relied on by the petitioner/respondent in their submissions) where the Court gave guidance on how the Court should exercise its discretion in deciding whether or not to grant stay pending appeal. The court held that:

1. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
2. *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
3. *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*
4. *The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal*
5. *The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

Whether the Applicant will suffer any substantial loss if the Orders are not granted

The applicant has at paragraph 9 of the supporting affidavit stated that it stands to suffer irreparable loss and damage if the application is not allowed and the Respondents execute the ruling. The applicant has however not indicated or demonstrated what loss it will suffer if the application is not allowed, neither has it averred that if they pay the costs then they will be unable to recover from the Petitioner if the appeal succeeds.

Whether the Application has been made without unreasonable delay

The ruling was delivered and sent to the applicants by electronic mail on 29th April 2020. Instructions to appeal from the client were received on 16th July 2020 and the application filed on 27th July 2020. There was therefore no delay on the part of the applicant.

2. Whether the applicant has met the requirements for grant of stay of taxation proceedings pending appeal

The settled principles on which basis an order of stay of proceedings may be granted include; The applicant has established that he/she has a prima facie arguable case/appeal. The application has been filed expeditiously. The applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought. The above principles were canvassed and replicated in several cases particularly those cited in **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** and especially the case of **Global Tours & Travels Limited: Nairobi HC Winding Up Cause No. 43 of 2000** where it was observed: -

“...the sole question is whether it is in the interest of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

It is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.

Whether the applicant has established that he/she has a prima facie arguable case/appeal.

In of the case of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR*, the Court in finding that the applicant had an arguable appeal stated that:

“...It is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues’

Similarly, in the case of *Re Global Tours & Travel Ltd HCWC No. 43 of 2000* quoted in *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR Ringera, J* (as he then was) held that:

“...In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as ... the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, ...”

The Court is not able to evaluate the prima facie merits of the appeal as the applicant has not attached a memorandum of appeal or a draft thereof to the application. The Court does not therefore know the grounds upon which the applicant intends to appeal against the said ruling.

Further and as submitted by the respondent, the 2nd Respondent’s notice of appeal was not lodged within the statutory timelines provided by ***Rules 74 and 75 of the of the Court of Appeal Rules, 2010*** which require that a notice of appeal be filed within fourteen days after the date of the decision against which it is desired to appeal.

The ruling subject matter of this application was dated 29th April 2020. The notice of appeal is dated 20th July 2020 and filed on 27th July 2020. It has been filed three months after the ruling was delivered. The applicant has not averred or demonstrated that leave was granted to file the notice of appeal out of time. Essentially, there is no valid appeal. On this basis, I do not think there is need to assess whether the other two requirements (being whether the application has been filed expeditiously and whether it is in the interest of justice to allow the application) have been met.

In the case of *Fulchand M. Shah v Panachand J Shah & 6 others [2010] eKLR* where the Court in dismissing an application seeking for orders of stay of execution and proceedings until the hearing and determination of an appeal held that;

- a) The courts in Kenya are hierarchical; the jurisdiction of determining the costs is vested upon the taxing master. If there are any issues arising from taxation they can only be brought to the high court by way of reference. This court has no jurisdiction therefore to stay proceedings before the taxing master.
- b) What is there to be stayed as a result of the order issued on 3rd July 2009 can only be costs. The costs payable by the plaintiff to the defendants are not yet ascertained. Accordingly, at this stage there is nothing to stay and there is nothing to show that the plaintiff will suffer irreparable loss if an order of stay is not granted.

The issues at hand in the application in the *Fulchand* case are similar to the issues at hand in the current application. The upshot of the above is that the application is dismissed with costs.

DATED AT KISUMU THIS 24th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE