Panari Center Limited v Intellicom Group Limited (Civil Appeal E913 of 2022) [2024] KEHC 3759 (KLR) (Civ) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E913 OF 2022

CW MEOLI, J

APRIL 4, 2024

BETWEEN

PANARI CENTER LIMITED ..... APPELLANT

AND

INTELLICOM GROUP LIMITED ..... RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 4th November, 2022 brought by Panari Center Limited (hereafter the Applicant), premised upon the grounds set out on its face and the depositions in the affidavit of the Applicant's General Manager, Rayma Atieno. The motion seeks the extension of stay of execution of the ruling delivered by the subordinate court on 24th October, 2022 in SCCCOMM No. E4408 of 2022 pending the hearing and determination of the present appeal and that costs abide the outcome of the appeal.

2. The deponent to the supporting affidavit stated that by its ruling, the trial court allowed the application dated 21st September, 2022 filed by Intellicom Group Limited (hereafter the Respondent), seeking the release of the Respondent's goods which had been held pursuant to distress levied by the Applicant for rent. That the Applicant, being aggrieved by the impugned ruling, wishes to challenge it in the present appeal. The deponent further stated that the appeal is arguable and has reasonable chances of success. That unless the order for stay sought is granted, the Applicant will suffer substantial loss since the Respondent is in rent arrears to the tune of Kshs. 3,636,993.24 and there is a likelihood that these assets constituting the only real security available to the Applicant, being removed from the Applicant's premises.

3. The Respondent swore a replying affidavit through its Director Mitch Benjamin Musyimi Kilonzi on 15th November, 2022 in resisting the Motion. He asserts that the appeal does not raise any arguable

grounds since the claim before the Small Claims Court was compromised by way of a consent subsequently adopted as an order of the trial court on 23rd August, 2022. The deponent further averred that the Respondent paid the full decretal sum in rent arrears, pursuant to the consent and hence was entitled to the orders sought in the application before the lower court dated 21st September, 2022. That the Applicant has misrepresented the facts by purporting that the outstanding decretal amount is in the sum of Kshs. 3,636,993.24. And that following the consent order, the Applicant was obligated to release the Respondent's goods which were being held in its premises, and continue to waste away.

4. In rejoinder, the Applicant's advocate Daniel Maingi swore a further affidavit on 30th June, 2023 restating the earlier averment that the claim in question concerned a rent dispute wherein the Respondent was in arrears to the tune of Kshs. 3,636,993.24. The advocate also restated that the Applicant is dissatisfied with the impugned ruling and has since filed a memorandum of appeal, challenging various aspects thereof, including the trial court's jurisdiction to decide on matters relating to payable rent.

5. When the parties attended court for hearing, the court directed that the Motion be canvassed by way of written submissions. Submitting in support of the Motion, the Applicant's counsel anchored his submissions on Order 42, Rule 6 of the *Civil Procedure Rules* (CPR) on the applicable considerations regarding stay of execution, and Order 50, Rule 6 of the *CPR* pertaining to the enlargement of time. Counsel submitted that the Motion was timeously filed and that unless a stay is granted, the Applicant is likely to suffer substantial loss through the release of the Respondent's goods which goods constitute the only security available to the Applicant. Counsel reiterated the averments made in the Motion regarding the arguable nature of the present appeal.

6. For his part, the Respondent's counsel argued that firstly, there is no existing stay order in place, to warrant an extension, as sought in the Motion. Regarding the merits of the Motion, and specifically what constitutes substantial loss, counsel called to aid the decision in *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR as cited in *Kirui v Kipkurgat* (Environment and Land Appeal 40 of 2022) [2023] KEELC 20001 (KLR). Counsel further asserted that substantial loss has not been demonstrated by the Applicant, to warrant the stay order sought. Moreover, the Respondent's counsel argued that the consent order issued by the trial court has not been challenged either through review or appeal. On those grounds, the court was urged to dismiss both the Motion and the appeal.

7. The court has considered the material canvassed in respect of the Motion. It is appropriate to state from the outset that the question whether the appeal herein is arguable is not a matter for consideration in dealing with applications seeking a stay of execution before the High Court. Secondly, the correct position is that the impugned ruling was delivered on 28th October 2022 and not 24th October, 2022 as stated in the Motion. Thirdly, upon its perusal of the record, the court has noted that no stay order appears to have been previously issued by the trial court in the first instance. Consequently, the prayer in the Motion seeking extension of stay orders is misplaced. Be that as it may, the court will, in the interest of substantive justice, consider the merits of Motion under the purview of a prayer seeking to stay execution of the impugned ruling.

8. It is trite law that the courts have discretionary power to grant stay of execution of a decree or order, pending appeal, and which discretion ought to be exercised judicially. See *Butt v Rent Restriction Tribunal* (supra). The applicable provision is Order 42, Rule 6 of the *Civil Procedure Rules* (CPR) which stipulates that:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

(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".

9. Concerning the condition on expedition in applying for stay, the record indicates that the ruling which triggered the Motion was delivered on 28th October, 2022. The instant Motion was brought less than one (1) month later. Consequently, the court does not find the delay to be unreasonable.

10. On the second condition, the relevance of substantial loss in any application for stay of execution was aptly addressed by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 when it held that:

> " Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented..."

11. The Court went on to set out the following regarding substantial loss:

> " 1. .....
>
> 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
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> 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
>
> 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

12. The decision of Platt Ag JA (as he then was), in the *Shell case* in the humble view of the court sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

> " The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of

the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the 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."

13. The learned Judge continued to observe that:

> "It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. 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."

14. Earlier on, Hancox JA in his ruling observed that:

> "It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson -Vs- Church* (No 2) (1879) 12ChD 454 at page 458 where he said:-'I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

15. The court has considered the averments by the Applicant concerning the manner in which it apprehends the likelihood of substantial loss. Specifically that the Respondent is in arrears of rent to the tune of Kshs. 3,636,993.24 and that unless the stay order sought is granted, the Respondent's distrained goods being held in the Applicant's premises will be released to the former. Leading to loss of its only form of security.

16. In rebuttal, the Respondent maintained that all outstanding arrears in rent were fully paid following a consent entered into between the parties and which was adopted as an order of the lower court, and hence the release order made *vide* the impugned ruling is proper. The Respondent further maintained that the purported claim of arrears in the sum of Kshs. 3,636,993.24 is without basis.

17. Upon perusal of the record but without going into the merits of the appeal, the court observed from the statement of claim filed before the trial court, that the sum sought by the Applicant was Kshs. 270,000/-. The record shows that on 23.08.2023, the parties recorded a consent to settle the matter through payment of the sum of Kshs. 220,000/- by the Respondent to the Applicant and it is not in dispute that a total sum of Kshs. 270,000/- was paid by the Respondent in this regard. There is no indication on the record that the Applicant had sought outstanding rents amounting to Kshs. 3,636,993.24, which sum in any event would exceed the pecuniary jurisdiction of the Small Claims Court. Nor has the Applicant demonstrated how this sum accrued, pursuant to the consent. However, it is not in dispute that the Respondent's distrained goods continue to be detained in the Applicant's premises, after settlement of the sum sought in the statement of claim.

18. Suffice it to say that, on the material tendered, the Applicant has not demonstrated the likelihood of substantial loss if the stay order is denied. As stated in the *Shell case* (supra), substantial loss in its various

forms, is the cornerstone of the jurisdiction for granting stay. That is what has to be prevented. Without evidence of substantial loss, it would be rare that an appeal would be rendered nugatory by some other event.

19. In the result, the court finds no merit in the Notice of Motion dated 4th November 2022, which is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Alusiola

For the Respondents: N/A

C/A: Erick