



Tsusho Capital Kenya Limited & 2 others v VNN ((Minor suing through her Next Friend and mother) JNM) (Civil Appeal 23 of 2018) [2023] KEHC 17627 (KLR) (16 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 23 OF 2018
DO CHEPKWONY, J
MAY 16, 2023**

BETWEEN

TSUSHO CAPITAL KENYA LIMITED 1ST APPELLANT

TRINITY TRANSPORTERS & LOGISTICS LIMITED 2ND APPELLANT

MOSES INDIAZI LUYANI 3RD APPELLANT

AND

VNN RESPONDENT

(MINOR SUING THROUGH HER NEXT FRIEND AND MOTHER) JNM

RULING

1. Pending determination in this matter and the subject of this ruling are two applications. The first is the appellants' notice of motion application dated May 10, 2021 which substantially seeks an order to stay the execution of the judgment and decree issued on April 24, 2019 in Mombasa CMCC No 165 of 2017, VWN v Tsusho Capital Limited & 2 others, pending the hearing and determination of the appellants' intended appeal against the judgment of this honourable court rendered on April 30, 2021 at the Court of Appeal.
2. The appellants'/applicants case as reproduced in the grounds on the face of the application and in the supporting affidavit of Joseph Nyandemu is that this court in its judgment delivered on April 30, 2021, dismissed the appellants'/applicants appeal for having been overtaken by events. In the resultant, the stay granted pending the appeal has lapsed and the respondent is likely to execute the judgment in Mombasa CMCC No 165 of 2017. That the respondent has actually initiated the execution by filing an application seeking the release of the funds held in the joint interest earning account.
3. According to the appellants'/applicants, they are likely to be prejudiced if stay is not granted because should the execution proceed, the respondent who was a minor at the time the proceedings herein were



initiated is unlikely to refund the decretal sum of Kshs 6,825,723.00 for lack of means. The appellants/ applicants aver that the respondents are unlikely to suffer prejudice if the stay is granted because the funds are held in joint interest account and may be accessed at any time. It is the appellants'/ applicants' case that the intended appeal is highly arguable with high probabilities of success.

4. The respondent opposed the application *vide* the grounds of opposition dated May 20, 2021 adducing grounds that the application is devoid of merit as there is no positive order capable of being stayed from the judgment of April 30, 2021. That, therefore the application is frivolous, and a waste of judicial time, hence the same should be dismissed with costs.
5. The second application is a notice of motion application dated May 13, 2021 filed by the respondent herein seeking for an order to release the funds deposited as security of the appeal and currently held in joint account number 6xxxxxx1 at Eco Bank Kenya Limited, in the joint names of Kuria Rimui and Kamau, Advocates LLP & Lestins and Smith, Advocates to the Firm of Lestins and Smith, Advocates.
6. The respondent's case in support of the application as adduced on the grounds on the face of the application and the affidavit of Collins Mbanda, the respondent's advocate is that on September 3, 2020 this court granted orders of stay directing that the decretal sum be deposited in a joint interest-earning account as security for hearing and determination of the appeal herein. The court heard the appeal and rendered the final decision on April 30, 2021 dismissing the appeal hence the condition under which the monies were deposited was served. However, the appellants' advocate has refused to execute the mandate to have the monies deposited as security for the appeal released to the respondent necessitating the instant application.
7. In opposition to the application, the appellants filed a replying affidavit sworn by Joseph Nyandemu, the 1st appellant's senior operations and collections manager. He avers that the appellants have filed an application seeking stay of execution majorly because the respondent is a minor and lacks the capacity to refund the decretal sum if execution is actualized and the intended appeal succeeds. In that regard, the appellants' view the present application as having been filed prematurely hence should not be allowed lest the intended appeal is rendered nugatory.
8. Thereafter, parties filed submissions in support of their respective cases. The appellants' submissions are dated June 21, 2021 while those of the respondent are dated June 14, 2021. I have read through the submissions and since they reiterate the summary reproduced above, they will be considered in the course of my analysis.

Analysis and Determination

9. Having considered the materials canvassed in respect of the two applications and I am of the view that only two issues came up for determinations, namely:-
 - a. Whether the appellant has made a case for stay of execution as sought.
 - b. Whether an order can be made for release to the respondent of funds deposited as security for the appeal, currently held in an escrow account in the names of the advocates on record for the parties.
10. On whether an order for stay of execution can issue, the starting point is order 42 rule 6 of the [Civil Procedure Rules](#) which donates to this court the jurisdiction to grant orders to stay execution pending appeal. The section reads as follows:-

“(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 applicants 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 applicants”.

11. From the above provision, it then follows that an applicant seeking for stay of execution of a judgment, decree or order pending appeal is obliged to satisfy the conditions set out under order 42 rule 6(2), aforementioned, namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. However, before considering whether the appellants’ application has met the threshold for stay of execution as established under order 42 rule 6(2) of the *Civil Procedure Rules*, it is imperative that the court addresses that the respondent’s concerns and submissions that the orders of stay as sought are not available to the appellants.
12. In that regard, this court has considered the events leading to the present application for stay. Vide a plaint dated December 19, 2016, the respondent initiated a suit against the 1st appellant seeking an award of damages and other assorted reliefs for compensation of injuries sustained in a road traffic accident which occurred on August 31, 2016. The appellants filed defence to the claim denying every allegation made therein while stating that the accident was wholly caused and or contributed to by the negligence of the respondent. On basis of that defence the 1st appellant filed an application dated June 27, 2017 seeking to have its name struck out of the primary suit filed before the lower court. However, that application was disallowed *vide* a ruling dated February 6, 2018 and the trial court directed that the liability of the 1st appellant would be determined upon full hearing.
13. Aggrieved by that decision, the appellants preferred the appeal herein and were granted sixty (60) days stay of the lower court’s proceedings to allow the appellant pursue the present appeal. Unfortunately, the appellants did not comply with the timelines when the stay of proceedings order lapsed thus the suit before the trial court progressed to its conclusion and a judgment delivered on April 24, 2019. On April 30, 2021, this court delivered its judgment on the appeal where it rightfully observed that the appeal had no legs to stand on since the interlocutory orders which were being challenged had lapsed, hence the same had been overtaken by events, whereas a substantive judgment had been delivered on April 24, 2019.
14. The appellants were also aggrieved by this court’s decision and preferred to appeal against it before the Court of Appeal. However, in the instant application, the applicant seeks that there be stay of the judgment delivered on April 24, 2019 by the lower court pending the determination on the



preferred appeal against it before the Court of Appeal. It is therefore evidently clear from the record that the judgment and decree of the lower court issued on April 24, 2019 is not what is intended to be challenged by the appellant before the Court of Appeal.

15. In the circumstances, this court agrees with the respondent's submissions that the stay of execution against the judgment of the lower court cannot issue since it is not the subject decision of which the intended appeal before the Court of Appeal is directed. Stay of execution can only be granted if the intended appeal is against the order being appealed against. I also concur with the decisions of the court in cases cited by the appellant which include the cases of *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, and *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015]eKLR, wherein a similar view was held.
16. Thus an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed. It is the said order that the court would have considered in regard to the principles for granting stay of execution. In any event, the orders of this court sought to be appealed against merely dismissed the appeal herein without ordering parties to do anything or refrain from doing anything or to pay any amount of money. It was a negative order which was incapable of execution and there is nothing to be stayed in this court's judgment delivered on April 30, 2021.
17. In the upshot, the appellants application dated May 10, 2021 fails for the above reason and the same is hereby dismissed with costs to the respondent.
18. The second issue for determination is whether an order can issue directing the release of funds deposited as security of the appeal herein to the respondent. The record reflects that on September 23, 2020, this court granted a conditional stay of the trial court's judgment by directing that the decretal sum be deposited in a joint interest-earning account in the name of the advocates on record pending the hearing and determination of the appeal.
19. This court agrees with the respondent's submissions that the conditional stay granted has already run its course. In addition, this court having found that the stay sought by the appellants could issue, and given that there is no preferred appeal against the final judgment of the trial court, this court is of the view that it would be more appropriate and in the interest of justice to permit the release of the funds deposited as security for prosecuting the appeal other than continuing to hold the said funds as proposed by the appellants.
20. In the circumstances, the respondents' motion dated May 13, 2021 is found meritable and the same is hereby allowed in terms of the following orders:-
 - a. The appellants notice of motion application dated May 10, 2021 is hereby dismissed with costs to the respondent.
 - b. The funds held in joint interest-earning account No 6xxxxx1 at Eco Bank Kenya Limited in the joint names of Kuria Rimui and Kamau Advocates LLP & Lestins and Smith Advocates to the Firm of Lestins and Smith Advocates and interests thereof be released for onward transmission to the respondent, VWN .
 - c. The respondent shall have costs of the application dated May 13, 2021.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF MAY , 2023.

D. O. CHEPKWONY



JUDGE

In the presence of:

No appearance for and by either party.

Court Assistant - Mwenda

