



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS APPLICATION NO 14 OF 2020

SUNSAND DUNES LIMITED.....APPLICANT

VESUS

RAIYA CONSTRUCTION LIMITED.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Nchogu, Omwanza & Nyasimi Advocates for the Applicant

A.B Patel & Patel Advocates for the Respondent

RULING

This is an application dated **14.8. 2020** seeking leave to appeal to the court appeal from a decision rendered on **8.7.20220** and subsequent stay is expressed to be brought under Section 1A, 3 and 3A, Under the provisions of Rule 11 (3) of the Advocates Remuneration Order., Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act. The motion by this very nature seeks the following substantive orders

- 1. That the Applicant/Respondent be granted leave to appeal to the Court of Appeal against the whole of the decision of the Honorable Mr Justice R. Nyakundi given at Malindi on 8th July, 2020.**
- 2. That this Honorable Court be pleased to issue a temporary stay of taxation of the Bill of Costs dated 10th August, 2018 in HCC No. 179 of 2012 – Raiya Construction Ltd -v- Sun Sand Dunes Ltd which is now scheduled for mention on 18th August, 2020 pending the hearing and determination of this Application**
- 3. That this Honorable Court be pleased to grant a stay of execution**

The application is supported with an affidavit by the applicant Counsel one Ondego Daniel. In the context of the circumstances as were presented in the affidavit the applicant is desirous of canvassing an appeal before the apex court on such matters. The applicant deponed that leave to file the appeal and stay of execution will also preserve the subject matter pending the hearing and determination of the appeal. He canvassed the application by way of written submissions dated 1st October 2020. Counsel for the intended appellant argued that relying on the decision of the court the judge fell into error and being aggrieved with the outcome there is need for an appeal to interfere with the findings. In support of the remedies in the notice of motion Counsel relied on the following authorities **Twiga Motor Limited vs Hon. Dalmas Otieno Anyango (2015) EKLR, HCC NO. 179 OF 2012 – Raiya Construction Ltd vs Sun Sand Dunes Ltd, Muriu Mungai & Co Advocates vs New K.C.C Limited HCC No. 284 of 2007** cited with approval in **Waweru Kariuki & Associates vs Invesco Assurance Co. Ltd (2018) Eklr, Butt Vs Rent Restriction Tribunal (18), The Board of Trustees, National Hospital Insurance Fund v. Kipkorir Titoo & Kiara Advocates, HCC No 154 of 2004, Nasibwa Wakenya Moses v University of Nairobi & Another (2019) Eklr.**

In a nutshell it was the contention by Counsel that the discretion of the court be exercised in his favour to grant both leave for an appeal and stay of proceedings before the taxing master.

On the other hand, the respondent to the application opposed any relief in the form of the prayers applied for by the applicant. In reference to the facts and litigation history of the matter the respondent was of the view that the application is meant to delay expeditious determination of the Bill of Costs. Further it was submitted that the applicant has not demonstrated that it has an arguable appeal with a probability of success to warrant grant of an equitable remedy. Counsel's contention is to the effect that there are no fatal defects in the ruling of the court which cannot be cured without necessarily filing an appeal. He therefore urged the court to decline the application for want of merit. In support of the submissions Counsel cited the following cases: **In the matter of the Estate of M'mAGIRIm'Mugira (Deceased) 2005 EKLR, Mwala Land Disputes Tribunal & Another v KiiluMathuva & 3 Others Ex-parte Kyengo Mathuva (2006) EKLR, Labh Singh Harman Singh Ltd V Attorney General & 2 Others (2016) Eklr, Ahmednassir Abdikadir & Co. Advocates V National Bank of**

Kneya Ltd (2) (2006) 1 EA 5, Evans Thiga Gaturu Advocate v Kenya Commercial Bank Ltd (2012) and Bernard Gichohi Njira v Kanini Njira Kathendu & Another (2016) Eklr. With the principles enunciated herein counsel submitted for this court to be persuaded to dismiss the application.

Introduction

This is a case for taxation of the bill of costs by the Deputy Registrar. It was earlier litigated before this court by way of an application. The court on consideration remitted back the claim to the Deputy Registrar for re-taxation. This is the bases upon which this matter once again has found its entry to the court in terms of the Chamber Summons dated **14.8.2020**.

Determination

The essential cases referred to by Counsels in their submissions provide the guiding principles in which the court will exercise discretion in determining the application.

What is a stay of execution? It is embodied under Rule 11 (3) of the Advocates Remuneration Order, order 42 Rule 6, order 51 Rule 1 of the Civil Procedure Rules and further enabled by the provisions of Section 1A, 1B and 3A of the Civil Procedure Rules. Therefore, in the instant application, the applicant sought an order of stay against the respondents in carrying out to fruition the order of the court to have the bill of costs to be taxed a fresh by the Deputy Registrar. Secondly, for the appeal to be entertained by the court of appeal the applicant must demonstrate grounds to support an arguable appeal. However, I am alive to the fact that the merits of the appeal remain in the province of the court of appeal. At this stage the court is only required to prospect the chances of appeal succeeding.

In essence the question I ask myself is whether the applicant has placed before court sufficient material for special leave to appeal against the impugned order. It is undoubtedly clear from the case law that the court has wide discretion more significantly under the Civil Procedure Rules to grant leave to appeal to the court of appeal. When a claim is commenced by way of taxation under the Remuneration order and the Advocates Act there are no clear guidelines on that special leave. Nevertheless, the court in its wide discretion to grant that remedy can resort to the inherent jurisdiction under Section 3 and 3(A) of the Civil Procedure Act. Leave so applied for is only granted if and only if the applicant is able to satisfy the conditions outlined in **RWW vs EKW (2019) in which the court stated that:**

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The circumstances under which the applicant find himself is an equitable remedy with a mixed bag of many conditions to be met before the court exercises its discretion as stated in **Absalom Dova vs Tarbo Transporters (2013) Eklr.**

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which include the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation”

Further, the applicant must demonstrate that the judgment being sought to be stayed must be of an executory nature of the order. In the court's decision set out in **Mohammed Salim t/a Choice Butchery v Nassepuma Memon Jamal (2013) EKLr and Ms Port Reiz Maternity v James Karanja Kabia C.A No 63 of 1997**, it was held,

“that the right of appeal must be balanced against an enquiry weighing right that of the plaintiff to enjoy the fruits of the judgment delivered his or her favour. Here must be a just cause for depriving the plaintiff of that right”

In the instant application, the court is being asked to stay any fresh taxation of the bill of costs referred to under reference by the respondent. The question to be resolved is whether from the facts deposed in the affidavits in support of the application do discharge evidential burden to justify grant of stay of execution. In my view, I do not think so. The fact that the earlier certificate of taxation by the Deputy Registrar was varied and set aside does not qualify as special circumstances in my opinion to equitably grant stay of the proceeding.

There is clear distinction between stay of execution of a decree of the court and on-going proceedings directed by the High Court to an inferior tribunal or court. The true position of this episode is that the applicant wants to pursue the issue on taxation to a higher court. To my mind the contentious issues that the intended appeal raises though crucial to the applicant fall short of a serious arguable case with a probability of success. The questions to be determined by the taxing master are fundamental as set out in the legal instruments which govern the bill of costs and its taxation. Another indication of this application is where the issue is a recurrent one that is likely to become moot before it reaches the ultimate court of appeal. It may be worthy to note the discretion to be exercised under section 3 and 3(A) 3 of the Civil Procedure Act should be exercised where the applicant can satisfy all the criteria for special leave to appeal. If the proposed appeal appears hopeless the application should be denied despite the fact he has the constitutional right of appeal. On the other hand the Civil Procedure Act under Section 1 (A) and 1 (B) on overriding objective was enacted to enable the court to deal with cases justly in accordance with test founded in rule 1(A). The elements expressed in the provisions obligates the court to ensure so far as its practical that cases are dealt fairly, expeditiously and proportionately for delay is always the enemy of justice.

The effect of these to the present application is the length of time expected to be taken to lodge and determine an appeal on the substance of the taxation.

The nature of the jurisdiction being exercised of the court justifies each of the conditions set out under the Rule on stay of execution to be met. On the basis of the foregoing provisions, the courts have on several occasions determined from the start the critical principles to purpose the court in refusing or granting stay of execution **Butt v Rent Restriction Tribunal (1979) KLR. In time with substantial loss, the court in James Wangalwa & Another v Agnes Naliaka Cheseto (2012) EKLR and Kenya Shell Ltd v Kibiru & Another c. a. No 97 OF 1986, the court observed inter alia,**

“The application for stay made before the High Court must demonstrate substantial loss as a fundamental ground to be proved by the applicant. These has to be beneficial of substantial loss to the present, earlier in the matter of paying of the damages awarded which would cause difficulty to the application itself, or because it would lose its money, if payment was made since the respondents would be unable to pay the money”

It follows therefore from the facts of this case the court has nothing to preserve. The preservation of the res is no longer in the custody of any of the parties as the monetary judgment was set aside by this court. Arising from the facts as found herein I hold that the applicant has not demonstrated substantial loss or existence of special circumstances which would entitle him to special leave to appeal and a stay order of execution. The essence of an order for stay of execution is to maintain status quo to prevent a party from suffering substantial loss which may not be compensated by way of damages. This approach in adjudication of applications on stay is significant in many ways; In one respect to ensure, the applicants right of or the appeal is successful is not rendered nugatory or is to preserve the res pending the appeal. It must be noted that the applicant has only one ground in his favor that of excising his constitutional right of appeal. All other grounds for purposes of this case remain in favour of respondent. The question that has to be decided by the Deputy Registrar would simply form the basis of an appeal to a superior court. A stay of execution being equitable remedy must strike a balance between the competing interest of the parties to a ligation under pinned principally on the right to a fair hearing in article 50 of the constitution. It means that if the court grants stay, it would entail in my respectful view denial of right to the respondent for an opportunity to canvass the issues before the Deputy Registrar as directed by the court.

In giving effect to overriding objectives in Section 1(A) and 1 (B) of the Civil Procedure Act and the principles discussed in the above cases there is no evidence that the applicant would suffer prejudice or substantial loss if special leave to appeal on the stay of execution is declined. I hasten to add that the court in granting stay would in effect negate the order for re-taxation of the bill of costs before the Deputy Registrar. Consequently, in light of the foregoing and considering all the issues, I disallow the application for leave and stay of execution with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF MAY, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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