



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO. E009 OF 2021

WEST MEDIA LIMITED.....1ST APPELLANT/APPLICANT

NIPPON ROYAL (K) LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

AUGUSTINE WANGUI MURIITHI.....RESPONDENT

(Arising from the judgement and Decree of Hon. A. Odawo SRM in Bungoma CMCC Suit No. 43/2020

delivered on 18th January, 2020)

RULING

Vide a Notice of Motion dated 11th February 2021 brought under the provisions of Article 159(2) (d) of the Constitution, Sections 1A, 1B, 3, 3A and 65 of the Civil procedure Act, Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules seeks the following reliefs;-

1. Spent
2. Spent
3. Spent
4. That pending the filing, hearing and determination of this appeal, there be stay of execution of the decree arising from the judgement of 18th January, 2021 in the Chief Magistrate's Court at Bungoma Civil Suit No. 43/2020.
5. That this honourable court be pleased to make such further or other orders as it may deem just, fair and reasonable in the circumstances and for the ends of justice.
6. That the costs of and incidental to the Notice of Motion do abide the outcome of the intended appeal.

The application is grounded on the grounds in the face of the motion and the supporting affidavit of Philip Muyoti, the 1st appellant's Director.

The applicant avers that judgement was entered by the trial court against the appellants on 18th January, 2021 without their knowledge. That the appellant's counsel was attending court on 8th February, 2021 on a different matter when he found the matter listed for hearing when all along they had known the matter was pending judgement. The purpose of the hearing on that day was an application by the auctioneer for his bill.

The appellant depones that if a stay is not granted, it will suffer irreparable loss as the respondent's physical and financial means are unknown, if the sum is paid and the appeal consequently succeeds, it will be difficult to recover and that the respondent can still recover the decretal sum if the appeal finally succeeds.

It is further deponed that the appeal shall be rendered nugatory if orders of stay are not granted, the appellants are ready to furnish security for the satisfaction of the decree and finally that it is in the interest of justice, fairness and equity that the application is allowed.

The respondent filed his replying affidavit in opposition wherein he depones that the decree has not been extracted and certification of costs not done hence the application is premature, that the applicants are forum shopping as they did not obtain a stay in the trial court and

therefore the instant application is meant to circumvent the provisions of Order 42 rule 6.

That non-knowledge of the delivery of judgement is not a ground for issue of stay. He depones that he is a man of good financial standing should he be ordered to refund the decretal sum as opposed to the applicants who have admitted that it is not financially stable hence he will be greatly prejudiced since he cannot enjoy the fruits of the judgement. He depones that if the appellants go under, it will not be able to pay the decretal sum together with costs and interest and finally that the applicants have not demonstrated the loss they stand to suffer.

Parties agreed to dispose of the application by way of written submissions. As directed, parties filed their respective submissions through Mr. Wekesa for the applicants and Mr. Anwar for the respondent.

The applicant submits on the provisions of Order 42 Rule 6 that an applicant must satisfy the three conditions before grant of stay; (a) substantial loss may result to the applicant unless the order is made, (b) the application has been made without undue 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 him has been given by the applicant.

Counsel proceeds to submit on the specific grounds as enumerated above in line with the applicants supporting affidavit and the various authorities cited which the court has given due attention and consideration.

The respondent in his submissions raised two issues he deemed pertinent in determining the appeal; whether the applicant has met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules and whether the application dated 11th February, 2021 is merited.

Counsel relying on the provisions of Order 42 Rule 6 submits that that the applicant has not satisfied the conditions therein save that the application has been brought without undue delay.

Applications of such nature are governed by Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which states: -

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

i. 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;

ii. 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.”

In such application, the Applicant must satisfy the triple conditions thus: -

- i. Demonstrate that if the order for stay is not granted, he might suffer substantial loss.
- ii. That the application has been filed without unreasonable delay.
- iii. That the Applicant has offered security for the due performance of any decree or order that may be binding on him.

The second condition has been conceded to and needs no consideration.

On the first condition, the applicant depones that the respondents physical and financial means are unknown and that if the decretal sum which no means is substantial is paid, the respondent will not be in a position to refund or will be difficult to recover if the intended appeal is successful, the appellants core business in the media services has been adversely affected by Covid-19 and its operations shall be impaired, that the respondent has not disclosed the source of income he shall use to refunds the decretal sum if the appeal finally succeeds and that the respondent shall still recover the decretal sum together with interest should he appeal fail.

Counsel further invited the court to consider the peculiar circumstances caused by the negative ravages of Covid 19 Pandemic. The case of **Stanley Mugweru Muchira & 2 Ors Vs John Muthike Muchira (2020)eKLR** has been cited.

The respondent on the other hand depones that he is a man of substance having shares worth over Kshs 761,000/= together with land and properties worth well over the decretal sum. Counsel cites the authorities in **Wilfred Nyawira Maina V Peterson Onyingo Gichana (2015)eKLR** and **Josephat Nikasio Vs Donald Masika (2020)eKLR** in support of his proposition.

That the applicant admits that the Covid-19 pandemic has adversely affected its core business and therefore, even if granted stay, it shall not be in a position to pay the decretal sum if it goes under.

The court is alive to the legal provisions governing grant of stay orders. It is no doubt that this entails a delicate balancing act. The respondent is entitled to enjoy the fruits of his judgement while the appellant is entitled to exhaust the appellate processes.

In *Kenya Hotel Properties Limited V Willesden Investments Limited (2007) eKLR* the Court of Appeal stated:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

The court having carefully considered the submissions and the authorities cited, the court finds that this condition has been met.

On the issue of security for the due performance of the decree, the applicant in paragraph 19 of his affidavit depones that it is ready and willing to furnish security by way of guarantee or as directed by court.

The respondent argues that this is not enough in light of the appellant’s admission that Covid-19 has negatively impacted on its core business.

Given the parties’ respective positions and the fact that the first issue is in favour of the applicant, I shall make the following orders.

For the reasons given this court makes the following orders; -

1. The application dated 11th February, 2021 is hereby allowed, on the following conditions:

- a) The applicant to deposit the entire decretal sum in an interest earning account in the name of both counsel for the parties within **Thirty (30) days** from the date of delivery hereof.
- b) In default of (a) above, execution to proceed.
- c) The applicant/ appellant to prepare and serve the Record of Appeal within **Sixty (60) days** from the date hereof.

2. Costs of this application shall abide by the outcome of the intended appeal.

It is so ordered.

DATED AT BUNGOMA THIS 19TH DAY OF MAY 2021

S.N RIECHI

JUDGE