



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E035 OF 2020

YUASA INTERNATIONAL LIMITED.....APPELLANT

VERSUS

GILBERT MWONGERA MUTWEMERI.....RESPONDENT

RULING

1. Before the Court is an application dated 16th December 2020 seeking stay of execution of the Judgment and/or Decree delivered on 19th November 2020 by Hon. E. M. Auka (SRM) in Nkubu CMCC No. 45 of 2011.

2. The Application is supported by the grounds on the face of it and by the supporting affidavit of John Muthomi, the Applicant's Advocate. It is averred that there was imminent threat of execution of the Judgment delivered on 19th November 2020 as the 30 days stay of execution was about to lapse; That the Appeal will be rendered nugatory if stay was not granted; That the Respondent is a person of straw and may not be in a position to make good any loss or damage suffered if the decree is enforced and the Appeal ultimately succeeds; That the Appeal is meritorious with a high chance of success; That the Application has been brought without undue delay; That the Applicant is ready and willing to offer security for the due performance of the decree.

3. The application is opposed by the Respondent vide his replying affidavit sworn on 29th December 2020. The Respondent avers that the Applicant has not fulfilled the conditions for grant of stay of execution as per the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules; He would not oppose the application if the Applicant deposits the decretal sum of Kshs1,112,000/= in a joint interest earning account pending the hearing and determination of the Appeal; The Appeal has no chances of success as the Applicant leased his vehicles illegally even after he had paid over two thirds of the purchase price as he had bought them under the Hire Purchase Act; That the law provides that once a party has paid over two thirds of the purchase price, the purchaser cannot seize the vehicles without a court order.

Issue for Determination

4. The only issue for determination in the instant application is whether or not the Court should grant the Applicant stay of execution pending hearing of the Appeal.

Determination

5. The test for applications for stay of execution in the High Court is, respectfully, set out in Order 42 Rule 6 of the Civil Procedure Rules. The provisions therein apply both to the first instance courts (including the High Court) and to the High Court as a first appellate court. The court has power to grant a stay of execution on conditions that the Applicant demonstrates that –

- a) substantial loss will result to applicant if stay is not granted; and
- b) security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and
- c) the application has been brought without unreasonable delay.

Substantial Loss

6. The first tests under Order 42 Rule 6 is whether the Applicant has demonstrated that he is likely to suffer substantial loss should stay not be granted. To urge his application, the Applicant has averred that the Respondent is a person of straw and may not be in a position to make good any loss or damage suffered if the decree is enforced and the Appeal ultimately succeeds. The Respondent in his response did not address this matter.

7. Case-law authorities have held that in such applications for stay, once an Applicant raises doubt as to the Respondent's ability to settle the decretal sum, the burden shifts to the Respondent to show that he has the means to pay since that is a matter which is peculiarly within his knowledge as per Section 112 of the Evidence Act. See *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR and *Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020*.

8. In the absence of any indication from the Respondent as to his ability to pay the decretal sum, this Court finds that the Applicant has demonstrated the likelihood of suffering substantial loss.

Security for due performance of decree

9. The Applicant has indicated its willingness to offer security for the due performance of the decree. The Respondent has expressed its willingness to allow the application on the condition that the security is deposited. This Court also finds that it would be in the best interests of justice to allow the application on condition that security is provided.

Delay

10. Judgment in the trial Court was delivered on 19th November 2020 and the instant application was brought on 16th December 2020, about a month later. This Court does not find that there was any undue delay on the part of the Applicant.

Arguable Appeal

11. Although the rules applicable to stay applications in the High Court do not expressly provide for it, the test applied by the Court of Appeal under its Rule 5(2) (b) applications - whether or not there is an arguable appeal - is relevant consideration to weed out frivolous applications. However, an arguable appeal is not one which must necessarily succeed. The appeal herein against a judgment and/deed of the Chief Magistrates' Court allowing a claim for sums allegedly paid under a Hire Purchase Agreement and dismissing the Applicant's counter claim is an arguable appeal.

Orders

12. Accordingly, for the reasons set out above the court makes the following orders:

i) The court grants an order for stay of execution of the Judgment and/or Decree delivered on 19th November 2020 by Hon. E. M. Auka (SRM) in Nkubu CMCC No. 45 of 2011 pending the hearing and determination of the appeal.

ii) The Applicant shall within Thirty (30) days deposit the sum of Kshs1,112,000/= in a joint interest earning account to be opened in the joint names of the parties' Counsel.

iii) In default of the deposit as per order ii) above, the stay of execution herein granted shall lapse and be of no effect.

iv) The costs of this application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S John Muthomi & Co. Advocates for the Applicant

M/S L. Kimathi Kiara & Co. Advocates for the Respondent.