



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E162 OF 2021

CHINA WU YI COMPANY LIMITED...APPELLANT/APPLICANT

-VERSUS-

DAVID MWANGI NJURU.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 26th March, 2021 brought by the appellant/applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of **Esther Waiya**, Legal Assistant with Metropolitan Cannon General Insurance Limited, being the insurer of the applicant's motor vehicle registration number KCM 287Y. The applicant sought an order for a stay of execution of the judgment and decree in Milimani CMCC No. 347 of 2019 pending the hearing and determination of the appeal against the aforesaid judgment.
2. To oppose the Motion, the respondent put in a replying affidavit he swore on 22nd April, 2021.
3. The Motion was canvassed by way of written submissions.
4. I have considered the grounds set out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion, the rival submissions and authorities cited.
5. The guiding provision in considering an application seeking an order for a stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the three (3) conditions to be satisfied in order for an application for stay to succeed.
6. The first condition is that the application must have been made without unreasonable delay. In her supporting affidavit, Esther Waiya states that there has been no unreasonable delay in bringing the instant Motion. The respondent did not touch on this principle in his replying affidavit.
7. From the record, it is apparent that none of the parties availed a copy of the impugned judgment to this court. Nevertheless, going by the averments made by the parties, the judgment was delivered on 5th March, 2021, whereas the instant Motion was filed on 26th March, 2021. In my view, this does not constitute inordinate delay.
8. Under the second condition, the applicant is required to show to this court's satisfaction the substantial loss it stands to suffer if the order for stay is denied. In its grounds in support of the Motion, the applicant argues that unless the order for stay is granted, the respondent is likely to execute the decree thereby resulting in substantial loss. Moreover, in its submissions the applicant contends that the respondent may not be in a position to refund the decretal amount if the same is paid out to him and the appeal succeeds, citing the case of **Agro Chemical Sacco Society Ltd v Vincent Wasonga Wandey [2010] eKLR** in which the court rendered itself thus:

“In the circumstances of the case, I do agree with the applicant that in the event of successful appeal, the respondent may not readily pay back the money, and this will no doubt cause loss to the applicant. I am in this guided next by the opinion of Sir John Donaldson MR in the case of ROSENGRENS –VS- SAFE DEPOSIT CENTRES LTD (1984) 3 All E.R 198 which was adopted with approval in NDUHIU GITAHU AND ANOTHER –VS- ANNA WAMBUI WARUGONGO (supra) he stated:

“We are faced with a situation where a judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiffs ... It is our duty to hold the ring even handedly without prejudicing the issue pending the appeal ...”

9. In reply, the respondent avers that he is lawfully entitled to enjoy the fruits of his judgment and that being a man of means, he is capable of refunding the decretal sum in the event of a successful appeal. The respondent went on to submit that the applicant has not demonstrated the substantial loss it stands to suffer and cites *inter alia*, the case of **Vincent Muyuka Ashiundu v Action Aid Kenya [2005] eKLR** where the court held that the burden of proving inability of a respondent to refund the decretal sum upon a successful appeal lies with the applicant.

10. Upon considering the rival positions taken, I read the copy of records and the current insurance sticker relating to the respondent's motor vehicle registration number KCK 071Z-CRV annexed to his replying affidavit as "DMN 3". I observed that none of them indicated the actual value of his motor vehicle. Furthermore, the respondent did not avail a valuation report to ascertain the current value of the said motor vehicle.

11. Suffice it to say that the question on who has the burden of proof on the issue of refund of the decretal sum was aptly discussed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held thus:

"Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge..."

12. In the absence of anything to indicate or ascertain the respondent's financial capacity, and upon considering the interest of justice, I am satisfied that the applicant is likely to suffer substantial loss should the order for a stay of execution be denied.

13. In respect to the third and final condition which is the provision of security for the due performance of the decree/order, the applicant indicates its readiness and willingness to comply with the conditions to be set by this court.

14. In the end, the instant Motion dated 26th March, 2021 is allowed in terms of prayer 3. Consequently:

a. There shall be a stay of execution of the judgment delivered on 5th March, 2021 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 30 days from today, failing which the order for stay shall automatically lapse.

b. Costs of the application to abide the outcome of the appeal.

Dated and signed at Nairobi this day of, 2021.

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A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY 2021.

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J. K. SERGON

JUDGE

In the presence of:

Mrs. Kalama for applicant

Mrs. Njuru for respondent