



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCA NO. E045 OF 2020

GEORGE MUORIA.....1ST APPELLANT

BEATRICE NYAKIO MUTHARIA.....2ND APPELLANT

-VERSUS-

SYNERGY INDUSTRIAL CREDIT LIMITED.....1 RESPONDENT

EXCEL HOLDINGS LIMITED.....2ND RESPONDENT

RULING

(To the Appellants/Applicants Notice of Motion dated 28th October 2020)

1. The 1st Respondent herein, was the plaintiff before the Lower Court where it sued the Applicants/Appellants seeking the payment of the arrears arising out of a hire purchase agreement. The trial court entered judgment in favour of the 1st Respondent in the sum of Kshs. 7,980,000/=. Aggrieved by the said judgment, the appellants filed the instant appeal and application dated 28th October 2020 wherein they seek an order for stay of execution pending the hearing and determination of the appeal.
2. The application is premised on the grounds set-out on the face of the Notice of Motion and supported by the 1st Applicant's affidavit wherein he avers that they will suffer substantial loss and that the appeal will be rendered nugatory unless the prayers sought in the application are granted.
3. The applicants' case is that they entered into a hire purchase agreement with the 1st Respondent for a total amount of Kshs. 7,980,000/= to be paid over hire purchase of motor vehicle Registration Number KAV 249M and ZC7843. They contend that they had already paid the 1st Respondent Kshs. 4,806,261/= out of the total sum of Kshs. 7,980,000/= and that the 1st Respondent had through a demand notice admitted that the balance owed to them was Kshs. 3,173,739/=.
4. The 1st Respondent opposed the Application through the Grounds of Opposition dated 6th November 2020 and the Replying Affidavit sworn by its Legal Officer **Mr. Jacob Meeme** who avers that the issues sought to be addressed by the appeal have already been conclusively determined through the application for review filed by the applicants before the Lower Court and that the only recourse available to the Applicants would have been an appeal on the Ruling on the application for review.
5. Parties canvassed the application by way of written submissions which I have considered. I find that the main issue for determination is whether the applicants have made out a case for the granting of orders for stay of execution pending appeal.
6. The principles governing the granting of orders for stay of execution pending appeal are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* as follows: -

“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 applicant 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 applicant.”

7. In *RWW vs EKW [2019] eKLR*, the court discussed the purpose of an order for stay of execution pending appeal and held 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.*”**

9. 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.”

8. In *Butt vs. Rent Restriction Tribunal [1982] KLR 417* the court gave guidance on how a court should exercise this discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

9. In the instant case, it is not in dispute that the application was filed without unreasonable delay in view of the fact that the impugned judgment was delivered on 21st August and the application filed two months later on 28th October 2020.

10. Turning to the issue of substantial loss, I note that the decree in question is a money decree of the sum of Kshs. 7,980,000 which the applicants contend ought to have been Kshs. 3,842,740 as they claim that they had already paid Kshs. 4,806,261 to the 1st Respondent.

11. In *Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR*, it was held that to show that the Appellant stands to suffer substantial loss, it must be demonstrated that the Respondent will not pay the money back if the Appellant succeeds in his appeal. He relies on the case of *Stanley Karanja Wainaina & Another vs Ridon Anyangu Mutubwa (2016) eKLR*.

12. In *Nairobi Civil Appl. No. 238 of 2005, National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another (UR)* the court stated: -

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to matter which is peculiarly, within his knowledge.”

13. In the present case, the applicants did not state that the respondents will not be in a position to reimburse the decretal sum should the same be paid to them and the appeal turns out to be successful.

14. As regards security for the due performance of the decree, the applicants submitted that since motor vehicle registration number KAV 249M and ZC7843 that is the subject matter of the suit is registered in the joint names of the Applicants and the 1st Respondent who has the custody of the logbook, the said logbook is sufficient security for costs. The applicants further submitted that they are not qualified to exercise the right to purchase the motor vehicle since they had not paid at least two-thirds of the hire purchase price. It was the applicants case that the property in the subject motor vehicle belongs to the 1st Respondent.

15. In *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd [2019] eKLR*, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.

16. Courts have taken the position that in considering whether or not to grant orders for stay of execution pending appeal, the right of the decree holder, to the fruit of the judgment, must be weighed against the right of the applicant to access justice by exhausting his right of appeal. The court is therefore required to take into consideration the likely effect of granting the stay on the proceedings in question and in doing so always opt for the lower rather than the higher risk of injustice. This is the position that was taken by **Warsame J.** (as he then was) in **Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

17. Guided by the finding in the above cited decision I find that in the circumstances of this case and considering that the applicants concede that they owe the 1st respondent the sum of Kshs. 3,842,740, coupled with the fact that it is not disputed that the 1st respondent is a co-owner of the motor vehicle that is the subject of the debt in dispute, I find that it will be just and fair to allow the instant application albeit subject to conditions that will ensure that the 1st respondent’s right to the fruits of the decree is protected.

18. Consequently, I grant the following final orders:

a) That there shall be stay of execution of the decree issued by the trial court on 21st August 2020 in Milimani CMCC 2340 of 2017 pending the hearing and determination of the appeal subject to the following conditions.

i) That the applicants shall within 30 days from the date of this ruling, deposit as security, the sum of Kshs. 1.5 million, in an interest earning account, in a banking institution of repute, to be held in the joint names of counsel for both parties.

ii) That in the event of failure to comply with condition no. a) i) hereinabove, the stay orders granted herein shall automatically lapse and/or be vacated in which case, the 1st respondent will be at liberty to execute the decree.

b) The costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Mukala for Applicants.

Ms Mutava for 1st Respondent.

Court Assistant: Sylvia