



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 283 OF 2018

THE STANDARD MEDIA GROUP LIMITED.....APPELLANT

VERSUS

MILCAH MWENDE KIMAKO – HAUSER.....1ST RESPONDENT

KENNEDY WAMBUA HAUSER.....2ND RESPONDENT

JUDGMENT

1. The appellant, **Standard Media Group Limited** (the Applicant) approached this court vide a Notice of Motion application dated **1st March, 2021** seeking orders of stay of execution of the Judgement/Decree issued on **7th December, 2018**, pending hearing and determination of the instant appeal.
2. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn on **1st March, 2021** by **Ms Milicent Ng’etich** and the supplementary affidavit sworn by the same **Ms. Milicent Ng’etich** on **28th May 2021**.
3. The Respondents has opposed the same via a **Replying Affidavit** sworn by their counsel **Mr. Randolph M. Tindika** on **22nd April, 2021**.
4. By consent of the parties, the application was canvassed by way of written submissions. The Applicant filed its written submissions on **1st July, 2021**, while the Respondents filed theirs on **6th July, 2021**.

The Applicant’s Submissions

5. In their submissions, the Applicant’s Counsel has framed three issues for determination. These are:

- whether the application is merited;***
- whether the application has been made in good time;***
- whether the appeal will be rendered nugatory if the prayers in this application are not granted.***

6. On the first issue, the Applicant has submitted that the application seeks to preserve the decretal amount issued by the lower court which was deposited in a joint account in the names of the two firms representing the parties in compliance with the ruling of the court. The Respondents executed an order allowing the bank to release Kshs. 5,061,153.00 and the bank released Kshs.3,900,000, leaving a balance of Kshs.1,161,153.00. It was the Applicant’s submission that it is still exposed to execution by the Respondent which is prejudicial, hence rendering its appeal nugatory. It is for the above reason that it prays for this application to be allowed.

7. On whether the application was made in good time, the Applicant has submitted that the application was made without unreasonable delay since the Judgment was delivered on **2nd February, 2021** and the application made on **1st March, 2021**.

8. Finally, on whether the application will be rendered nugatory if the application is not granted, the Respondent claims that there has been part execution of the decree herein pursuant to the court order issued on **17th February, 2021**. That in any event, the execution was finalized as claimed by the Respondent’s counsel then they would not suffer any prejudice if the stay order is granted. Reference has been made to the case of **Butt –vs- Rent Restriction Tribunal [1982] KLR**, where the court of appeal held that discretion ought to be exercised in a manner

that would not prevent an appeal.

9. Further, the counsel for the Applicant has submitted that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal is exercised without prejudicing the Applicant as the appeal would be rendered nugatory if there is no stay. It was their submission, that even though there has been partial fulfilment of the decretal sum, loss would be suffered if the appeal succeeds and the remaining amounts are not preserved. The Applicant has urged this court to allow the application since it has met the twin principle for an order of stay.

The Respondent's Submissions

10. The Respondent filed their written submissions dated **6th July, 2021** and they have submitted therein that the application is brought under the provisions of **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules** and from the reading of the above mentioned provision, an Applicant seeking stay must satisfy three mandatory conditions which are;

- i. demonstrate that it will suffer substantial loss if the order is not granted;***
- ii. application ought to be made without undue delay;***
- iii. provision of security sufficient for the due performance of the decree in the matter appealed against.***

11. The Respondents aver that the Applicant's statement that the decretal sum is secured in a joint account is not true. It is their submission that the said amount was paid out pursuant to a court order. Further, the Applicant has not demonstrated the mandatory requirement of the substantial loss it will suffer if the application is declined. The Respondents have cited the case of **Kenya Power & Lighting –vs- James Mutithi Mwaniki [2018]eKLR**, where the Honorable Judge held as follows;

“On substantial loss, the Applicant argues that it may suffer enormous losses if its assets are sold in execution of the decree. It is further stated that the Respondent has no financial ability to reimburse the decretal amount. The burden is on the Applicant to satisfy the court that the Respondent is a man of straw lacking the capacity to refund the decretal amount. In the MASISI MWITA case relied on by the Respondent the court held:-

No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has levied and completed, that is to say, the attached properties have been sold, as in the case here, does not in itself amount to substantial loss under Order 42, Rule 6 of the CPR. This is so because execution is a lawful process.

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the Appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs Chesoni.

The issue which arises is whether the Applicant has demonstrated substantial loss. Except the risk of execution which is a lawful process, the Applicant has not shown any other factors which may lead to irreparable loss. I agree with the MASISI MWITTA case (supra) that the Applicant needs to demonstrate that he will suffer irreparable loss in the event that the orders are denied.”

The Respondents have submit that since the Applicant has failed to allege or demonstrate that it will suffer any loss then the current application should be dismissed with costs to the Respondents.

12. In conclusion, it is the Respondents submission that the last mandatory requirement is with regard to the provision of security for the due performance of the decree which might ultimately be binding upon the Applicant. The Respondents have cited the case of **Chase Bank (K) Ltd –vs- Peter Karugo Kariuki [2019]eKLR**, where the judge said;

“I note that the application for stay of execution was filed timeously. The Applicant however failed to offer security and to show how it will suffer substantial loss if the orders sought are not granted. It put too much weight on the provisions of Section 56(3) of the Kenya Deposit Insurance Act and by so doing lost sight of and failed to comply fully with the provisions of Order 42 rule 6 of the Civil Procedure Rules. It is therefore my finding that the application is incompetent. It is hereby dismissed. The costs of the application are awarded to the Respondent.”

13. Counsel has therefore urged the court to dismiss the application since the Applicant has failed to satisfy the two mandatory requirements for stay of execution as submitted. However, he has gone on to submit that should the court be inclined to allow the application, then the Applicant should be ordered to deposit the balance of the decretal sum in an interest earning account in the joint names of the advocates herein within 14 days of the ruling.

Analysis and Determination

14. I have considered the application, affidavits in support and the response together with the submissions by the parties herein. I have also considered the decisions relied on by either party. I find that the only issue for determination is whether to grant or refuse to grant stay of execution being sought by the Applicant herein.

15. An application for stay of execution is granted or denied under well settled principles. These principles are provided for under **Order 42**

Rule 6 of the *Civil Procedure Rules*, which the relevant part states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub rule (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.

16. The principles guiding the grant of a stay of execution pending appeal are provided for under **Order 42 Rule (2) of the Civil Procedure Rules** as encapsulated above. Against this backdrop, it was rightly stated in the case of **Antoine Ndiaye –vs- African Virtual University [2015]eKLR**, that an Applicant seeking for stay of execution of a decree or order pending appeal is obliged to satisfy the certain conditions namely:-

i. that substantial loss may result to the Applicant unless the order is made;

ii. that the application has been made without unreasonable delay, and;

iii. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

17. I shall first deal with the issue of whether the application was filed timeously first. The rule requires that an application for stay should be filed without delay. In this case, the Judgment sought to be appealed was issued on **2nd February, 2021** and considering that the application was filed on **1st March, 2021**, in my view the application was filed within a reasonable time.

18. As to what substantial loss is, it was observed in the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto[2012] eKLR**, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

19. The Applicant herein has not mentioned or stated the substantial loss that it is likely to suffer if stay of execution is not granted. It has also not adduced any evidence to prove that it is likely to suffer substantial loss should the orders be denied

20. Under the provisions of **Order 42 Rule 6(1)(2) of the Civil Procedure Rules**, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the Applicant was required to provide the actual security for consideration by the Court as to its sufficiency. In the case of **Equity Bank Ltd –vs- Taiga Adams Company Ltd[2006] eKLR**, it was held that:-

“Of even greater impact is the fact that an Applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others.”

21. The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the Applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to the court stepping into the arena of dispute.

22. In my view, the Applicant has failed to sufficiently meet the three mandatory requirements to enable this court exercise its discretion and grant the stay of execution sought. However, in the circumstances of this case and interest of justice, I wish to adopt the position endorsed by the court in the case of **John Gachanja Mundia –vs- Francis Muriira Alias Francis Muthika & Another [2016]eKLR**, where it was stated that:

“... Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice

in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

23. I therefore proceed to hand the Applicant, the Applicant ought to be handed a lifeline and allow the application dated 1st March, 2021 on condition that it deposits the remaining decretal sum of Kshs.1,161,153.00 in an interest earning joint account in the names of counsel for the parties in the next fourteen (14) days. Failure to which, execution shall ensue.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance by and for either party

Court Assistant - Gitonga