



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.E187 OF 2021

AZAN MOTORS LIMITED.....1ST APPELLANT/APPLICANT

DICKSON OCHIENG ONYANGO.....2ND APPELLANT/APPLICANT

VERSUS

GN (minor suing through mother ENM.....RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated 8th April 2021 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order for stay of execution of the further proceedings in CMCC No. 7555 of 2019 and the judgment delivered on 6th April, 2021 pending the hearing and determination of the appellant's Appeal herein.
2. The respondent opposed the Motion by filing the replying affidavit sworn by her advocate, Caroline Chepkorir Kibiwott on 12th May 2021.
3. The parties were directed to file written submissions. At the time of writing this ruling the applicants had not filed their submissions.
4. A brief background of the matter is that the respondent instituted a suit against the applicant seeking for general and special damages plus the costs and interests arising from a road traffic accident.
5. Upon hearing the parties, judgment delivered on 6th April 2021 was entered in favour of the respondent. Being aggrieved by the aforementioned decision the applicant appealed to this court to challenge the decision.
6. In their affidavit filed in support of the motion dated 6/4/2021, the applicant's counsel stated that unless the orders for stay of execution of the decree pending appeal are granted the respondent is likely to execute judgment of the subordinate thereby rendering their appeal hopeless.
7. He avers that they are able and willing to comply with stay conditions in form of a bank guarantee as the company is currently in short of liquid cash owing to the effects of the covid 19 pandemic that affected cash flow.
8. He contends that no prejudice will be occasioned on the part of The respondent that cannot be undone by way of costs if the orders sought herein are granted.
9. In response, Ms. Caroline Jepkorir Kibiwott, learned counsel for the respondent, claims that the applicant has failed to prove substantial loss because they have not presented any tangible evidence to persuade this court that it will occur, and that the respondent will indeed suffer loss if the application is granted because she will be prevented from enjoying the fruits of her judgment.
10. The respondent contends that while the applicants indicated in their application that they are willing to offer a bank guarantee from Diamond Trust Bank as security, they believe that this is insufficient because it may prevent the decretal sum from attracting interest and there is a risk of the bank failing to honor the guarantee.
11. It is her submission that the applicants have not demonstrated in any way that there exists an arguable appeal
12. The guiding provision in considering an application seeking for an order for stay of execution is Order 42, Rule 6(2) of the Civil

Procedure Rules which sets out the following conditions in determining an application for stay:

- a) The application should have been brought without unreasonable delay;**
- b) The applicant must demonstrate the substantial loss to be suffered; and**
- c) There must be provision of security for the due performance of the decree or order being appealed against.**

13. On the first condition, the applicant avers and submits that the Motion has been timeously filed. From my study of the record and the impugned judgment, I note that it was delivered on 6th April, 2021 which is two days prior to the filing of the instant Motion. I therefore find that there has been no unreasonable delay in bringing the Motion.

14. Under the second condition on substantial loss, it is apparent from the Motion that the applicant avers that the Respondent is likely to execute judgment by the subordinate thereby rendering the appeal herein hopeless and that its right to be heard, thereby resulting in substantial loss.

15. The Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1979] eKLR** when it held that in considering an application for a stay of execution, the courts ought to exercise their discretion in a manner that will not render the appeal in question nugatory, if successful.

16. It is the submission of the respondent that the appellant has not demonstrated the substantial loss she would suffer if the order is denied since there is no evidence that execution will follow.

17. I also observed that the Motion; supporting affidavit of advocate Kevin Ngunjiri; and the memorandum of appeal, that the award of damages is one of the issues to be challenged on appeal, since the applicant is of the view that the same is manifestly excessive.

18. I am also alive to the reality that unless the applicant is granted an opportunity to defend its case, it stands to be condemned unheard, thereby undermining the dictates of substantive justice and violating the applicant's constitutional right to be heard on its defence in the dispute before the same is conclusively determined.

19. From the foregoing, I am convinced that the applicant has reasonably shown the substantial loss it may suffer should the order for a stay of execution be denied.

20. In respect to the third and final condition, the applicant expressed its willingness to comply with the stay conditions in the form of a bank guarantee by their bank to wit Diamond Trust Bank Limited.

21. In the end therefore, the Motion dated 8th April, 2021 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:

- a) There shall be a stay of execution of the ruling delivered on 28th April, 2020 and all consequential on the condition that the applicant deposits the decretal sum in an interest earning account in the joint names of advocates or firms of advocates appearing in this appeal within 30 days from today. In default, the order for stay shall automatically lapse.**
- b) Costs of the Motion to abide the outcome of the appeal.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent