



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 28 OF 2021

AWALE TRANSPORTERS LTD.....1ST APPELLANT

SHELTON OTEDO.....2ND APPELLANT

VERSUS

GEORGE KEGO KARIUKI

(Suing as the legal representative and administrator of the estate of

JOSHUA KIPTANUI-DCD).....RESPONDENT

(Being appeal from the Judgment of Honourable D. Milimu, RM

in Eldoret CMCC No.387 of 2019 delivered on 12th March 2021)

RULING

INTRODUCTION

1. By Notice of Motion Application dated 14th July 2021, Awale Transporters Ltd and Shelton Otedo (the Applicants herein) seek orders that;

a) Spent.

b) Spent.

c) There be an order of stay of execution of the decree in Eldoret CMCC No. 387 of 2019 pending the hearing of this application inter-parties.

d) This Honourable Court do set aside the Lower Court's order of 2nd July 2021 requiring the Appellants to pay the Respondent half of the decretal sum plus costs and deposit the other half of the judgment sum pending hearing and determination of this Appeal.

e) This Honourable Court do grant an order of stay of execution of the decree in Eldoret CMCC No. 387 of 2019 on condition that the Appellants deposit the entire decretal sum in a joint interest earning account of both Advocates on record pending the hearing and determination of this Appeal.

f) Costs of this application be provided for.

2. The motion is supported on the grounds on the face of it and the Supporting Affidavit sworn by **Mohamed Sheikh** on 13th July 2021. The deponent avers *inter alia* that he is the transport manager of Awale Transporters Ltd and that on 12th of March 2021 the trial court entered judgment against the Appellants and in favour of the Respondents. That the Appellants being dissatisfied with the whole judgment of the trial court preferred an appeal before this court.

3. The Applicants further averred that they filed an application dated 7th April, 2021 seeking orders of stay of execution pending appeal. The

Applicants contend that on 2nd July, 2020 the trial court allowed the application but on the following conditions; that the Appellants do pay half of the decretal sum to the plaintiff and deposit the balance in a joint interest earning account in the names of the advocates on record within (30) days from the date of the ruling failure of which execution to follow and the Appellants to pay the Plaintiff the costs of the suit within (30) days in default execution to issue. Consequently, being dissatisfied with the whole ruling the Appellants herein filed this instant application.

4. The Appellants contend that they are not liable for the causation of the accident and should not therefore be condemned to pay the Respondent. It is the Appellants' further contention that the Respondent is a man of straw and that the costs of the suit were to be shared equally by all the Defendants in the lower court and therefore the Appellants cannot be condemned to bear all the costs of the lower court. The Appellants are apprehensive that any money paid to the Respondent will not be recovered in the event the appeal succeeds.

5. The Appellants further contend that the appeal filed raises triable issues and has high chances of success. The Appellants however, have offered to deposit the entire decretal sum in a joint interest earning account in the names of the Advocates on record as security and further aver that in the event that the Respondent is successful, he will be able to receive his payment and in the event the Appellants are successful, they will be able to recover their money and that none of the parties will suffer prejudice. The Applicants urged this court to set aside the orders of the trial Court in the ruling delivered on 2nd July 2020 and prayed that this application be allowed. Further, the Applicants averred that this instant application has been filed timeously, without any delay and in utmost good faith.

6. The application was opposed via a Replying Affidavit of George Kego Kariuki, the Respondent, sworn 26th July, 2021 in which he deposed that the application is incurably defective, bad in law and devoid of merit. He further contended that the application is misconceived and untenable; and that the Applicants have not met the conditions to warrant the grant of stay of execution orders. Further, it was the Respondent's contention that the Appellants cannot evade liability since they never called any witness at the trial court to rebut the Respondent's evidence. The Respondent further averred that this instant application is only calculated to delay and prevent the Respondent from enjoying the fruits of his judgment; and also deny him justice.

7. I have carefully considered the application, the supporting affidavits, the grounds of opposition and the submissions filed as well as the authorities relied upon.

8. The principles guiding the grant of a stay of execution pending appeal are well settled. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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 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.”

9. In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 Rule 6 (2) of the Civil Procedure Rules to be satisfied that;

a) The applicant will suffer substantial loss if stay is not granted;

b) The application for stay has not been brought without undue delay; and

c) The applicant has provided security for the due performance of the decree.

10. The power of the court to grant stay of execution of a decree pending appeal is discretionary. However, the discretion should be exercised judiciously. See **Butt V Rent Restriction Tribunal [1982] KLR 417.**

11. With the above in mind, the Court must then determine whether the Applicants have established that they will suffer substantial loss and or have presented special circumstances that will warrant the Court to exercise its discretion and grant stay of execution.

12. In this application it is the Appellants' contention that the Respondent is a man of straw and therefore not able to repay the appellants the decretal sum, if paid to him in the event the appeal succeeds. Further, the Appellants contend that if half of the decretal sum, that is Kshs.407, 675/= is paid to the Respondent as ordered by the trial Court, it unlikely that Respondent will be able to refund the Appellants in the event the appeal succeeds and thus the Appellants stand to suffer substantial loss.

13. The Respondent on the other hand contends that the Appellants have not established that they would suffer substantial loss if the stay is not granted.

14. On whether the Appellants will suffer substantial loss, substantial loss would entail what was aptly discussed by **Kimaru, J** in **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

15. The mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. See **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63.**

16. Where the allegation is that the Respondent will not be able to refund the decretal sum the burden is upon the Applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others v. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.** The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed; but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.

17. Although the Applicants herein, have not disclosed their grounds for believing that the Respondent would not be able to refund the decretal sum herein, the Respondent on the other hand only mentions in passing that he is a man of means as he is a profound businessman and farmer but fails to place any evidence before this court to show that he has the capacity to repay the Applicants the decretal sum in the event that the appeal is successful.

18. Further it is not in doubt that an application seeking stay should be brought without inordinate delay. The judgment herein was delivered on 12th March 2021. The Applicants filed his Memorandum of Appeal on 1st April 2021 and the application of stay in the trial court was filed on 8th April 2021 and the ruling therein was delivered on 2nd July 2021. This instant application was filed on 15th July 2021. I am of the opinion that the application has been filed timeously.

19. The next issue for consideration is the issue of security. An Applicant ought to satisfy the condition of security.

In **Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR** it was stated that;

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”

20. In the instant application, the Applicants are willing to deposit the entire decretal sum in a joint interest earning account in the names of the parties Advocates on record as security.

21. Whether the Appellants, have an arguable appeal? Clearly this is a question to be answered by the appellate court. However, having perused the Memorandum of Appeal it raises some legal issues. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before court; one which is not frivolous.”

22. In conclusion, I find that the application dated 14th July, 2021 meets the threshold for the grant of stay of execution. I therefore order as follows;

1. That execution of the judgment and the ensuing Decree in Eldoret CMCC No. 387 of 2019: George Kego Kariuki V. Catholic Diocese of Eldoret & 2 Others be and is hereby stayed pending the hearing and determination of the intended appeal on condition that the entire decretal sum be deposited by the Applicants in an interest earning account in the joint names of Counsel for the parties within 21 days of the date hereof;

2. The ruling in Eldoret CMCC No. 387 of 2019: George Kego Kariuki V. Catholic Diocese of Eldoret & 2 Others delivered on 2nd July, 2021 is hereby set aside.

3. Costs of the subject application shall abide the appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER 2021

E. O. OGOLA

JUDGE