



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 200 OF 2007

MOHAMED SALIM SHAMSUDIN.....PLAINTIFF/RESPONDENT

VERSUS

TRISHCON CONSTRUCTION COMPANY.....DEFENDANT/APPLICANT

DHANJI VELJI.....INTERESTED PARTY

RULING

1. Through the application dated 2nd July 2019, the defendant/applicant and the Interested Party seek for following orders:-

1. Spent

2. That pending hearing and determination of this application, this Honourable court be pleased to order stay of execution of the decree and warrants of attachments and sale of LR No. 12833/5.

3. That the Honourable court be pleased to grant an order of stay of execution of the decree and warrants of attachment and sale LR No. 12833/5 pending hearing of the review application mentioned in the application and upon such terms and conditions as the Honourable court may deem fit to grant.

4. That the plaintiff be allowed to withdraw the sum of Kshs 11,926,713/- "without prejudice" to his rights under the application for review of the judgment of the Court of Appeal in the Civil Appeal (Application) No. 28 of 2013.

5. That the honourable court be pleased to refund Kshs 4,454,322/- to the defendant (Trishcon Construction Co. Ltd), and to uplift the Prohibitory Order dated 13th March, 2017 with respect to property known as L.R. 12833/5.

6. That the costs of this application abide by the outcome of the application.

2. The application is supported by the Interested Party's affidavit and is premised on the grounds that in a ruling delivered by this court on 4th July 2019, the Interested Party's application dated 11th February 2019 was dismissed on grounds of material non-disclosure and failure to deposit the decretal sum in an interest earning account.

3. The applicant states that he seeks stay of execution of the sale of his immovable property pending the hearing of review application in the Court of Appeal in Nairobi Civil Application No. 86 of 2013 wherein an order of stay of execution was granted on condition that the sum of the arbitral award of Kshs 16,381,035 is deposited in a joint interest earning account within 60 days.

4. The Interested Party avers that he filed an application on 30th October 2013 to review vary and/or set aside the ruling of the Court of Appeal but that through an order dated 19th October 2015, the Court of Appeal held that the orders of stay are already in force and cannot be set aside. He states that as at 17th October 2018, he had deposited Kshs 16,381,035 in a joint interest earning account in compliance with the order of the Court of Appeal but that despite the said compliance, an order of notification of sale of his property was issued on 6th August, 2018.

5. It is the applicant's case that unless stay orders are granted, the plaintiff might sell his property at a throw away price thereby causing him loss and damages. He contends that he has an arguable application for review at the Court of Appeal.

6. The respondent opposed the application through the grounds of opposition dated 14th October 2019 wherein he sets out the following grounds:-

- 1) That the application is frivolous, vexatious and abuse of the court process and a waste of judicial time meant to scuttle the realization of the Arbitral Award delivered on 26th May 2009.*
- 2) There are no stay of execution orders in the High Court or Court of Appeal.*
- 3) The Court of Appeal has already dismissed the appeal filed before it by the defendant and interested party herein.*
- 4) The Court of Appeal having already heard the defendant and Interested Party's Appeal and pronounced judgment, is functus officio and cannot grant a stay in this matter. Consequently, this court cannot also grant a stay.*
- 5) Further, no stay order is capable of being issued by a court of law against a negative judgment.*
- 6) There is no substratum upon which a stay of execution can be granted.*
- 7) There is no reason why the full sum held in the joint account cannot be released to the plaintiff/decree holder.*
- 8) This application is res judicata the issue of stay of execution having been determined by the High Court and Court of Appeal.*
- 9) The applicant is misleading this honourable court by claiming that he adhered to the orders of the Court of Appeal in civil Application No. 86 of 2013 when in fact, he was compelled to deposit the decretal sum by the Honourable Lady Justice Ngetich on the 18th December 2017 to stop an ongoing process of execution and pending hearing and determination of his application dated 1st December 2017 which application was dismissed by the Honourable Justice Makau on 31st January 2019.*
- 10) The defendant and the Interested Party seeks to continue denying the plaintiffs fruits of judgment.*
- 11) Litigation must come to an end.*

7. At the hearing of the application, **Mr. Shah** learned counsel for the applicants conceded that the applicants had lost the appeal before the Court of Appeal wherein costs of Kshs 2,033,783 were awarded to the respondent. Counsel submitted that following the decision of the Court of Appeal and considering that the applicants had complied and deposited the decretal sum in a joint interest earning account, part of the funds held in the said account ought to be paid to both the applicant and the respondent in line with the court order of 18th December 2017.

8. **Mr. Wandabwa**, learned counsel for the respondent submitted that both the applicant and the respondent are entitled part of the money held in the joint interest earning account. Counsel argued that the amount due to the respondent started accruing interest from May 2009 and that as at early 2019, the accrued interest was Kshs 29 million. He argued that the entire amount held in the account should be paid to the respondent.

9. Counsel submitted that the prayers sought by the applicant are contradictory as on one hand the applicant seeks an order of stay while on the other hand; he seeks an order for the release of the money held in the joint account. He submitted that there is no pending suit or appeal on which an order of stay would be founded and that an application for review cannot form a basis for an order of stay.

10. Counsel maintained that the decision by the Deputy Registrar allowing the execution cannot be revisited or faulted as an earlier application to vary the order was dismissed on 31st January 2019.

11. The respondents did not oppose the prayer for the release of the money held in the joint account.

12. Upon considering the application dated 2nd July 2019, the respondents grounds of opposition and the submissions made by the parties' counsel, I find that the main issue for determination is whether the applicant has made out a case for the granting of the orders sought.

Stay of execution.

13. Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows regarding stay of execution:-

(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 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

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

14. From the above provision, it is clear that orders for stay of execution may be issued on specified conditions pending appeal. In the present case, it was not disputed that the appeal that was pending before the Court of Appeal had already been determined in the respondent's favour. It is therefore my finding that no basis has been made for the prayer for stay of execution as the existence of an application for review cannot form a basis for stay of execution order.

Withdrawal of the money in the joint account.

15. Both parties were in agreement that the money held in the joint account together with interest, ought to be paid out to them in line with the court order of 17th July 2015. I have perused the said order and I note that it is worded as follows:

i. That the respondent are liable to pay the claimant Kshs 11,926,713/- which is the difference between the cost of completing the project works of Kshs 16,381,035/-, professional consultancy fees of Kshs 920,100/-, and amount due to the respondents for work done and materials on site of Kshs 5,2012,522/=, and the cost of the retained tools of Kshs 171,900/-.

ii. That the cost of this arbitration be shared equally on a 50/50 basis between the parties.

iii. That each party meet own costs on this arbitration.

iv. That taxation of costs be referred to the High Court for determination.

v. That interest at current marker bank rates on monies payable start to accrue at the expiry of 30 days of signing this award.

vi. That any party to the dispute may settle the Arbitrator's fees and cost as invoiced and recover the same from the defaulting party within 30 days from the date of signing hereof.

vii. Any aggrieved party may appeal within 30 days from the date of signing this Award.

16. That applicant conceded that following the said order, its appeal to the Court of Appeal was unsuccessful and that the respondent was awarded costs of Kshs 2,033,783 thereby increasing the amount due to the plaintiff to Kshs 13,960,496. On its part, the respondent contended that the interest due to it has accrued to Kshs 29 million.

17. I note that both parties were in agreement that the funds held in the joint account should be released to them. However in view of the varying positions taken by the parties regarding how much money is due to each party from the amount deposited in the joint account, I find that it will be necessary to take proper accounts of what is due to each party before an order for release of the funds can be effected. For this reason, I direct that the proper accounts be taken before Deputy Registrar on the amount due to each party after factoring the accrued interest.

18. In conclusion, I allow the application dated 2nd July 2019, albeit partly in the following terms:-

a) The amount deposited in account No. 030002061880 in Paramount Bank in the joint names of Andrew Wandabwa and Gopichadra & Company Advocate be paid to the parties herein in proportions specified in the order of 17th July 2015 upon the calculation of the accrued interests due and the costs of 2,033,783 awarded to the respondent.

b) I make no orders as to costs.

c) Parties are at liberty to apply.

Dated, signed and delivered in open court at Nairobi this 6th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for Wandabwa for plaintiff/respondent

Mr. Bansali Sanjay for the defendant

Court Assistant – Sylvia