



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 23 OF 2018

TSUSHO CAPITAL KENYA LTD.....1ST APPELLANT

TRINITY TRANSPORT & LOGISTICS LTD.....2ND APPELLANT

MOSES INDIAZI LUYAYI.....3RD APPELLANT

VERSUS

VIONA NASIMIYU NDOMBE.....RESPONDENT

R U L I N G

1. By an application by Notice of Motion dated the 22.05.2019 but filed on the 27.05.2019, the Appellant/Applicant seeks an order of stay pending appeal. The application is supported by the Affidavit of Joseph Nyandemu exhibiting the judgment of the trial court delivered on the 24.04.2019. In that judgment the appellants were found liable at 100% and damages were awarded in the aggregate sum of Kshs 8,481,249.

2. The grounds advanced to premise the application and disclosed on the face of the application as well as in the Affidavit in support were that the appeal is arguable and meritorious and that unless the stay sought is given the execution of the judgment would render the pending appeal nugatory. The arguability of the appeal is pursued on the basis that the 1st appellant was merely a financier of the offending motor vehicle who had no control over the persons using the same and therefore not vicariously liable in the cause sued upon.

3. Even though the judgment sought to be stayed has not been challenged by the current appeal, which is essentially an interlocutory appeal preferred prior to the delivery of the judgment, the appellant fears that nothing would stop having the judgment executed against it in which event no meaningful purpose would survive to merit pursuing the appeal. I get the appellant to say that the judgment against the appellant finds its foundation on the finding by the trial court subject of this appeal.

4. The application was resisted by the respondent by the grounds of opposition dated 01.09.2020 and filed in court on the same date in which the application is termed, incompetent, incurably defective and abusive of the court calculated to obstruct and delay the respondent from reaping the fruits of his litigation. It is additionally contended that by own ignorance the appellant did nothing to forestall the primary suit proceeding to conclusion and as at today the prayer in this appeal cannot be granted without setting aside the final judgment by which the 1st appellant was held 100% liable. In the respondent's view, the appeal has been overtaken by event and no prospects of it being rendered nugatory now exist.

5. Being an application under Order 42 rule 6 of the Act, the court must be satisfied that the applicant risks suffering substantial loss unless the stay is granted to preserve the substratum of the appeal and that the same applicant has moved without undue delay and provided security for the due performance of the decree should the appeal fail. I have equally appreciated the law that in monetary decrees, it is uncommon to render an appeal nugatory if there is demonstration that the decree holder can reconstitute the sums paid out if the appeal succeeds. I further give regard to the appreciation that there is indeed a final judgment against the appellant subsequent to this appeal being lodged and while it was pending hearing. It is however of note that the decision challenged in this appeal is the only basis upon the 1st appellant was retained as a party to the litigation and thus the foundation upon which the liability was adjudged against it. In the application yielding the decision now appealed against, the 1st appellant urged that being a financier of the motor vehicle alleged to have injured the respondent, it was not a proper party to be sued for it was not in control thereof nor over the driver.

6. On the facts disclosed in this matter, I entertain no doubt that the appeal is not the kind to be viewed as frivolous but I consider it arguable. Being arguable, I consider that it is only just that it gets its day in court and that the outcome there be preserved and not rendered worthless or futile. I consider that unless I grant stay, there would ensue execution and passage of the decretal amount to the respondent.

7. I do consider the decretal sum in the matter as not insubstantial and it would have sufficed for an affidavit by the respondent to

demonstrate her means and ability to effect a refund should the appeal succeed. No affidavit was ever filed and no advertence was made to such ability. There is as such no assurance that in the event the appeal succeeds, the respondent would be able to effect a refund. Without such assurance or just prospects, the pursuit of the appeal shall have been made nugatory and of no meaningful purpose but merely academic. Such would not be fair nor just. The court shall itself have spent its resources in vain and in most undesirable manner. That should not be the attribute of a court of law.

8. This court views the dissipation of the right to efficaciously access justice as one of the worst and very substantial losses a citizen may be put through and would in every event such prospects emerge seek to obviate the eventuality. The Kenyan courts have repeatedly and consistently held that the existence of substantial loss is the cornerstone to an application and grant of orders of stay pending appeal and I do find here that once that be established the journey by the applicant is substantially made. It then just remains for the court to consider how to secure the respondent as decree holder in the event the appeal fails.

9. In this matter the applicant has not offered any security for the due performance of the decree as anticipated by the words of order 42 Rule 6(2) b. However, the Rule must remain the handmaid of justice not a mistress and the discretion remains for the court to set terms that further and serve the interests of justice. Being a monetary decree, the interests of the decree holder would be best and fully secured by the deposit of the outstanding decretal at the disposal of the court or parties so that upon conclusion of the appeal the party entitled is not disadvantaged.

10. Accordingly, I direct that, as a condition for grant of stay pending the hearing and determination of the appeal, the appellant shall within 30 days from today deposit the due decretal sum into a joint interest bearing account in the joint names of the advocates for the parties.

11. In the end the Notice of motion dated the 22nd May 2019 is allowed, stay pending appeal is granted on terms of the said deposit. The costs of the application shall be in the appeal.

Dated, signed and delivered on line this 3rd day of **September 2020**.

P J O Otieno

Judge

FURTHER DIRECTIONS

1. Let the appeal be canvassed by way of written submissions. Let the Appellant file and serve submission within 21 days from today for the respondent to also file and serve own submissions within 7 days after service by the appellant.

2. Mention on 12/10/2020 for further directions.

3. Costs in the cause.

Hon. Justice P.J.O. Otieno J

03/09/2020