



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 85 OF 2009

ASWA DEVELOPERS & CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

COMPACT FREIGHT SYSTEMS LIMITED.....DEFENDANT

RULING

1. For determination is the Notice of Motion dated 20/3/2019 and seeking in the main an order that the defendant, as judgment debtor, be granted stay of execution of the Judgment dated 7/12/2018 pending appeal to the Court of Appeal.
2. The grounds put forth to justify being granted the orders as disclosed in the Notice of Motion itself and in the Affidavit of Anthony Ritho Kaburu sworn and filed in support thereof were that; being dissatisfied with the judgment, the judgment-debtor filed a notice of appeal against the whole of the judgment and that it stood to suffer undue hardship and irreparable damage if denied orders of stay for reasons that the sum involved is colossal and if paid out will force the judgment debtor into insolvency and closing of shop with no prospects of revival even by a court order.
3. In opposition to the application, the decree holder filed both grounds of opposition and a Replying Affidavit sworn by one Stephen Kinuthia Wangombe, a director of the decree-holder.
4. The contention made in the grounds of opposition were that on delivery of the judgment, the court heard and granted an informal application for stay hence it had exhausted its jurisdiction in that regard as the same has become *res judicata* and the court rendered *functus officio* and therefore the sole design of the application was to frustrate the plaintiff from enjoyment of the fruits of litigation and thus abuse the court process.
5. In the Replying Affidavit, the respondent contended that it was not for this court, but the court of appeal, to consider and determine the weight of the issues in the appeal and that mere pendency of the appeal does not operate as stay pending appeal. In addition, it was contended that there had not been demonstrated any sufficient cause nor substantial loss to be suffered by the applicant if stay is refused. The contention of the court being *functus officio* was reiterated as it was pointed out that no financial statements of the applicant had been exhibited to demonstrate that the sum is colossal to be capable of driving it into insolvency.
6. On security to be offered, the decree-holder/ respondent averred that the same was at the discretion of the court and not the applicant to determine security and that in the circumstances of the case, the matter having been in court for more than 10 years, it was only just that at least half of the judgement sum be paid out as the other half is deposited and that at the very worst the entire decretal sum be deposited into court as security for the due performance of the decree.
7. Pursuant to the directions of the court, parties filed respective written submissions. The applicant's submissions were lodged on the 24/2/2020 while those by the respondent were lodged on the 26/02/2020.
8. I have had the opportunity to read the submissions by both parties and appreciate both sides not to disagree on the principles of law applicable on the application of this nature. Both appreciate that it is the onus of the applicant to demonstrate that it stands to suffer a substantial loss to the extent of the appeal being rendered nugatory and that it has to offer such security, as the court may order, for the due performance of the decree appealed against.
9. There is the third consideration that the application need be brought promptly and without undue delay which I do not consider to be subject of argument in this matter because the judgment having been delivered on the 7/12/2018, the bill of costs was filed on the 22/2/2019 and the application itself was filed on the 21/3/2019. In my opinion the application for stay should be available for consideration when there is real and legal possibility of an execution ensuing. That I appreciate to be only possible once a decree is extracted and costs taxed. Short of that, after an order is issued pursuant to section 94 of the Act. Here, by the time the application was filed, costs were yet to be taxed and

therefore there was no real and legal prospects of an execution process ensuing in accordance with the law. For that reason, I take the view and hold that here the application was brought with promptitude, in fact even pre-emptively, and it cannot therefore be faulted for undue delay.

10. Having said so, my outstanding task should thus be to consider if the applicant has demonstrated substantial loss as being capable of visit upon him unless I grant stay. The duty is to the extent that the applicant proves that if stay is not granted and execution is allowed to proceed a state of affairs would result in an irreparable negation of the very essence and purpose of pursuing the appeal in that even a triumphant result will be no more than academic. It is that annulment of the very purpose of litigation that constitutes a substantial loss.

11. It is the discharge of that burden upon the applicant that becomes the cornerstone in an application for stay pending appeal. Without it, the applicant and his application get derailed off rail with no prospects of a come-back.

12. In ascertaining the prospects of substantial loss in a monetary decree the yardstick is whether the respondent is in a position to effect a refund should the appeal succeed after pay the decree has been settled. In **Kenya Shell Ltd versus Kibiru & Another (1986) KLR 410** the Court of Appeal was of the view that: -

“It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made.”

13. In this matter there is a monetary decree and the applicant is not alleging inability of the respondent/decree-holder to effect a refund but puts forward its own financial difficulties as the justification for seeking stay. That to me would be a new parameter for consideration and I doubt that it is the law. The applicant cannot use his own inability as the reason to keep a successful, litigant from his property in the decree.

14. I do find that, the financial difficulties of a judgment-debtor cannot be a reason to grant stay but could be the reason to refuse grant of stay. I say it could be a ground to refuse stay in that a person starrng at prospects of insolvency is not the same debtor to be entrusted with a judgment debt.

15. To entrust such a person with the debt by giving him more time may be to risk the misfortune befalling it before the appeal is heard and disposed of. I take the view that exposing a decree-holder to such a risk is to stand on its way from ever enjoying the fruits of its litigation.

16. In deciding whether or not to grant stay, a court of law strikes the delicate balance between the unconditional right of the appellant to approach the court and be heard on to appeal against the right of the decree holder to the fruits of the litigation as expressed in the decree. The order that the court ought to come up with should not tilt so much in favour of one as to injure the other side.

17. Here there is a decree grounded on a contract between the parties whose valuation was grounded upon an expert's assessment. That assessment was done way back in the year 2008, more than 12 years ago. I take the view that to continue to keep the money from the decree holder would be unfair and unjust to both side. To the respondent decree-holder, the money has been kept away from it for too long while to the appellant to continue shielding it from paying out the sum will only burden it with additional interest should the appeal fail.

18. In those circumstances, I do find that there being no substantial loss established as the cornerstone of grant of stay and being convinced that a grant of stay would visit more harm than good to both sides, I decline the application and order it to be dismissed with costs.

Dated, Delivered and Signed at Mombasa this 7th day of October 2020.

P.J.O. OTIENO

JUDGE