



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENTA

AT MOMBASA

CIVIL APPEAL NO.135 OF 2019

BAHARI (T) COMPANY LIMITED.....APPLICANT

-VERSUS-

ALIBHAI RAMJI INVESTMENT LIMITED.....DEFENDANT

JUDGMENT

1. The Applicant has now filed application dated **17th June, 2020** seeking the following orders:-

a) Spent

b) Spent

c) Pending hearing and determination of Mombasa Court of Appeal between Bahari (T) Company Limited (Appellant) and Alibhai Ramji Investments Limited (Respondent), there be a Stay of Execution of the Judgment/Decree granted herein on 4th June, 2020.

d) The costs of and incidental to this application abide the result of the said Appeal.

2. The **Notice of Motion** is premised **upon Seven(7) grounds** appearing on the face of it and supported by **the Affidavit** sworn on **17th June, 2020** by **Mehmood S. Jagani**, who is the Applicant's Director. The deponent avers that the Applicant being dissatisfied by the **Judgment** delivered on **4th June, 2020** has lodged an **Appeal** as well as requested for typed and certified copies of Proceedings and Judgment. Therefore, it is just and fair for **the Stay of Execution orders** to be issued pending hearing and determination of the **Intended Appeal** at the Court of Appeal.

3. The Applicant avers that if orders of Stay are granted, the **Appeal** shall be rendered nugatory, as the Appellant would have already been executed. Further, the Applicant avers that it is ready and willing to furnish any such security as the court may order for the due performance of the order and more particularly including depositing the **Log Book** of its machinery valued at **Kshs.4 million** in court.

4. In response to the application, the Respondent filed a **Replying Affidavit** sworn on **8th July, 2020** by **Mushtaqali Alibhai** who is described as the Respondent's Manager. He avers that the instant Application is bad in law, misconceived, ill intended and is an orchestrated attempt to escape liability and delay justice for the Respondent.

5. The Respondent avers that Applicant filed similar Applications seeking Stay in this Court on **11th July,**

2019, and this Court dismissed the said Application vide **Ruling** delivered on **23rd October, 2019** stating that the Applicant did not meet the threshold for grant of Stay of Execution.

6. The Respondent in response to the offer by the Applicant to deposit a

Logbook of its machinery worth **Kshs.4,000,000/=** contends that no assessment and/or **Valuation Report** to ascertain the value of the machinery or its status has been displayed. Further, the motor vehicle cannot be deemed good security as it is subject to tear and wear and cannot remain of the same value over time.

7. The Respondent avers that it has been in operation for decades and has financial capabilities to comfortably reimburse the decretal sum without wasting Judicial time. Therefore, no prejudice will be suffered by the Applicant in satisfying the decretal amount.

Rejoinder

8. Vide a **Further Affidavit** sworn on **13th July, 2020**, the Applicant avers that because of the **Covid-19 Pandemic**, Companies including the Respondent are undergoing difficult financial times and it will be difficult to recover the decretal amount if the same is paid out to the Respondents and that the allegations of the Respondent's financial capabilities to refund the decretal sum are mere allegation not backed by financial statements or copies of title deeds.

Analysis and Determination

9. This Court has carefully perused and considered grounds for the application herein and the Affidavits in Reply, submissions by the parties, and the annexures to the Affidavit filed.

10. The Applicant has indicated dissatisfaction with the Judgment of this Court. On substantial loss, the Applicant argues that the Covid-19 pandemic effect on businesses cannot be gainsaid and this Court ought to factor the special circumstances the Applicant finds itself in, and to curb the risk of the Applicant suffering substantial loss since the Respondent has indicated its intention to execute the **Judgment** delivered on **4th June, 2020** rendering the **Appeal** nugatory. The Applicant also submits that it is willing to abide as per any order for security as may be reasonable to fulfil in due compliance with the conditions set by this Court.

11. This Court made its finding vide **Judgment** delivered on **4th June, 2020**. Therefore, it would not want to go into the merits of the Appeal. While this Court is not being asked whether it could have been wrong in its appreciation of the Appeal, it is well aware that even where it is overly confident of its findings, those findings are subject to a decision by the Appellate Court. Therefore, this Court's duty would be to safeguard and preserve the subject of the Appeal. See **Siegfried Busch...Vs...MCSK [2013]eKLR:-**

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

12. Having found that it would best in the circumstances to preserve the *status quo* so as not to render the Appeal nugatory, this Court is of the view that Stay of Execution pending Appeal is a matter within the court's discretion, which discretion is to be exercised subject to the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules**, which provides:-

6.(1) No appeal or second appeal shall operate as a stay of

execution or proceedings 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 sub-rule (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.”

13. Similarly, in the case of Feissal Amin Janmohammed T/A Dunvia Fowarders...Vs... Shami Trading Co. Ltd, [2014] eKLR, Kasango J. stated as follows:-

“It is trite law therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made; that the application was made without unreasonable delay and that the applicant has offered proper security”.

14. Considering all the circumstances of this case, I note that Applicant has demonstrated that it will suffer substantial loss if Stay is not granted. This Court appreciates that most businesses have been hard hit with financial hardships during **this Covid -19** pandemic period. There is a Decree against the Applicant for the amount of **Kshs.3,994,968.60** which in this Court’s view, is colossal by Kenyan standards during the current **Covid -19** pandemic period and very few individuals will be in a position to pay without being overly destabilized. See Court of Appeal case of Job Kilach...Vs.... Nation Media Group & 2 Others, Civil Application No. Nai.168 of 2005.

15. This Court appreciates that the Applicant has offered to deposit a **Logbook** of its machinery in court taking into account that the Applicant is cash strapped during this **Covid-19** pandemic period. In the case of Focin Motorcycle Co. Limited...Vs... Ann Wambui Wangui & Another [2018] eKLR, where it was held 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 for stay.”

16. Similarly, in the case of Arun C Sharma..Vs.. Ashana Raikundalia T/A Rairundalia & Co. Advocates, Justice Gikonyo stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

17. It is noteworthy that every person is entitled to have a fair trial as envisaged under **Article 50(1)** of the **Constitution of Kenya**. The said **Article 50(1)** of the **Constitution of Kenya** provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

18. Hence, no person should be driven away from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party's access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction. Accordingly, having considered the parties' Affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court comes to the firm conclusion that there would be more injustice in the Applicant being denied an opportunity to ventilate its case on merit through the appellate system of the Country.

Disposition

19. For the foregoing reasons, the upshot of this court's decision was that the Appellant's **Notice of Motion** application dated and filed on **20th March, 2019** is merited and the same is hereby allowed in terms of **Prayer No.3** on the following conditions:-

a) THAT the Appellant shall deposit into court the original logbook in respect of Motor Vehicle KHMA602G within thirty (30) days from today together with signed transfer forms.

b) THAT the Respondent be at liberty to do a valuation of the subject property to ascertain its current value.

c) The Appellant is hereby directed to file and serve its Record of Appeal within ninety (90) days from today.

d) Costs of the application shall abide by the outcome of the Appeal.

It is so ordered.

DATED, SIGNED, and DELIVERED at MOMBASA on this 7th day of October, 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all Judgments and Rulings be pronounced in open Court.

D. O CHEPKWONY

JUDGE