



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 108 OF 2013

YUSUF ABDUL.....APPELLANT

VERSUS

SEA ANGEL SERVICE STATION LIMITED..... RESPONDENT

R U L I N G

1. On the 3/5/2017 this court delivered a judgment by which it allowed the appeal and set aside the decision of the lower court in whole and awarded the costs of the appeal to the appellant. That decision aggrieved the respondent who then filed an appeal to the Court of Appeal and it is reported, without rebuttal, that the appeal has been assigned serial number **CACA No. 116 of 2019**.

2. While that appeal is pending and even before the costs of the appeal have been taxed, the appellant is said to have demanded to be paid the costs before the trial court in the sum of Kshs. 67,605/= and given an ultimatum that if not paid within 10 days from 26/8/2020 it was keen to take out execution proceedings.

3. As a consequence of such threat the Respondent/Applicant has brought the Notice of Motion dated 3/9/2020 and sought, in the main, order that there be stay of execution of the decree in CMCC No. 2957 of 2006 and that in this appeal pending the hearing and determination of the appeal to the Court of Appeal.

4. The grounds shown on the face of the application and the Affidavit in support, sworn by the Respondent, are that while it had lodge an appeal to the Court of Appeal, the appellant was intent on executing the decree for costs in the appeal here and at trial a fact which will render the appeal nugatory and yet the applicant was prepared to avail any security the court may order and lastly, that the appellant stood to suffer no prejudice if the application was granted. In addition to stating such facts, the Affidavit then annexed and exhibited a notice by the Appellant demanding costs, the decree and certificate of costs in the lower court and a Memorandum of Appeal filed in the Court of Appeal. In the same Affidavit of support, it is contended that the appeal has high chances of success and that the appeal would be rendered nugatory if the order for stay is not granted but without disclosure as to the nature of loss that would render the appeal nugatory.

5. In resisting the application, the respondent filed not only grounds of opposition but also a Replying Affidavit by the Appellant. The grounds of opposition fault the application for having been brought after an inordinate and undue delay of three months, that there was no demonstration of substantial loss as a cornerstone of grant of stay and lastly, that it is unusual to grant stay to forestall recovery of costs only. There was then the amplification of the fact that it is rare to order stay, on recovery on costs and that if the court in its discretion find it fit to grant stay, then, it should order security in the sum of Kshs. 300,000/= to cover costs of the lower court in the sum of Kshs. 67,000/= and Kshs. 155,000/= for the appeal as an approximated costs herein.

6. The application was argued orally after the court declined the request by the applicant to have it canvassed by way of written submissions. In his oral submissions, Mr. Atancha relied wholly on his application then cited to court two decisions being ***Amal Hauliers Ltd vs Abdulnasim Abubakar Hassan [2017] eKLR*** and ***Superior Homes (K) Ltd vs Musango Kithome [2017] eKLR***. He also gave to court the serial number of the appeal to the Court of Appeal as No. 116 of 2019.

7. In citing the two decision, the counsel took the view, contrary to his client's deposition in the affidavit that it was prepared to avail any security ordered, that security is not always a consideration. I have however had the benefit of reading the two decisions by my two colleagues, W. Korir and Kemei, jj, and established that in both cases deposit of the decretal sum was ordered. In fact, in the Malindi case the Judge ordered that ½ of the sum be paid out to the decree holder and the other half be deposited into an escrow account. I will thus proceed from the point of view that nothing has been presented before me to change the position of Order 42 Rule 6(2) b that, the security as is sufficient to meet the decree, ought to be ordered and offered before stay is granted.

8. It is however noteworthy that here there is no allegation that the respondent in the application for stay would be unable to effect a refund if paid and later on the appeal succeeds.

9. For the respondent, arguments were made to the effect that there is no merit in the application in that the same was filed after undue delay; no substantial loss had been demonstrated and that what is sought to be stayed is payment of costs and that it is uncommon in Kenya for courts to order stay and that there was very little in the reported cases in this area.

10. When to grant stay is a well walked path with well-established principles being that it is a discretionary power granted where the application is brought promptly and it is shown that substantial loss awaits the applicant unless stay be granted and that when granted the due performance of the decree is secured by an order for security.

11. As a remedy, the order for stay pending appeal seeks to balance the competing interests between the appellant's right in enforcing the right to access court and be heard with some assurance that the outcome of the appeal would be material and substantive rather than academic or pretence as opposed to the right of the respondent, as the successful party, to access and enjoy the fruit of litigation as expressed in the property in the decree. That balance when struck ought to secure the interest of both in the property litigated upon so that at the end of the appeal, the party adjudged to be entitled is not put to the hardship of having to secure the possession thereof. It is sufficient for grant of stay if the applicant proves that upon conclusion of the matter it would be put into further costs of litigation to get access to the property.

12. In this matter however, it is not the applicant's position that the decree, being monetary and limited to costs, would be difficult or impossible to retrieve the same for the respondent. That is not adverted to at all. It is merely asserted that the appeal would be rendered nugatory unless stay is granted. Nothing is said of what is likely to happen to render the appeal nugatory. In *Kenya Shell Ltd vs Kabiru [1986] KLR 410*, the Court of Appeal, (Platt JA), had this to say:-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when the appeal would be rendered nugatory by some other event. Substantial loss is the cornerstone of both jurisdictions for granting stay. That is what is to be prevented. Therefore, without this evidence it is difficult to see why the respondent should be kept out of their money”.

13. In -this case, there is no proof of any loss let alone a substantial one to merit me considering granting stay to the respondent. In addition, I do find that the only sum due to the respondent now sought to be resisted is the costs of the litigation here and in the court below. I consider it a rare thing that a court would grant stay merely to forestall payment of costs without more. In any event the sum of the adjudge costs are modest and not colossal to imbue the fear of difficulty in recovery

14. In the ultimate, I find no merit in the applicants and I order it dismissed with costs.

Dated, signed and delivered on line this 16th day of October 2020.

P J O Otieno

Judge