



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 144 OF 2020

TOYOTA KENYA LIMITED.....APPELLANT/APPLICANT

VERSUS

CHEMLINE AFRICA LIMITED.....RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 13th March 2020, in which the appellant/applicant sought for inter alia an order for stay of execution of the judgment/decree of the trial court delivered on 6th March 2020 pending appeal. The motion is supported by the affidavit of Rebecca Niwagaba.

2) The respondent filed the replying affidavit sworn by Julius Kimathi, one of the respondent's directors to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in this appeal recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds set out on the motion plus the facts deponed in the rival affidavit together with the rival written submissions. Under the provision of Order 42 rule 6 of the Civil Procedure Rules, the principles to be considered in determining an application for stay of execution pending appeal are set out as follows:

First, an application seeking for stay of execution pending appeal must be filed without unreasonable delay.

Secondly, that an applicant must show the substantial loss it would suffer if the order for stay is not granted.

Thirdly, that the provision of security for the due performance of the decree must be considered.

4) The background of this dispute is short and straightforward. Chemline Africa Ltd, the respondent herein filed an action against Toyota Kenya Ltd, the appellant herein, before the Chief Magistrate's Court at Nairobi Milimani Commercial courts whereof it sought for judgment against the appellant as follows:

i. Payment of ksh.2,438,000/=

ii. In the alternative the appellant be compelled to provide the respondent another motor vehicle equivalent to the value of motor vehicle registration no. KBL 259M Toyota Cabin pick up.

iii. Loss of user of ksh.7,000/= per day from June 2013 until the date of compensation.

iv. General damages.

v. Costs of the suit.

5) What prompted the filing of the aforesaid suit is a road traffic accident involving motor vehicle registration no. KBL 259M Toyota Double cabin pick up which the respondent bought from the appellant.

6) It was alleged that the chasis of the motor vehicle was completely altered in the appellant's garage when it went for repairs therefore the same could not pass through inspection. The appellant denied the respondent's claim. Hon. G. M. Mmasi, learned Senior Principal Magistrate heard the suit and in the end gave judgment in favour of the respondent in the sum of ksh.2,438,000/= plus general damages and

costs of the suit. Being aggrieved, the appellant preferred this appeal to challenge the decision.

7) In the motion, the appellant sought for an order for a stay of execution pending appeal stating that unless the order is granted it would suffer substantial loss in that the respondent may execute the decree before this appeal is heard and determined.

8) The respondent opposed this ground stating that the appellant has failed to adduce evidence in support of the assertion of the substantial loss. I have perused the application, the supporting affidavit and the applicant's submissions and I have not seen any evidence of the substantial loss on the part of the appellant if the order for stay is denied. In other words, there is no factual particulars of the nature of loss or prejudice to be visited upon the appellant in the absence of an order for stay. In paragraph 9 of the supporting affidavit, Rebecca Niwagaba depones as follows:

“9. That the applicant/appellant will suffer substantive loss and irreparable damage if this honorable court does not grant the orders of stay as it is a corporation whose reputation will be damaged if execution is effected upon it by the respondent with regard to a matter the appellant/applicant has a high belief in succeeding in the appeal.”

9) It is clear from the above excerpt that the appellant/applicant did not establish the substantial loss. The execution process is a lawful process with resultant consequences which cannot be said to cause substantial loss to a judgement debtor.

10) The second ingredient is that the application for stay must be filed without unreasonable delay. It is apparent from the record that the decision to be challenged on appeal was delivered on 6th March 2020 while this motion was filed on 13th March 2020. It is clear in my mind that the same was timeously filed.

11) The final consideration is the provision for security for the due performance of the decree. The appellant has stated that it is ready to comply with any direction for the deposit of the security for the due performance of the decree.

12) Having come to the conclusion that the appellant has failed to establish the substantial loss it would suffer if the order for stay is denied, then the appellant does not deserve to be given the order for stay despite meeting the other conditions. The cornerstone of an application for stay is the proof of substantial loss a party would suffer if the order for stay is denied. In this case the appellant/applicant has failed to establish that principle.

13) In the end, the motion dated 13th March 2020 is found to be without merit. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent