REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 98 OF 2018

PANAJ AUTOMOBILES (K) LTD..................APPELLANT/APPLICANT

VERSUS

MATHEKA KALUKU...1ST RESPONDENT

ZACHARY MUTURI..2ND RESPONDENT

R U L I N G

Introduction

1. The Applicant has filed the instant application seeking for stay of execution of the judgement delivered on 18th October, 2017.

2. The application is brought under Section 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. It seeks the following substantive orders:

> **(i) That this Honorable Court be pleased to order stay of execution of the judgement delivered on 18th October, 2017 by Hon A. Kibiru against the 1st Defendant/Applicant in Machakos Chief Magistrates Courts Case No 919 of 2010 pending the hearing and determination of this application.**
>
> **(ii) The court be pleased to order stay of execution of the judgement delivered on 18th October, 2017 by Hon A. Kibiru against the 1st Defendant/Applicant in Machakos Chief Magistrates Courts Case No 919 of 2010 pending the hearing and determination of the appeal.**
>
> **(iii) Costs of this application be provided for.**

3. The applicant's application is supported on the grounds set out in the body of the application and the affidavit sworn in support by Trushar D. Patel dated 7th of August 2018. The appellant contends that it is dissatisfied with the ruling delivered on 17th July, 2018 by Hon A. Kibiru in **Machakos Chief Magistrates Case 919 of 2010** and that the said appeal is arguable and has high chances of success and the delay in filing the application is not inordinate and the respondents will not suffer prejudice if the application is allowed.

4. The 1st respondent filed a replying affidavit dated 17th August, 2018, in which he contended that:-

> **a. The grounds in the application do not support the prayers sought.**
>
> **b. The subject ruling was delivered over a year ago thus the applicant has unreasonably delayed.**
>
> **c. The ruling is not attached.**
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> **d. In any event, the honorable court has no jurisdiction to stay a negative order dismissing the application dated 19.2.18.**
>
> **e. At any rate, the applicant does not deserve the discretion of the honorable court for he has made an untrue allegation that he has not been served with notice of entry of judgement and intention to execute.**

Submissions

5. Vide written submissions dated 31st October, 2018, Kamotho Njomo & Co Advocates for the applicant submitted that mandatory terms couched under Order 42 Rule 6 of the Civil Procedure Rules have been satisfied by the appellant; On substantial loss, he submits that in his paragraph 13 of the supporting affidavit, he deponed that the 1st Respondent's financial ability is not known. Further on inordinate delay, he submits that the ruling was delivered on 17th July, 2018 and the instant application was filed on 8th August, 2018. On security, he submits that in paragraph 14 of the supporting affidavit, he has indicated willingness to deposit security and the intended appeal is arguable and not frivolous, therefore his right of appeal ought to be safeguarded. Counsel contended with regard to the failure to attach a copy of the ruling that the ruling at this stage is not in issue for what he seeks is a stay in relation to the judgement and not the ruling and in addition that he has attached all filed documents in relation to the application that was dismissed hence the court is appraised of the facts leading to the ruling.

6. Mr. Brian Wambua Munyao, Advocate for the respondent submitted that there is no copy of the ruling attached to the application. He submitted that the ruling that was delivered on 17.7.18 dismissed the application dated 19.2.18 and the same is a negative order and he relied on the case of **Raymond M Omboga v Austine Pyan Maranga, Kisii HCCA 15 of 2010**. He contended the present application is grounded on an appeal that challenges not the judgement delivered on 18.10.17 but is limited to the ruling delivered on 17.7.18. Learned counsel submitted that in the terms of Section 75 of the Civil Procedure Act, the appellant has no automatic right of appeal and has not sought leave thus the application ought to be dismissed with costs. With regards to the principles for grant of stay, learned counsel submits that the applicant has totally failed to prove loss that is likely to occur; further with regards to security he submits that the applicant in his pleadings has not indicated willingness to deposit security. With regard to success of the intended appeal, learned counsel submits that the memorandum does not indicate any triable issues hence the application should not be allowed. If it is allowed, counsel submits that half the decretal amount be deposited.

7. The singular issue for determination is whether the applicant is entitled to the orders sought.

Analysis

8. It is trite that issues for determination in a suit generally flow from the pleadings unless the pleadings are amended in accordance with the Civil Procedure Rules, the court shall consider the said pleadings. In order to determine the issues between the parties herein, one needs to look mainly at the application and the orders sought. A reading of the application demonstrates that the applicant seeks an order of stay of execution of a judgement and decree delivered on 18.10.2017 pending the hearing and determination of an appeal. A look at the memorandum of appeal that is annexed as evidence indicates that the appeal is against the ruling delivered on 18.8.2018.

9. The principles for granting stay of execution are provided for under **Order 42 rule 6 (1)** of the **Civil Procedure Rules** as follows:

> **"No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside."**
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> **Order 42, rule 6** states:
>
> **"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."**

10. The above provisions pre-suppose that there is an appeal in existence. With regards to appeals, Section 79G of the Civil Procedure Act provides as follows:

> **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
>
> **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.**

11. A look at the application indicates that the applicants seek stay of execution of a decree in a judgement that was delivered on 18.10.17 and from the record and pleadings, I see no appeal against the said judgement therefore the instant application fails on that ground.

12. The Ugandan case of **LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS [1986] UG CA 6** where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in **JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55** that;

> **"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign**

countries."

13. I have noted that the affidavit in support relates to facts that are different from the orders sought and I am unable to rely on the same, for doing so would amount to re-drafting the application for the applicant.

14. For arguments sake, if I were to consider the ruling that is targeted in the memorandum of appeal that the applicant has annexed, no copy of such ruling was annexed to the affidavit. Indeed without a copy of the ruling delivered by the trial magistrate this court is not in a position to evaluate the basis of the learned magistrate's decision. The reason for requiring the attachment of a copy of the decision, subject of appeal is in order for the Court to examine by reading the decision and satisfy itself as to its correctness, legality or propriety. This is because as was observed by Justice Ngugi in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi& Another (2018) eKLR**, a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts of law to overturn the original verdict is necessary, and from the application before me, I am unable to establish what that original verdict is and it is unnecessary to delve into the merits of whether or not the court may stay execution of the said ruling.

15. In the case **of Juliet Kwamboka Ongwae t/a Kahawa Kulturev Mocha Place Limited [2018] eKLR**, Judge J. M. Mutungi found that "…the ruling sought to be appealed from was not annexed; the pleadings in the lower court were not equally annexed; and neither was the lease agreement between the parties which was the genesis of the dispute between the appellant and the respondent…" therefore the application was found to lack merit and was dismissed.

Determination

16. In light of the above analysis, the court is unable to come to the aid of the applicant to grant the orders sought as there was omission of crucial relevant materials that the court would have needed to evaluate. The Applicant has not come out clearly as to whether the orders sought are in respect to a ruling or a judgement. This uncertainty militates against the Applicant's application.

17. For all the above reasons, it is my view that the appellant's application dated 7th August 2018 lacks merit and the same is for dismissal. I order the same dismissed with costs to the respondents.

Orders accordingly.

Dated and Delivered at Machakos this 21st day of January, 2019.

D.K. KEMEI

JUDGE