



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.86 OF 2014

COMM CARRIER SATELITE SERVICE LIMITED.....1ST PLAINTIFF

AZHAR CHAUDRY.....2ND DEFENDANT

VERSUS

GLOBAL FREIGHT LOGISTICS LIMITED.....DEFENDANT

RULING

1. Before this Court is the Notice of Motion dated **6TH NOVEMBER 2018**, seeking Orders as follows:-

“1. SPENT

2. SPENT

3. SPENT

4. Pending the hearing and determination of the intended appeal this Honourable Court be pleased to issue a stay of the judgment of this Honourable Court delivered on 5th October 2018 and all consequential proceedings.

5. The Respondents be condemned to pay the costs of this application.

The application which was premised upon **Sections 1A, 1B, 3A and 94** of the **Civil Procedure Act, Cap 21, Order 22, Rule 1 and Order 46 Rule 6** of the Civil Procedure Rules was supported by the Affidavit sworn on **6th November 2018** by **AZHAR CHAUDRY** the **2nd Plaintiff/Applicant** herein.

2. The Respondents opposed the application through the Replying Affidavit sworn on **7th December 2018** by **ARBI MUSSANI** a Director of the **1st Respondent**. Pursuant to directions given by the Court the application was argued orally before the court on **29th January 2019**.

3. This application arises from the judgment delivered on **5th October 2018** in which **Hon. Lady Justice Olga Sewe** found in favour of **GLOBAL FREIGHT LIMITED**, the **1st Respondent** herein. At the time of delivery of that judgment, the Court granted to the Applicants a stay of execution for thirty (30) days from the date of delivery of the judgment. The Applicants aver that notwithstanding the subsistence of that 30 day stay the Respondents on **30th October 2018** proceeded to instruct auctioneers to commence execution. On **2nd November 2018** the auctioneers proceeded to the Applicants premises and made a proclamation.

4. The Applicants aver that they have filed a Notice of Intention to appeal against the judgment delivered on **5th October 2018**, and seek a stay of execution pending the hearing and determination of their intended appeal. It is submitted for the Applicant that the application has been made timeously and without unreasonable delay. It is further submitted that the Applicants have already deposited the sum of **Kshs.30 Million** in court which amount they are willing to have utilized as security for costs. The Applicants further avers that should the decretal sum be paid out their appeal may be rendered nugatory as the Respondents may be unable to refund the decretal amount if ordered by the court.

5. As stated earlier the Respondents opposed the application. They contend that they were not served with the Notice of Appeal nether has any appeal been filed. The Respondents term the Notice of Appeal as a red herring. It was submitted that the Respondents have waited for close to eight (8) years to have this matter concluded. They have annexed the company's management accounts to prove that the Respondents are capable of refunding the decretal sum if called upon to do so.

ANALYSIS AND DETERMINATION

6. **Order 42 Rule 6(2)** of the Civil Procedure Rules provide as follows:-

“No order for stay of execution shall be made under subrule (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.”

7. I have considered the submissions in this case. The judgment in question was delivered on **5th October 2018**. The application for stay of execution was filed in court on **9th November 2018**, about one month after the judgment had been delivered. I am satisfied that the application was brought in a timeous manner. The applicant has averred that if they pay out the decretal sum their appeal may be rendered nugatory as the Respondents may be unable to refund the decretal sum if their appeal succeeds. The Respondents counter that they are going concern who have been engaged in active business since the 1970's and are therefore quite capable of refunding the decretal sum when and if ordered to do so.

8. I have considered the Respondents plea that they have been pursuing this claim for the past eight (8) years. The general rule is that a party ought not be denied the fruits of judgment except for very valid cause. The court has to weigh the rights of the Respondent to derive benefit from the judgment as against the Applicant's right to pursue an appeal.

9. In cases of money decrees the general rule has been that an appeal would not be rendered nugatory if the decretal sum was paid out. However in **784 AIR SERVICES LIMITED –VS – THEURI MUNYI 2014 eKLR**, the court held thus:-

“It is no longer an irreversible proposition in a money decree, if payment be made on an appeal is eventually successful, then appeal cannot be said not to be rendered nugatory. It is so because if there is expense and some length of time to be spent so as to recover what has already been paid out or execution has ensured then the appeal may well be said to be rendered nugatory.”

10. Similarly in **NATION MEDIA GROUP LIMITED & 2 OTHERS –VS- JOHN JOSEPH KAMOTHO & 3 OTHERS [2006]eKLR** the court held that:-

“.....the fact that a Respondent in an application of this kind has the financial means to refund the decretal sum should the appeal succeed is not invariably decisive.....there might be long delay in recovering the taxed off sums. In such a likely eventuality, the applicants might be greatly inconvenienced. The balance of conveniences is in favour of the Applicants.”

11. I am mindful of the fact that the Applicants have already deposited the sum of **Kshs. 3.0 Million** in court which is sufficient to cover the decretal sum. Taking all relevant factors into account, I would allow this application for stay subject to the following:-

1. The deposited sum of **Kshs. 3.0 Million** remain held by the court as security.
2. The Applicants to file their appeal within thirty (30) days hereof failing which the stay will automatically be lifted with no further reference to the Applicant.

Costs in the cause.

Dated and Delivered in Nairobi this 6th day of March 2019

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Justice Maureen A. Odera