



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO. 24 OF 2018

NAIROBI UPPERHILL HOTEL LIMITEDAPPELLANT

VERSUS

KENYA QUALITY FOOD PACKERS LIMITED.....RESPONDENT

RULING

1. Nairobi Upperhill Hotel Limited (Upperhill Hotel) has filed this present appeal against the Ruling of Senior Principal Magistrate Mrs. A.M. Obura of 3rd August 2018. The Respondent to this appeal is Kenya Quality Food Packers Limited (Food Packer).

BACK GROUND

2. Judgment was entered, after an ex parte hearing, before the learned Magistrate, Senior Principal Magistrate A.M. Obura on 5th March 2018.

3. Upperhill Hotel filed an application before the Magistrate's Court, dated 11th May 2018 seeking to set aside that judgment. By the Ruling of 3rd August 2018 the Learned Magistrate dismissed the application.

4. This present appeal is against that dismissal. Upperhill Hotel by a Notice of Motion dated 27th August 2018, before this Court, seek stay of execution of the judgment of the Learned Magistrate pending the hearing and determination of this appeal.

5. Food packers have also filed a Notice of Motion dated 12th October 2018 seeking the variation or setting aside of the ex parte stay of execution granted to Upperhill Hotel. It is clear that the applications need the Court to determine the same issues and accordingly the both applications are being considered together in this Ruling.

NOTICE OF MOTION DATED 27TH August 2018.

6. By this application Upperhill Hotel has deponed, through the affidavit of Geoffrey Wahome Muotia, its Director General, that it has an arguable appeal; that the decretal sum sought to be executed by the Food Packers is "colossal" and the resources of Food Packers are unknown; that it was condemned by the Magistrate's Court unheard; and that it is willing to abide by any condition that the Court will impose.

NOTICE OF MOTION DATED 12TH OCTOBER 2018

7. This application, filed by Food Packers, is premised on the ground that Upperhill Hotel may fail to pay the decretal sum at the conclusion of this appeal; that Upperhill Hotel has failed to show that it has an arguable appeal; that this Court should in the alternative consider ordering Upperhill Hotel to deposit the decretal sum as security, in Court.

ANALYSIS

8. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provide the condition upon which a Court may order stay of execution of decree. Under Rule 6(1) it is provided that an appeal does not operate as a stay of execution. Sub rule (2) of that Rule the appellant seeking to stay execution of a decree must meet the certain parameters. That sub rule (2) provides:

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;

(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.

9. Those conditions of granting stay of execution pending appeal were discussed in the case:

ERICK NYALE & ANOTHER V MWANAMBUA MUSA MWANYUMBA (SUING AS THE MOTHER AND ADMINISTRATOR OF THE ESTATE OF MUSA ALI MWARINDANO [2015] eKLR viz:

“The conditions of granting a stay pending appeal was subject of the decision in the case KENYA SHELL LIMITED –vs- KIBIRU (1986) KLR where it was stated-

In Kenya Shell Limited Vs Kibiru (1986) KLR 410, Platt, Ag. JA (as he then was) at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI rule 4 (now Order 42 Rule 6(2) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to say why the respondents should be kept out of their money.”

On the part of Gachuhi, Ag JA (as he then was) at 417 he stated-

“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

10. Upperhill did not show what substantial loss would result if stay was not granted. It did however state that if Food Packers were paid the decretal sum they may fail to reimburse it in the event the present appeal was successful.

11. The evidential burden of proving Food Packers were in a financial position to refund the decretal sum if the appeal was successful shifted to Food Packers. This is because Food Packers are the only ones with knowledge of their own financial well being, or otherwise. They failed to meet that burden of proof.

12. Similarly Food Packers alleged that Upperhill Hotel were in a weak financial position, and this evidential burden of proof was also not met by Upperhill Hotel.

13. The other condition set out in subrule (2) are that an applicant must file the application for stay of execution without unreasonable delay. Upperhill Hotel’s application was filed on 27th August 2018 against the Learned Magistrate’s Ruling of 3rd August 2018. It is clear there that there was no unreasonable delay in making that application.

14. It is clear that Upperhill by filing this appeal it was exercising its right as provided under the law. But the Courts have often stated that, that right of appeal needs to be balanced with the rights of a successful litigant. This is what was stated in the case **ERIC NYALE & ANOTHER (Supra)** as follows:

REDLAND ENTERPRICES LTD –V- PREMIER SAVINGS & FINANCE LTD (2002) 2 KLR where the Court in considering an application similar to the present one held that:-

“the right of appeal must be balanced against an equally weighty right that the Plaintiff to enjoy the fruits of the judgment delivered in his favour, there must be just cause for depriving him of that right.”

DETERMINATION

15. Balancing those two rights I am of the view that stay of appeal can only be granted on condition. It is necessary that Food Packers feel secure that if the appeal fails they will receive the decretal sum. It is also, in this case, necessary that Upperhill Hotel feel secure that it will not fail to get refunded if the appeal succeed.

16. Doing the best I can will order Upperhill Hotel to deposit into an interest earning account Kshs. 15,784,509 or, in the alternative to file into this Court a bank guarantee, guaranteeing to pay that amount. The costs will, in the interest of justice, abide with the outcome of the appeal.

17. In the end the orders of the Court are:

(a) There shall be stay of execution of the decree issued on 27th March 2018 in Milimani CMCC No. 5802 of 2015 on

condition:

(i) That Nairobi Upperhill Hotel Limited shall deposit in the interest earning account of both advocates Kshs. 15,784,509 within 14 days from this date hereof; in the alternative:

(ii) That Nairobi Upperhill Hotel Limited shall provide by filing into Court and serving within 14 days from this date hereof a bank guarantee to pay Kshs. 15,784,509, when required by a Court order in this case.

(b) Failure of Nairobi Upperhill Hotel Limited to satisfy the one of the two conditions of stay in (i) or (ii) above the stay of execution shall automatically lapse and be vacated.

(c) The costs of the Notice of Motions dated 27th August and 12th October 2018 shall abide with the outcome of this appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... COUNSEL FOR THE APPELLANT

.....COUNSEL FOR THE RESPONDENT