REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 182 OF 2018

SPANISH COACH EXPRESS LIMITED…..……...…….. APPELLANT

VERSUS

PRIDE FUELS LIMITED……..……..…… RESPONDENT

RULING

1. By a Notice of Motion application dated 11th September, 2018, the Applicant seeks for the following orders;

(a) spent;

(b) spent;

(c) that pending the hearing and determination of this Appeal this Honourable Court be pleased to stay the Ruling delivered herein on 3rd September, 2018 in Mombasa and any other order that may be issued pursuant thereof pending the hearing of the Appeal;

(d) the motor vehicle registration Number KBW 630H released to the Applicant conditionally or unconditionally;

(e) that the list of the Application be provided for.

2. The application is based on the grounds on the face of it some of which are replicated in the affidavit sworn by OSMAN ABDULAZIZ on 11th September, 2018. The summary of this being that on 3rd September, 2018, the Hon Principal Magistrate, F. Kyambia in RMCC No. 1092 of 2018 PRIDE FUELS LIMITED VERSUS SPANISH COACH EXPRESS LIMITED VERSUS SPANISH COACH EXPRESS LIMITED delivered a ruling in favour of the Respondent (who was the Defendant/Applicant therein) which is in respect of an application to set aside an interlocutory judgment that had been entered against the Appellant/Applicant who maintained that no service of summons was effected on it.

3. The Applicant also averred that before this application, the auctioneers attached its motor vehicle Registration No. KBW 630H and the Respondent's Director, one **Mr Hasnain Nooran** intimated that they intended to proceed with the execution process and sale the aforementioned vehicle to satisfy the interlocutory judgment.

4. It further avers that if the execution is left to proceed, it is likely to suffer irreparable loss as the vehicle is its tool of trade, and yet its appeal has high chances of success as demonstrated in the memorandum of appeal.

5. The application is opposed by the Plaintiff/Respondent through a replying affidavit dated 18th September, 2018 on which she deponed that the applicant's application seeking to set aside the interlocutory judgment was regularly dismissed and so it does not satisfy the conditions required for granting of stay of execution pending appeal.

6. He also depones that the Applicant admitted that the debt by entering into a settlement agreement with it and managed on the same, hence there are no triable issues raised.

7. The parties agreed to proceed with the hearing of the application by way of written submissions, which each counsel did file.

8. I have gone through the pleadings, written submissions from both parties herein and the Applicant's application as well as the affidavit of service which paved way for hearing of the ex-parte proceedings. The issues which arise for determination are;

a. Whether the execution process which was commenced was properly done.

b. Whether the stay of execution ought to be granted.

9. The Applicant argued that it was not served with Notice of entry of judgment in default of appearance or defence as required in law which affects the execution levied on them by **M/s Kinyua & Company Auctioneers** on behalf of the Respondent purportedly in execution of warrants of attachment and sale issued by this Honourable Court on a decree of Kshs.4,504,104/= plus costs in **RMCC No. 1092 of 2018**.

10. The Respondent on the other hand did not respond to the issue of there having been no notice of entry of judgment but instead submitted that the motion was incurably defective, bad in law and an abuse of court process for having been brought pursuant to a non-existent provision of law. It also submitted that the motion does not satisfy the conditions for granting a stay pending appeal where there is a regular judgment on record. It infact made a false statement by further submitting that the trial magistrate was satisfied that the summons were duly served and dismissed the applicant's application on sound grounds.

11. Before I deal with the question of setting aside the judgment in default, I wish to consider the issue of whether the motor vehicle registration NO. KBW 630H should be released to the Applicant conditionally or unconditionally. Order 22 rule 6 of the Civil Procedure Rules, which is of fundamental significance provides for non-service of notice of entry of default judgment. The proviso thereof provides as follows;

> **"Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."**

12. The above proviso is cast in mandatory terms, no execution by payment, attachment or eviction shall issue on judgment in default unless at least a ten days' notice of the entry of judgment has been given to the judgment debtor either at his address of service or his served upon his personally.

13. In the case of SHAFFIQUE ALLIBHAI VERSUS WILLIAM OCHANDA ONDURU T/A OCHANDA ONGURU & COMPANY ADVOCATES & ANOTHER (2014) eKLR, Gikonyo J. held as follows;

> **"There are good reasons why the proviso was enacted and I suspect it was informed by the constructional desire to bring to the attention of the Defendant the fact of entry of judgment, and that would also prevent unscrupulous plaintiffs who may seek to ensure the process of the court through execution of a judgment where there has been no or no proper service of summons to enter appearance and the plaint. I say these things because it is not uncommon that unscrupulous plaintiffs have obtained judgment on default of appearance or defence on false return of service. The notice will expose such mischief and provide opportunity for remedy. The proviso was introduced into the repealed Civil Procedure Rules after such unfortunate executions and attachments befell many unsuspecting defendants in the 1990's. There is no mischief, however, in this case. But I needed to emphasize the importance of the said notice; it sacrifices the right of the plaintiff to execute and legitimizes the execution. It is therefore, an important facet of and serves a useful purpose in administration of justice. It is not to be treated as mere technicality. The Respondent has not denied it did not issue the required notice of entry of judgment and the record reveals none was served on the Defendant. Whereas, I agree with counsel for the Respondent that absence of such notice of entry judgment does not lead itself to setting aside the judgment, however, it leads any execution levied therefrom to be set aside *ex debito justicae* for it is wholly irregular. On that basis, the executor by way attachment issued and levied against the Defendant herein is irregular and it is accordingly set aside. So also are any or all consequential processes or action that attended to the warrants of attachment issued herein. Meanwhile, pending a discussion on the whether the judgment in default herein should be set aside, I order a stay of any execution of the decree."**

Also see the decisions in NAIROBI BOTTLERS LTD VERSUS BENJAMIN DEON MUSAU (2017) eKLR by Sergon J and ANDERSON NYAGAH WACHIRA VERSUS SIMON NJUGUNA (2018) eKLR by L. Njuguna.

14. It is therefore my finding that the learned magistrate erred in holding that the procedural lapses by the Plaintiff/Respondent in failing to serve the entry of judgment notice upon the Applicant/Appellant were curable and ought to have declared that the execution process which had been initiated by the Respondent as irregular since it was contrary to the Provision of Order 22 Rule 6 of the Civil Procedure Rules.

15. I hence proceed to order the said execution to be set aside, and the Respondent is, however, nonetheless at liberty to serve the notice as required to regularize the position before he can proceed with execution, if at all.

16. The next consideration is whether the judgment in default herein should be set aside. The common thread in the cases of ;

(a) **KIPLANGAT KOTUK VERSUS ROSE JEBUR KIPNG'OK (2015) eKLR**

(b) **KENYA COMMERCIAL BANK LIMITED VERSUS SUN CITY PROPERTIES LIMITED & 5 OTHERS (2012) eKLR.**

In that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

17. Order 46 Rule 6(2) of the Civil Procedure Rules, 2018 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following;

(a) substantial loss may result to the applicant unless the order was made;

(b) that the application was made without unreasonable delay; and

(c) such security as the court orders for the due importance of such decree or order as may ultimately be pending on him has been given by the appellant.

18. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be secured. The key word is "and". It connotes that all three (3) conditions must be met simultaneously.

19. And guidance on how a court should exercise such discretion is in the holding of the Court of Appeal decision of BUTT VERSUS RENT RESTRICTION TRIBUNAL (1982) KLR 417, that ;

(a) The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

(b) The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

(c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

(d) The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case tht there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.

(e) The court-exercising its powers under Order xvi Rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion, failure to put security for courts as ordered will cause these order for stay of execution to lapse."

20. On the issue of substantial loss, the Applicant/Appellant emphatically submitted that they would suffer substantial loss since the attached bus is their tool of trade which is used to ferry passengers from Nairobi to Mombasa. They also averred that if the attached bus is sold, they will likely go through hardships such as instituting court proceedings to recover the contended decretal sumo or loss.

21. The Respondent on the other hand argues that the applicant has not demonstrated how they would not be able to recover the decretal amount from them in court in the event the appeal succeeds. Gikonyo J, in the case of **WINFRED NYAWIRA MAINA VERSUS PETERSON ONYIEGO GICHANA (2015) eKLR** stated as follows;

"I am content to cite a work of Ogola J, in TROPICAL COMMODITY SUPPLIERS LTD (supra) that;

"…….. substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that it merely nominal ……."

22. I will add to what the court said in the case of BUNGOMA HC MISC **APPLICATION NO 42 OF 2011, JAMES WANGAZWA & ANOTHER VERSUS AGNES NALIAKA CHESETO** that;

"The Applicant must establish other factors which should tell the execution will create a state of affairs that will irreparably affect or negate the very essential cure of the Applicant as the successful party in the appeal. This is what substantial loss would entail….."

23. In the instant case, it is my finding that indeed the Applicant will suffer substantial loss since that attached bus is its tool of trade and they are and will continue to incur loses of the attached bus continues to be in the possession of the Respondent or is sold.

24. As for whether or not there was an unreasonable delay in the part of the appellant in bringing the application for stay, the record shows that the ruling sought to be set aside was delivered on 3rd September, 2018 and the application filed on the 11th September, 2018 which is about 8 days. I therefore find that there has not been any unreasonable delay on the part of the Applicant who filed the instant application in eight days.

25. Finally, whether the applicant should be ordered to provide such security for the due performance of such decree or order, it should be noted that the judgment in question is a money decree. In considering whether a money decree or liquidated claim would render the success of the appeal nugatory, the Court of Appeal in the case of KENYA HOTEL PROPERTIES LTD VERSUS WILLESDEN PROPERTIES LTD, Civil Application No NAI 322 OF 2006(VR) said;

"The decree is a money decree and normally courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However,

with time, it became necessary to put certain order to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that on considering such matters as hardship, a third principle of law was not being established at all."

26. In view of the foregoing, the court finds that the applicant/Appellants application dated 11th September, 2018 has merit and allow the same in the following terms;

(a) A stay of execution of the decree in Mombasa RMCC NO 1092 OF 2018 is hereby granted pending the hearing and determination of the appeal herein on condition that the entire decretal sum is deposited in a joint interest earning account in the names of Advocates for the parties on record within thirty (30) days from the date of this ruling, failing to which the stay shall automatically lapse;

(b) The costs of the application shall abide in the appeal.

It is ordered.

DATED and DELIVERED SIGNED this 14th day of March, 2019.

D. CHEPKWONY

JUDGE.

In the presence of:

M/S Okunu, counsel for the Applicant

Court assistant; Beja