



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 279 OF 2004 (O.S)

LEISURE LODGES LTD.....PLAINTIFF

VERSUS

JAPHETH S. ASIGE

S.O. ANYANZWA t/a

ASIGE, KEVERENGE & ANYANZWA CO. ADVOCATES.....DEFENDANTS

R U L I N G

1. Before the court for determination is an application by a Notice of Motion by the Defendant/Judgment -Debtor praying in the main that he be granted stay of execution pending appeal against the judgment of the court delivered on the 12/10/2018.
2. The facts said to ground the application are that the applicant as a legal firm stands to be irreparably disrupted and damaged in its operations unless stay be granted; that the interim liquidators have unequivocally acknowledged that the adjudged sum was applied pursuant to their orders and directions; that the payment of the sum would be an injustice, inequity and unfairness that presents a substantial loss and would deprive the applicant from the protection of the law and lastly, that the trust and integrity of the applicant's professional legal practice, painstakingly build over the years, is in imminent risk of going into smoke and in an incalculable substantial loss.
3. The said facts were reiterated and repeated in the Affidavit in support sworn by Mr. Japheth Asige Advocate. That affidavit over and above restating those facts annexed and exhibited the ruling sought to be appealed against as well as an undated notice of appeal lodged at the Registry on the 19th October 2018 and served on the counsel for the decree-holder/Respondent on the 26/10/2018 together with a letter dated 12/10/2018 bespeaking the proceedings and ruling for purposes of an appeal.
4. That affidavit equally adds, at paragraph 7, the fact that the loss and damages the applicant risks are substantial and incalculable by any damages or restoration because the firm was likely to be destroyed in its operations including the prospects to meet third party obligations including clients, loans and mortgages, tax authority and employees. It is then asserted that the intended appeal is arguable and that the court should be keen and cognizant that the substratum of the appeal needs to be protected so that in the event of success it is not rendered nugatory.
5. The Application was opposed by the defendant on the basis of the Replying Affidavit sworn by Mr. John Mutua, the executive director of the plaintiff/decreed-holder, who takes the view that the application is premature on account of the fact that no formal decree has been extracted hence nothing to stay because even the costs are yet to be taxed.
6. In addition it was deposed that even if there were execution proceedings capable of being issued there was no demonstrated substantial loss to be suffered by the Defendant applicant who has equally not offered any security from the due performance of the decree that may ultimately result.
7. On arguability of the appeal, it was contended that the applicant having failed to render an account as ordered by the court, since June 2017, there was no arguable appeal and that there was no evidence that the decree-holder had authorized the applicant on how to disburse the funds, hence the said funds ought to be in the hands of the decree-holder.
8. On 28/11/2018, when matter came up for hearing the same was adjourned to enable the applicant file supplementary affidavit as well as written submissions within set timelines. Pursuant to those directions the Applicant filed written submissions dated 30/01/2019 on 31/1/2019 while the respondent filed own submissions on the 26/02/2019. It is those submissions the parties attended court on the 25/3/2019 to highlight.

Submissions by the Applicant

9. The applicant's submissions underscores the facts and depositions in the application and crowns it with a concession that the "substantive law" on stay of execution pending appeal is to be found in Order 42 Rule 6 of the Civil Procedure Rules and makes emphasis that if stay be not granted the operations of the applicant as a legal firm would be destroyed and brought to a standstill. It was then asserted in the submissions that the applicant would be prepared to submit to such security as the court would consider necessary. Reliance was then placed on the decision the *Court of Appeal in Oraro & Racher Advocates vs Co-operative Bank of Kenya* in which the Court of Appeal granted stay to the applicant, a firm of advocates, having weighed the effect of ordering the firm to deposit a sum of Kshs.10,000,000/= as compared to that of keeping such sum away from the respondent, which is an established bank, pending the outcome of the appeal. On those grounds it was prayed that application be allowed and stay granted.

10. For the Respondent, the application was opposed on grounds of opposition, replying affidavit and the submissions filed. Emphasis was laid on the fact that the applicant fell short of the pre-requisite of grant of stay pending appeal set by Order 42 Rule 6(3) in that there was no substantial loss demonstrated; that the application was filed after undue delay and that no security had been offered for the due performance of the order that may ultimately be found to bind upon the applicant.

11. It was in particular pointed out that the fears expressed at paragraph 7 of the Affidavit in support were broad vague and lacking in specifics. The Respondent then referred the court to the decisions in *James Wangalwa vs Agness Naliaka Cheseto [2012] eKLR*, *R vs Commissioner for Investigations and Enforcement Exparte Wanainchi Group Kenya Ltd [2014] eKLR* as well as *Machira & Co. Advocates vs East African Standard (No. 2) [2002]eKLR*, among others, on legal requirements upon an applicant seeking stay pending appeal particularly that the applicant has to expound on how the enforcement of the order would occasion substantial loss to him.

Analysis and determination

12. This court proceeds from the learning that the purpose of stay pending appeal and the conditions to be imposed for grant is to secure the litigation between the parties so that at the end of the said litigation, on appeal, the appellant, if successful, realizes a tangible outcome not merely academic while at the same time the respondent, as decree-holder, is also assured that the time spent on appeal is not utilized unfairly to dissipate the vested rights in the decree. That goal is achieved by ensuring that while the appellant's right to appeal is safeguarded, the Respondents interests and rights in the property in the decree is equally assured of protection.

13. In this matter the sum this court has adjudged to be due and payable to the respondent decree-holder, as a former client to the Applicant/judgment debtor, is Kshs.50,000,000/= plus costs and interests. That may not be a little sum for most Kenya legal practitioners to be availed readily for purposes of deposit. I do consider the sum substantial which may visit upon the judgment debtor considerable difficulties in his practice.

14. This court appreciates the applicant's right to access justice unhindered while well aware that however well convinced that its decision sought to be challenged may be right, the final decision rests with the appellate court. A trial court should never be seen to stand on one's way towards exercising right to access the appellate court by putting conditions that would be seen to fetter the access to justice. While so proceeding, it must equally be born in mind that there is also the decree -holder with a crystalised right in the decree. The balance that I consider to serve the justice between the parties is that stay be granted on terms that the decretal sum be secured.

15. It is also my understanding that the security to be offered must be that which the court in its discretion considers sufficient for the due performance of the decree that may ultimately result. I do not interpret Order 42 Rule 6(2) b to mandate that the applicant must offer security beforehand. In granting stay the court exercises discretion to meet the ends of justice and it matters not that the applicant has not come forth to offer the security. It also doesn't matter that no decree has been drawn and costs taxed when the stay is sought. I consider it not to matter at this time, having heard the parties, because the settlement of a decree and taxation will follow and I shall not have disposed the application for stay finally by dismissing it on such account without expecting similar applications to be brought once those steps are taken. Proceeding that way would be too technical and oblivious of the need to employ judicial time efficiently

16. Those considerations and principles well applied to the facts of this matter makes the court to come to the view and opinion that the applicant, an officer of the court, need not be restrained or throttled from presenting his appeal. He certainly has that right which ought not be impeded.

17. Having considered all facts I consider relevant, I do grant to the applicant/judgment-debtor an order of stay pending appeal but on terms that he shall, within 30 days from the date of delivery of this ruling, lodge in court a bank guarantee in the sum of Kshs.5,000,000/= and valid for at least twelve months from the date of issue.

18. As costs of the suit have not been taxed, I direct and order that the costs of the application be in the cause.

Dated and delivered at Mombasa this 5th day of April 2019.

P.J.O. OTIENO

JUDGE