



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 137 OF 2018**

**SIMBA COACH LIMITED.....APPELLANT**

**VERSUS**

**KIRIIYU MERCHARNTS AUCTIONEERS.....RESPONDENT**

**RULING**

1. The applicant herein filed an application dated the 22<sup>nd</sup> November 2018 seeking the substantive order for leave to deposit the original log book in respect to M/V KAZ 991 together with the valuation report of Kshs 2,240,000.00 as a substitute of the decretal sought in the suit of Kshs 583,798.00 on such basis of granting a conditional stay pending the hearing and determination of the appeal as ordered by Court on the 6<sup>th</sup> November 2018. The main ground of the application is that the applicant has not been in a position to deposit the decretal sum within the stipulated period as directed by the court and is hereby requesting for the substitution of the same as per the terms of the application.

2. The respondent on his part opposed the application via the replying affidavit dated 30<sup>th</sup> November 2018. It is its argument that the applicant has not demonstrated how and why they are unable to demonstrate their inability to comply with the terms of the ruling.

3. The substantive issue that requires to be determined is whether this court can make an order to substitute the security and allow the application herein.

4. The application herein is brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and orders 42 rule 6 and 51 rule 1 of the Civil Procedure Rules. The applicant through this application seeks to have a review of the orders made on the 6<sup>th</sup> November 2018 and have the security substituted.

5. The court had on the 6<sup>th</sup> November 2018, in the presence of counsel for both the applicant and the respondent, ordered as follows -

‘(1) That the applicant shall deposit the decretal sum of Kshs 583,798.00 in court in the next 14 days.

(2) There shall be conditional stay for 14 days.

(3) Mention on the 27<sup>th</sup> November 2018.’

6. Security in stay of execution application is provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 as follows:

‘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.’

7. There are no fast and hard rules on what and how much the security ought to be and in this case the court reserves its discretionary power to determine as per the circumstances of the case and the nature of the security.

8. The Court of Appeal in *Butt vs. Rent Restriction Tribunal* [1982] KLR 417 gives guidance on how a court should exercise this discretion

and held that:

- ‘1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
- 2. 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.*
- 3. 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.*
- 4. 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 were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*
- 5. The court in exercising its powers under Order XLI 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 costs as ordered will cause the order for stay of execution to lapse.’*

9. In the instant suit, this court made a determination on the interim application and made an order granting the applicant a conditional stay of 14 days upon deposit of the entire decretal sum in court. The applicant unable to pay the same has invoked the court’s inherent powers and now seeks to have the same substituted. In essence the applicant herein seeks for a review of the orders of this court. It should be noted that this application ought to have been brought under the provisions of Order 45 of the Civil Procedure Rules, as held in *Edward Mungai Waweru vs. Samson Ochieng Kagunda & Another* [2018] eKLR and *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR.

10. Order 45 (1) of the Civil Procedure Rules provides that:

*‘Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.’*

11. The Court of Appeal in *Pancras T. Swai vs. Kenya Breweries Limited*, Civil Appeal No. 275 of 2010, [2014] eKLR was of the view that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds:

*‘i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or*

*ii. That there was a mistake or error apparent on the face of the record; or*

*ii. That sufficient reasons exist to warrant the review sought.*

*In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.’*

12. Regardless of the form, this court will consider the application as presented and make a determination thereon in the spirit of the provisions of Article 159 (2)(d) of the Constitution of Kenya.

13. It is the applicant’s position that it has not been in a position to deposit the decretal sum within the stipulated period and thus requests for the substitution of the security. The applicant invokes the inherent powers of this Court and the provisions of Order 42 Rule 6.

14. It is trite law that such applications ought to be made without unreasonable delay. The orders sought to be substituted were made on the 6<sup>th</sup> November 2018 in the presence of counsel of both parties. The orders were to be executed within 14 days. The applicant herein has after the lapse of the prescribed period made the said application seeking for the substitution.

15. The court in *Jaber Mohsen Ali & Another vs. Priscillah Boit & Another* E&L No. 200 of 2012[2014] eKLR was of the view that unreasonable delay depends on the circumstances of the case. The court stated:

*‘The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on*

*the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.'*

16. In the instant suit, the applicant was fully aware of the orders of this court of the 6<sup>th</sup> November 2018. It was also aware of its financial status as at the same period and ought to have in the circumstances made the application as soon as possible to salvage the situation and not after the lapse of the conditional period. It is my opinion that the application was made late in the day and this imputes that the application was not made in good faith but rather the same was made to delay and avert justice.

17. It should be noted that the applicant herein has not offered this court any reason why they are unable to deposit the sum ordered. In the affidavit in support of the application sworn by Felix Buni, the deponent merely states, in paragraph 3, that "...the Appellant has not been in a position to deposit the decretal sum sought within the stipulated period..." His further affidavit also does not disclose the reasons for the inability to deposit the said sum and thus has not offered sufficient reason as to why the same ought to be reviewed.

18. In *Alice Gathigia Karuku vs. Maisha Floor Mills* [2013] eKLR the Court was of the view that before the said substitution can be granted sufficient reasons for the substitution ought to be presented by the applicant. In the instant suit, it is my opinion that the applicant has not offered any reason for the substitution and thus the same ought to be dismissed.

19. The applicant has put the value of the motor vehicle at Kshs 2,240,000.00. This is way more than the decretal sum, the applicant can therefore not say that it is unable to raise the decretal sum yet it has assets value is more than the decretal sum.

20. Such an argument was addressed in *Kyuna Investments Limited & 2 Others vs. Florence Muyaka* [2013] eKLR where the court in dismissing a similar application stated that

*'The valuation of the vehicles show that they are worth over Kshs. 5 million the applicant therefore cannot argue that she cannot get deposit the Kshs. 4.8 million in court, she has assets she can sell to satisfy the court order am therefore not persuaded that she is not able to raise the security sum in cash.'*

21. Further the applicant is seeking to have the deposit of the decretal sum substituted with a motor vehicle logbook. It is their opinion that the same will be sufficient to settle the decree. In determining what security should be deposited courts are guided to make an order that will protect both parties in a suit. In *Visram Ravji Halai & Anor. vs. Thorntorn & Tupin [1963] Ltd* Civil App. No. NAI 15 of 1990, the Court of Appeal held that in making orders for security the court ought not to place the plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered.

22. In the case of *Absalom Dova vs. Tarbo Transporters* [2013] eKLR the court stated that:

*'The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...'*

23. The court in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR was of the view that -

*'... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words "ultimately be binding" are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.'*

24. The same was reiterated in *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates*, where the court stated that:

*'The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.'*

25. So is motor vehicle logbook an ideal security in the circumstances? The issue of a logbook being used as security for stay of execution of a decretal sum has been widely discussed by courts in others cases. In *Lochab Brothers Ltd vs. Lilian Munabi Nganga & 2 Others* [2007] eKLR, for example, the court dismissed a similar application to substitute security with a logbook, the court expressed the view that -

*'there is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.'*

26. In the recent case of *Esri Star Ltd & Another vs. Sila Oweshiwani* [2018] eKLR the court held *that* “a motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for stay of execution in a case involving a money decree.”

27. From the foretasted authorities, it is clear that a logbook is not and cannot be the ideal security in the circumstances owing to the circumstances and the uncertainties that it possesses in terms of how the respondent will recover the decretal sum. In an upshot, it is my humble opinion that the applicant herein has failed to provide sufficient reason to substitute the security as ordered by this court and as such the application cannot succeed.

28. Further it must be noted that the applicant herein seeks have a review of orders that have been already been spent. These prayers cannot be granted as the orders were conditional and they have since lapsed. Granted these circumstances, even if the applicant had established a case for review, the application would still have failed since in my opinion, no useful purpose would be served by reviewing orders which are already spent.

29. It is thus my opinion that the application 22<sup>nd</sup> November 2018 is devoid of merit and should be dismissed with costs to the respondent. I will, however, in the interest of justice, hand the applicant a lifeline. It shall deposit the decretal sum of Kshs 583,798/00 in court in the next fourteen (14) days and there shall be conditional stay for 14 days. Failure to do so execution shall ensue.

**DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 10<sup>th</sup> DAY OF April, 2019**

**W MUSYOKA**

**JUDGE**