



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 55 OF 2018

BASH HAULIERS LTD.....APPLICANT/APPELLANT

-VERSUS-

DAMARIS KITSAO BAYA.....1ST RESPONDENT

MWANGO MWAHANGA KALU..... 2ND RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 14th November, 2018 and filed on 16th November, 2018 by the Appellant/Applicant. The same is brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A Civil Procedure Act seeking an order of stay of execution of the judgment delivered and/ or orders made on 11th July, 2018 pending the hearing and determination of the appeal herein. Temporary stay of execution was granted on 21st November, 2018.

2. The application is premised on the grounds on its face and the supporting affidavit by one Caren Nada Jaguga a senior legal officer at the Appellant's insurers office. The application has been opposed by the Respondents who have filed a replying affidavit by the 1st Respondent.

The Applicant's Case

3. The Applicant claims to have a meritorious appeal which will be rendered nugatory if the order sought is not granted. In the supporting affidavit its deponed that the Respondents were awarded Kshs.4,457,091/20 as damages which is too high. The Applicant fears that should the said money be paid it would suffer substantial loss as the difference in amount is substantial and the Respondents ability to refund such monies is untested.

4. Its further deponed that a similar application for stay of execution had been filed before the lower court but the said court declined to hear it and granted the Applicant a 14-day stay of execution. That this application was filed within the 14 days. The Applicant has offered to deposit a bank guarantee for the due performance of the decree plus any other orders the court makes in terms of security.

5. In support of the application, Mr. Mugambi Mungania filed written submissions. He argued that the Applicant had satisfied all the three prerequisites under Order 42 Rule 6 Civil Procedure Rules. On the application being brought without undue delay, he submitted that the application was filed before the lapse of the 14 days given by the trial court.

6. On the issue of substantial loss to the Applicant he submitted that the award of Kshs.5,696,364.00/= by the lower court is contested. That in the event of a successful appeal the Respondents are unlikely to refund the money. The reason for such submission he said was because the evidence of the Respondents was that the deceased was the bread winner for the Respondents. Cited is the case **of Magante Ventures Simon Mutua Muatha & Anor (2018) EKL**

“25.....substantial loss does not have to be a colossal amount of money. It is sufficient if an Applicant seeking a stay of execution demonstrates that it will go through hardship such as instituting legal proceedings to recover the decretal sum it paid to a Respondent in the event his or her appeal was successful Notably the 1st Respondent herein did not file an affidavit of means to demonstrate that he was in a good financial position to repay the Appellant the decretal sum in the event it was successful in his appeal ...”. His submission is therefore that the Respondent's ability to refund the decretal sum in the event of a successful appeal remains untested.

7. He further submitted that the Applicant was willing to abide by any orders or this court on security. He urged the court to allow the Applicant to deposit a bank guarantee as security since it is a security in the real terms of the law.

The Respondent's Case

8. The 1st Respondent in her replying affidavit states that she is one of the legal administrators of the deceased's estate. According to her, the application and appeal are meant to deny the deceased's estate the fruits of the judgment. Further that execution is a legal process which they are lawfully pursuing. She has deponed that nothing has been filed to show that the Respondents will not be able to refund the decretal sum if paid.

9. Without prejudice she averred that the Applicant should be ordered to deposit the full decretal amount in an interest earning account as well as any other orders as to security the court deems necessary. She denied that the appeal is arguable.

10. M/s Ameli Inyangu & Partners for the Respondents in their written submissions relied on the cases of **Butt –v- Rent Restriction Tribunal (1982) KLR; Masisi Mita –v- Damaris Wanjiku Njeri Civil Appeal No. 107 of 2015 (2016) Eklr; Halburgs Laws of England 4th Edition volume 37 pages 330 – 332** and order 42 Rule 6 Civil Procedure Rules as the basis for their submissions on stay of execution application herein.

11. Counsel submitted that the Applicant had not proven any substantial loss it will suffer should the instant application not be allowed. On the Respondents' ability to refund the decretal sum if paid he submitted that the Applicant had not conducted any due diligence to establish the capability of the Respondents to make a refund.

12. On whether the application had been made without undue delay it was submitted that after delivery of judgment on 11th July, 2018, the court granted a 30 days stay which lapsed on 12th August, 2018. That the Applicant went to slumber and only woke up upon being served with an execution notification. It was contended that a similar application was filed in the lower court and the present one was filed after an inordinate delay. On this point, he relied on the case of **Jaber Mohsen Ali & Anor vs- Priscillah Boit & Anor E&L No. 200 of 2012 (2014) Eklr.**

13. Relying on the case of **Bluebird Aviation Limited –vs-Msi Aircraft Maintenance Services International GMBH & CO.KG (2016) Eklr.** It was submitted that the court should order the Applicant to deposit the decretal sum in a joint interest earning account to be opened by advocates of both parties.

Analysis & Determination

14. I have considered the application, grounds, affidavits and submissions. The issue I find falling for determination is whether the Appellant/Applicant has satisfied the conditions set out in Order 42 Rule 6 Civil Procedure Rules which provides that: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order , and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”. The four conditions to be considered are: sufficient cause, substantial loss, security to be furnished and the application ought to have been filed without undue delay.

15. The judgment being challenged was delivered on 11th July, 2018. The appeal herein was filed on 6th August, 2018 which was within time. The current application was also filed within the time frame granted by the lower court on 7th November, 2018.

16. None of the parties herein and in particular the Appellant/Applicant filed a certified copy of the judgment and/ or decree of the lower court. This court has called for the same from the parties in vain. The main reason for calling for the same was to satisfy myself on:

i. The finding of the lower court on liability.

ii. The exact award on quantum because the Appellant/Applicant talks of Kshs.5,788,749/= as per the memo of appeal, while the Respondent talks of Kshs.4,654,455.00/=.

17. To avoid further unnecessary delays in the matter, I have decided to work with an average of the two differing figures.

18. There is no evidence to show that the Applicant has paid any part of decretal sum. Besides the allegations of substantial loss, to be suffered none has been so far demonstrated to exist. It was the Respondent's duty to show that if the decretal sum is paid the Respondents will not be in the event of a successful appeal.

19. It is however not lost to this court's observation that even where no such demonstration has been made, the court has to be alive to the fact that the appeal could go either way and hence protect the interests of both parties.

20. In this case the Applicant has indicated its willingness to get a bank guarantee for the full amount and also abide by any other alternative conditions the court will give.

21. After due consideration of all the material before me, I am satisfied that the Appellant/Applicant has made out a case for issuance of stay of execution pending appeal. The same will however be granted on the following grounds:-

i. The Applicant to pay the Respondent through her advocate Kshs.1,500,000/= within 30 days.

ii. The Appellant/Applicant to secure a bank guarantee for Kshs.3,000,000/= within 30 days.

iii. The Applicant to fast track the processing of the appeal.

iv. Costs to be in the cause.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 14TH DAY OF JUNE, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE