



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 75 OF 2019

NESCO SERVICES LIMITEDAPPELLANT/APPLICANT

VERSUS

CM CONSTRUCTION (EA) LIMITEDRESPONDENT

RULING

1. By a Motion on Notice dated 25th June, 2019, the applicant herein, **Nesco Services Limited**, primarily seeks an order for stay of execution of the judgement and orders made on 28th May, 2019 in Machakos CMCC No. 162 of 2017 pending the hearing and determination of this Appeal.

2. According to the applicant, on 28th May, 2019, judgement was entered against the applicant in CMCC No. 162 of 2017 in which the Respondent was awarded a sum of Kshs 10,941,779.80 with interest and costs.

3. According to the Applicant it has an arguable appeal with high chances of success and if the orders sought herein are not granted, this appeal will be rendered nugatory since the applicant is at risk of its property being attached before the hearing of the appeal hence the applicant stands to suffer substantial loss.

4. As security, the applicant offered two properties being Mavoko Town Block 3/134446 and 134445 which properties the applicant disclosed that the owner had consented to be offered as security and to support this contention, the applicant exhibited a copy of the resolution to that effect and it was willing to deposit the titles thereof in court.

5. In opposition to the application, the Respondent averred that the appeal has no chances of success since the applicant admitted not having paid the respondent its contractual dues amounting to Kshs 10,941,779/-. In its view the right of appeal has to be balanced with the right of the decree holder to enjoy the fruits of the judgement. It was contended that since Order 46 Rules 6(b) of the **Civil Procedure Rules** gives the court powers to determine the security upon ordering stay to ensure the due performance of the obligation by the applicant as to costs and to satisfy the decree, the applicant cannot dictate to the court what type of security to furnish. To the Respondent, if and when the court is inclined to grant stay then it should direct half the decretal sum to be paid to the Respondent and the other half deposited in an interest earning account in the joint names of the advocates for the parties within 30days.

6. The Respondent averred that it is able to refund the decretal sum if and when the appeal succeeds and it exhibited payments which it has been receiving. It was the Respondent's case that this application is just but a waste of judicial time and is a delaying tactic aimed at denying the respondent the fruits of the judgement hence it is in the interest of justice that the applicant be compelled to satisfy the decretal sum.

Determination

7. I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon.

8. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

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.

9. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

10. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intent of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**.

11. The same position was adopted by **Kimaru, J in Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where he stated that:

"The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

12. According to **Ogola J in Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331:-**

"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 is merely nominal..."

13. Similarly, **Musinga, J in Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** stated that substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.

14. This was the position of **Warsame, J (as he then was) in Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss..."

Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

15. On the first principle, **Platt, Ag. JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

"It is usually a good rule to see if Order XLI Rule 4 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 see why the respondents should be kept out of their money"

16. On the part of **Gachuhi, Ag. JA** (as he then was) at 417 held:

"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 judgement. 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 judgement."

17. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

18. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

19. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

20. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success since lack of means per se is not necessarily a ground for granting stay. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

21. In this case none of the parties has exhibited the proceedings to show the nature of the evidence adduced in order for the court to determine the chances of success of this appeal.

22. In this application however, I agree with the respondent that the applicant was very economical with in terms of material. Nowhere in the affidavits filed has it shown the manner in which it stands to suffer substantial loss. It is not for example contended that the Respondent's position is so precarious that he is unlikely to refund the decretal sum once the same is paid over to her.

23. Conversely, the Appellant does not contend that if compelled to pay the decretal sum it is likely to fold up. To the contrary, it seems to be the Appellant's case that it is financially solid. That being a factual matter ought to be deposed to in the affidavit in support of the application. I agree with the position adopted in Bungoma High Court Misc Application No 42 of 2011 - **James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”

24. In this case however, the sum involved is slightly over Kshs 10,000,000/=. As appreciated in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331:-**

“...insistence on a policy or practice that mandates security for the entire decretal amounts is likely to stifle possible appeals – especially in a commercial court, such as ours where the underlying transactions typically tend to lead to colossal decretal amounts.”

25. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account.

26. Therefore, with respect to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the said case the amount in question was Kshs. 4,000,000.00.

27. Having considered the instant application, it is my view that this a case where a stay ought to be granted but on conditions. Accordingly, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing of this appeal on condition that the Appellant pays half of the decretal sum to the respondent and deposits the balance in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos. Both conditions to be complied with within 30 days from the date of this ruling and in default this application shall be deemed to have been dismissed with costs to the Respondent.

28. The costs of this application will be in the appeal.

29. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 22nd October, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyakundi for the Appellant/Applicant

CA Geoffrey