



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 39 OF 2018

TEBERE CONCRETE COMPANY LTD.....APPELLANT/APPLICANT

VERSUS

ABDULRAZAK MASUDI (Personal Representative

of MASUDI MOHAMED HASSAN (Deceased).....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the Notice of Motion application dated 27th September 2018 in which the applicant seeks an order for stay of execution pending the hearing and determination of this appeal.
2. It is the applicant's case that the respondent has moved to attach and proclaim its goods and threatens to auction them which would in turn render the appeal nugatory and occasion it substantial loss.
3. In rejoinder, the respondent filed a replying affidavit sworn on the 18th June 2019 in which he deposed that the appeal by the applicant was not tenable as it was an abuse of the court process calculated to delay the execution of the judgement of the trial court.
4. The respondent further deposed that the attachment and proclamation of the applicant's property was done through lawful means. The respondent further deposed that the applicant ought to be ordered to deposit the decretal sum in a joint interest-earning account if the court was to grant the stay.

B. Respondent's Submissions

5. The respondent submitted that the applicant had not tendered any evidence to enable the court exercise its discretion to grant the stay and a such the applicant was not deserving of stay of execution. He relied on the case of **Nyota Tissue Products v Lawrence Lawi Kuboka & 4 Others [2018] eKLR** where the court held inter alia that in such an application, the applicant should show the damages it would suffer if the order of stay was not granted.
6. The respondent further submitted that the application was made with an inordinate and an inexcusable delay the trial court's judgement having been delivered on the 29th August 2018. He relied on the case of **Joseph Ouma Onditi v Jane Kisaka Mun'gau [2018] eKLR.**
7. The respondent also submitted that the applicant had not deposited or offered a security for costs. He relied on the case of **Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR** where the court held inter alia that all conditions for stay of execution must be met for an order of stay to be granted.
8. The respondent further submitted that the appeal by the applicant had no chance of success as the issue of indemnity and third party notice was overtaken by events and should have been raised in the trial court. He relied on the case of **Union Insurance Company of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. Nairobi 179 of 1998** where the court held that for a stay of execution to be granted the applicant must show that the appeal has chances of success.

C. Analysis & Determination

9. This is an application that invokes the discretionary powers of the court. In the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** and **Kenya Shell Limited vs Benjamin Karuga Kibiru [1986] KLR 410**, the common thread was that a stay of execution will not be granted unless the conditions in

Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

10. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. Substantial loss may result to the applicant unless the order was made;

2. The application was made without unreasonable delay; and

3. 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.

11. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed and the word “and” connotes that all three (3) conditions must be met simultaneously.

12. It is my considered view that substantial loss does not have to be only a risk for loss of substantial amount of money. It is sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

13. There was no affidavit evidence by the respondent on the court record of proof of his ability to pay back the decretal sum and as such, this court is satisfied that the applicant would suffer substantial loss. It has thus satisfied the first condition of being granted a stay of execution pending appeal.

14. It is further noted that the applicant is appealing against the ruling of the trial court delivered on the 7th day of August 2018 which dismissed his chamber summons dated 22/06/2018 that sought to introduce a third party and also sought stay of execution of the trial court’s judgment of 29th August 2017 awarding the respondent Kshs. 870,000/= as damages as a result of fatal road accident.

15. I also note that prior to the applicant’s chamber summons dated 22/06/2018, the respondent herein had already commenced execution proceedings wherein the attachment and proclamation of the applicant’s goods had begun pending auction of the same. In the circumstances foregoing, it is my opinion that the delay was inordinate and it has caused the respondent to suffer prejudice or injustice in the form of denial of his right to enjoyment of his judgement.

16. The applicant has not demonstrated its willingness to furnish security. There was no affidavit evidence pointing to the fact that it was willing to furnish security. However, the court may order that security be provided if it deems it fit in the interests of justice.

17. In the case of **Ujagar Singh v Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus:

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

18. Further, in the case of **Siegfried Busch vs MCSK [2013] eKLR**,

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

19. Accordingly, having considered the parties’ pleadings, affidavits, written submission and the case law relied in support of their respective cases, it is the considered view of this court that as the applicant is entitled to exercise to its right of appeal, it is in the interests of justice that a stay of execution pending the hearing and determination of the appeal of the learned trial magistrate’s judgment be granted so as not to render his appeal nugatory.

20. Due to the delay occasioned by the applicant in filing this application, it will be condemned to meet the costs of this application for the respondent.

21. Consequently, I hereby find the application merited and allow it in the following terms: -

a) That orders for stay pending appeal to issue in favour of the applicant pending hearing and determination of the appeal.

b) That the applicant to deposit the full decretal amount in an interest-earning account in the names of the advocates on record for the parties within thirty (30) days in default the orders for stay will stand vacated.

c) That the applicant to meet the costs of this application which will be in the cause.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Bahati Mwamuye for Applicants

Mr. Okwaro for Mr. Yusuf or 1st Respondent