



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 280 OF 2018

DOSHI & CO (HARDWARE) LIMITED.....1ST APPELLANT

PATRICK NYOIKE MAKATO.....2ND APPELLANT

VERSUS

SUSAN NDUKU NDUMI.....RESPONDENT

(Being an appeal of the Judgment and decree of the Chief Magistrate's Court

at Milimani by Hon D.O. Mbeja (Mr) Senior Resident Magistrate

delivered on 22nd May 2018 in CMCC 5822 of 2017)

RULING

INTRODUCTION

1. The Appellants' Notice of Motion application dated 14th January 2019 and filed on 15th January 2019 was filed pursuant to Article 159(2) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Orders 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT there do issue an order of stay of execution of the judgment herein and the resultant decree pending the hearing and determination of the Appellants/Applicants' appeal.

4. THAT the costs be in the appeal.

2. Their Written Submissions were dated and filed on 21st February 2019 while those of the Respondent were dated 7th May 2019 and filed on 13th May 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANTS' CASE

4. The Appellants' present application was supported by an Affidavit that was sworn by the 1st Defendant's Manager, Davies Ndonge, on 11th January 2019.

5. The Appellants stated that on 22nd May 2018, Hon D.O. Mbeja (Mr) Senior Resident Magistrate entered judgment in favour of the Respondent herein against them for Kshs 1,500,000/= general damages and Kshs 14,045/= special damages. They stated that their Notice of Motion application dated 22nd May 2018 seeking extension of stay of execution pending appeal that was initially granted on 22nd May 2018,

was dismissed on 26th September 2018 on the ground that they had not expressed their willingness to provide security.

6. They averred that on 7th November 2018, they filed a Notice of Motion application dated 6th November 2018 seeking a Review of the aforesaid Ruling but that on 7th January 2019, after awaiting delivery of the Ruling on notice, they perused the court file and noted that their said application was expunged from the court record for having been undated.

7. They pointed out that they had already requested for certified copies of the proceedings and were apprehensive that their assets stood to be executed in the event an order for stay of execution was not granted. It was also their contention that they had brought their application without any inordinate delay and expressed their readiness and willingness to furnish security for the payment of the aforesaid decretal sum.

8. They thus urged this court to allow their application as prayed.

THE RESPONDENT'S CASE

9. In response to the said application, the Respondent swore a Replying Affidavit on 11th February 2019. The same was filed on even date.

10. She stated that the Appellants filed two(2) applications in the lower court and that they were both dismissed. It was her averment that it was necessary that litigation come to an end. She termed the present application a waste of judicial time and an attempt to frustrate her from enjoying the fruits of her judgment.

11. She was emphatic that the Appellants had failed to satisfy the conditions for being granted an order for stay of execution.

12. It was her further averment that the Appeal had little chances of success on appeal and that the application having no merit, ought to be dismissed in its entirety with costs.

LEGAL ANALYSIS

13. The Appellants relied on the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and the cases of **National Bank of Kenya Ltd vs Alfred Owino Bala [2015] eKLR** and **Pascal Obonyo Agwena & 3 Others vs Simon Juma Odiyo [2018] eKLR** in support of their case.

14. It was their submission that their application had been filed without inordinate delay. They contended that in the event they succeeded in their Appeal and they will have paid the Respondent, it will be difficult to recover the decretal sum from her compared to her recovering from them because the 1st Respondent was insured by G A Insurance, an institution of good repute, good standing and one that had means to indemnify it for judgment and costs incidental to the suit.

15. They stated that they were willing and ready to deposit the decretal sum in court or to deposit it in a joint interest earning account in the names of the advocates or depositing into court or depositing a Bank Guarantee for the decretal sum.

16. On her part, the Respondent submitted that the Appellants had not demonstrated her inability to refund the decretal sum if it was paid to her and in the event the Appeal herein was successful. It was her argument that they had not therefore demonstrated that they would suffer substantial loss.

17. She also stated that there was delay in their filing the present application because despite judgment having been delivered on 22nd May 2018, it was not until 15th January 2019 that it was filed.

18. She added that although they had indicated their readiness and willingness to deposit the decretal sum, the Appellants had not taken any steps to deposit the same.

19. To support her case, she relied on the cases of **John Mwangi Nderitu vs Joseph Ndiritu Wamathai [2016] eKLR**, **John Gachanja Mundia vs Francis Muriira alias Francis Muthika & Another [2016] eKLR**, **Jaber Mohsen Ali & Another vs Priscillah Boit & Another [2014] eKLR** and **Machira t/a Machira & Co Advocates vs East African Standard [2002] eKLR**.

20. It was evident from the Written Submissions before court that the Appellants and the Respondent were agreed on the circumstances under which an applicant could be granted an order for stay of execution pending appeal. What they were not agreed upon is whether or not the Appellants were entitled to being granted an order for stay of execution pending appeal.

21. Order 42 Rule 6 (2) of the Civil Procedure Rules 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 her has been given by the applicant.”

22. An applicant seeking a stay of execution must demonstrate:-

- a. That she will suffer substantive loss if the order for stay is not granted;
- b. That she had filed her application for a stay of execution timeously; and
- c. That she was willing to provide security.

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

24. Notably, the Respondent did not attach any Affidavit of Means to demonstrate that if she was paid the entire decretal sum and the Appellant succeeded in its Appeal, she would be able to refund the same.

25. It was the considered view of this court that any difficulties in recovering decretal sum upon an appeal succeeding could be deemed to amount to substantial loss. As it was not clear how the Respondent would refund the decretal sum to the Appellants in case the Appeal was successful, this court was satisfied that the Appellants had demonstrated that they would suffer substantial loss if the order for stay of execution pending appeal was not granted. The Appellants had therefore satisfied the first condition under Order 42 Rule 6(2)(b) of the Civil Procedure Rules.

26. Appreciably, “**equity aids the vigilant and not the indolent.**” However, it was the view of this court that although the Appellants filed their present application almost eight (8) months after judgment was delivered, there were other processes between the time judgment was delivered and the filing of the present application.

27. The Appellants sought an order for stay of execution pending appeal in the lower court and also sought to review the said order in which the first application was also dismissed. They also became the second dismissal order on 7th January 2019. The Respondent did not adduce any evidence to demonstrate that they were aware of when the Ruling of their Review application was dismissed. This court thus accepted their explanation that the second Ruling was to be delivered on notice and which notice they never received.

28. Notably, every person is entitled to have a fair trial as envisaged under Article 50(1) of the Constitution of Kenya. The said Article 50(1) of Constitution of Kenya provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

29. As the present application was filed a week after they established that their application for review was dismissed, this court determined that the present application was made without delay and hence the Appellants had satisfied the second condition for being granted an order for stay of execution pending appeal.

30. In respect of the third condition, this court noted that the Appellants were ready and willing to deposit the decretal sum for the due performance of the decree as may be ultimately binding on them.

31. Unless there had been a consent between the Appellants and the Respondent, the Appellants could not have made any steps to facilitate the depositing of the decretal sum as the Respondent contended. They could only have deposited the same after being ordered to do so by the court.

32. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Appellant being denied an opportunity to ventilate its case on merit. Indeed, no person should be shut out from accessing court or having his day in court. The right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

DISPOSITION

33. For the foregoing reasons, the upshot of this court’s decision was that the Appellants’ Notice of Motion application dated 14th January 2019 and filed on 15th January 2019 was merited and the same is allowed in terms of Prayer No 3 in the following terms:-

1. **THAT the Appellants shall deposit into an interest earning account in the joint names of their advocates and those of the Respondent, the sum of Kshs 1,514,045/= within the sixty (60) days from the date hereof i.e. by 31st January 2020.**
2. **For the avoidance of doubt, in the event the Appellants shall default on Paragraph 33 (1) hereinabove, the conditional stay of execution shall automatically lapse.**
3. **The Appellants are hereby directed to file and serve their Record of Appeal within sixty (60) days from today i.e by 31st January 2020.**
4. **The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the placing**

of the typed certified proceedings and lower court file to enable the Appellants comply with Paragraph 33 (3) hereinabove.

5. Costs of the application herein shall be in the cause.

6. Either party is at liberty to apply.

34. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of November 2019.

J. KAMAU

JUDGE