REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 92 OF 2017

GULF BADR GROUP (K) .....PLAINTIFF

VERSUS

MORE THAN CONQUERORS CO. LTD.....DEFENDANT

R U L I N G

1. On 22/6/2018, this court granted to the defendant an order for setting aside a default judgment but on condition that the defendant deposits the sum sued for in a joint interest earning account in the names of the advocates for the parties within 30 days and on default the order for setting aside would lapse and the default judgment would be restored.

2. Being aggrieved by that decision the Defendant has filed a Notice of Appeal and the notice of motion dated 13th July 2018 seeking an order that there be stay of the portion of the ruling directing deposit pending the hearing and determination of an appeal to the Court of Appeal.

3. The reasons set forth to ground the application, besides the fact that a Notice of Appeal had been filed, were that the defendant has a strong appeal which will be dissipated by an execution taking place and thus leaving nothing to pursue on appeal hence an irreparable loss. To the Defendant/Applicant the order for deposit is tantamount to denial of the right of appeal, and thus contends that it is not a necessary consideration for the court and thus made no offers save for thrown way costs.

4. When served the plaintiff/respondent filed a replying affidavit by its counsel on record, one Hannah M. Mtekele in which the Application is opposed in its entirety on the first ground that even in this application the defendant/Applicant has not offered to avail the security for the due performance of the decree if the appeal fails and that the offer of security of **Kshs.30,000/=** for a sum of **USD206,447** is most unreasonable.

5. It was then asserted and averred that the plaintiff is a shipping agent for Evergreen Shipping Line which operates one of the largest container fleets in the world and thus not a person of the straw and that the application was a ploy to keep the plaintiff from the enjoyment of fruits of its litigation.

6. On the directions given by the court, the parties filed written submissions on the 27/11/2018 and 12/11/2018, respectively, then attended court on 30/4/2019 to highlight the same.

7. In the submissions, the defendant applicant underscores the fact that it had come to court without delay and that there was danger of the 30 days granted for compliance lapsing and execution ensuing yet the Defendant entertains a belief that it has a strong appeal to the Court of Appeal which will not be feasible after execution and thus upon the Defendant an irreparable loss and the appeal rendered nugatory. It was then disclosed that the appellant feels that the condition for deposit is oppressive and the decision in ***Linear Coach Co. Ltd vs Al Husnein Motor Ltd [2013]*** for the proposition of the law that the purpose and aim of a court of law is to do justice between the parties. Other decision in Grace ***Wanjiku vs Highland Mineral Water Co. Ltd [2015]*** and **Kenya Power** and ***Lighting Co. Ltd vs Abdul Hakim Abdalla Mohammed [2017]*** for the proposition that the discretion of the court is wide and unfettered and that an award of a sum equivalent to thrown away costs would have been sufficient.

8. In oral submissions, counsel submitted that the sum of about Kshs.20,000,000/= is substantial and not easy to raise. On the need to offer security the counsel maintained that the same would be a matter to be argued before the Court of Appeal and not open for this court to address.

9. In opposition, the respondent submitted that on the lapse of 30 days to comply the default judgment was reinstated and therefore there is a judgment whose stay demand compliance with Order 42 Rule 6. To the respondent there had not been given security for the due performance of the decree should the appeal fail. It was pointed out that thrown away costs is not a consideration under Order 42 Rule 6 and

that only the judgment sum is due for consideration as security. Counsel then cited to court the decision in ***Wachira vs East African Standard 2[2002] KLR 63*** for the proposition of law that it is the duty of the Applicant to show the specific details and particulars of the feared loss and that where no tangible or pecuniary loss is shown to the satisfaction of the court, no stay will be granted. The decision in ***Antoine Ndiaye vs African Vitual University [2015] eKLR*** was also cited for the proposition of the law that an applicant must show that execution if allowed to ensue would create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party in the appeal.

10. The respondent pointed out that the Applicant had adamantly failed to offer security for the order it seeks. It was then submitted that to fail to order security for stay pending appeal is a misdirection on the part of the court. ***Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR*** was cited for the Principle of the Law that need for security is mandatory and that it would amount to flirting with the appellant and shedding crocodile tears for the successful party with a decree at hand. On those grounds it was urged that the Application be dismissed for lacking in merits.

Analysis and determination

11. I have had the benefit of reading the parties submissions and the helpful authorities cited by both sides. Even though the appeal challenges my discretion in setting aside and terms it as oppressive, I am aware that it is not for me in this application to consider that aspect. I am not even expected to consider the strength of the appeal under the Rules of this court. I think it needs to be clarified that the principles applicable before me are not the same that apply before the Court of Appeal under Rule 5(2)b of the Rules of that court. Accordingly the decision in ***Kenya Power and Lighting Co. Ltd vs Abdul Hakimi Abdalla Mohammed*** cited by the applicant is of no assistance to this court.

12. In this matter my only concern is to safeguard the substratum of the litigation on the appeal so that no substantial loss is occasioned to the Appellant by the appeal being rendered nugatory but at the same ensuring that the successful party, with a decree in hand, is fully secured in the event the appeal fails.

13. In the matter before me, I am in no doubt that when the period imposed for compliance lapsed, the default clause took effect with the consequence that the default judgment in the sum of USD 206,447 was reinstated. It is thus axiomatic that today in this file there is a judgment in the said sum.

14. Order 42 Rule 6(2) which guides this court on how to deal with an application for stay provides:-

> **"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".**

15. As worded, the law commands the court to establish before grant of stay pending appeal, that there is a real prospect of irreparable loss being visited upon the Applicant; that the application has been brought without undue delay and that there has been offered security for the due performance of the decree appealed against. As said before in this file there is a monetary decree in an ascertained sum. It is that sum the applicant says if the legal process is put in place to recover there it will suffer irreparable loss.

16. In this, I fully agree with the decision in **Masisi Mwita's case** that mere execution is never deemed substantial loss unless it be shown that the execution will create a state of affairs that will irreparably effect and negate the very substratum and subject of the appeal so that even in the event of the appeal succeeding the outcome would be no more than an academic exercise. While it is true that the applicant has undoubted right of appeal, it is also equally true that the respondent has a valid decree subject to the appeal which decree must also be taken into account. While a decree of the court pends settlement, it cannot be validly said, without more, that its execution *per se* would result into an irreparable loss as defined and known to law. To the contrary a decree of the court ought to be executed at the earliest permissible opportunity so that litigation is brought to an end.

17. In this matter the only ground put forth is that the sum is huge and difficult to put together for purposes of deposit. It is not that if execution proceeds before the appeal is heard and the appeal later on succeeds, it would be impossible to recover owing to the impecuniosity of the decree holder. In fact the assertion by the respondent that it is financially firm by virtue of being a shipping agent for Evergreen Shipping Line, one of the largest container fleet operators has not been challenged or commented upon. Lack of challenge leaves it uncontested that the decree holder has the capability to refund the sum even if the appeal succeeds.

18. In monetary decrees like in this matter it is unusual for the appeal to be rendered nugatory and therefore substantial loss unless it be shown that the respondent is about to wind up or will not be in a position to effect a refund [1] and it remains upon the applicant to prove so[2].

19. In this matter even if the application was brought timeously, there has not been availed to court evidence of sufficient cause to show that unless stay is granted substantial loss would be visited upon the applicant. In addition the Applicant simply wants the court to ignore and rubbish the requirements of Order 42 Rule(2) on provision of security which is the cornerstone of grant of stay pending appeal. The impression I get from the Applicants application and the submissions is that the applicant demands stay on its own terms and not willing to subject itself to the law as applied in accordance with the judicial discretion of the court. I think that is very unfortunate.

20. That notwithstanding, I have said enough to show that the applicant he failed to bring himself within the threshold of the law of granting stay pending appeal with the consequent that the application cannot succeed but fails and is hereby dismissed with costs.

Dated and **delivered** at **Mombasa** this **8th** day of **November 2019**.

P.J.O. OTIENO

JUDGE

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[1] Kenya Shell vs Kibiru [1986] KLR HQ

[2] Caneland Ltd vs Delphis Bank Ltd