



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**HIGH COURT CIVIL APPEAL NUMBER 48 OF 2019**

**AUTOMOBILE WAREHOUSE (NKU) LIMITED.....APPELLANT**

**=VERSUS=**

**TIMOTHY MOMANYI MANGERA.....1<sup>ST</sup> RESPONDENT**

**IMPERIAL BANK LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before me is the notice of motion dated 24<sup>th</sup> July, 2019 brought under **Section 1A, 1B & 3A** of the **Civil Procedure Act** and **Order 42 rule 6(1) and 9, order 51 rule 1** of the **Civil Procedure Rules, 2010** and all enabling provisions of the law.
2. It seeks one main order. That pending the hearing and determination of the appeal filed herein, there be an order of stay of the execution of the judgment/decree in Nakuru CMCC 1299/2012 delivered on 5<sup>th</sup> March, 2019, and any consequential orders thereto, upon terms that may be just reasonable and facilitative of this appeal.
3. The main ground for the application as set out on the face of the notice of motion is that the applicant's application for stay pending appeal made before the trial court was dismissed with costs on 23<sup>rd</sup> July, 2019. The applicant filed this application on 24<sup>th</sup> July, 2019.
4. The applicant is of the view that the appeal has high chances of success, it is willing to furnish the security this court may deem fit. The applicant's expects to persuade the court that it is exposed to irreparable loss and damage and to rely on "this court's practice in the exercise of its appellants jurisdiction that there be stay of execution pending hearing and determination of the appeal."
5. The Notice of Motion is supported by the affidavit of PRAKASH SHAH sworn on 24<sup>th</sup> July, 2019 and annexures. Judgment of the lower court in CMCC 1299 of 2012, the memorandum of appeal and the ruling of 23<sup>rd</sup> July, 2019.
6. The application is opposed through the replying affidavit of one Timothy Momanyi Mangera, the 1<sup>st</sup> respondent sworn on 24<sup>th</sup> July, 2019 seeking the dismissal of the application for failure to comply with **Order 42 rule 6** of the **Civil Procedure Rules**. That the application has failed to demonstrate;
  - It will suffer substantial loss if application is not granted.
  - It has provided security for due performance of the decree.
  - It has moved the court timeously.
7. The respondent argues that it is preposterous for the applicant to suggest that he is not a person of means yet he paid the deposit of Kshs. 2,900,000/= to the applicant for the purchase of the truck and has so far paid Kshs. 6,953,363/=.
8. Parties agreed to canvass the application by way of written submissions.
9. The gist of the matter is that the 1<sup>st</sup> respondent had filed suit seeking mandatory orders to compel the applicant herein and another to release motor vehicle registration number KBP 181Q Mitsubishi Fuso Motor (the truck) to him, after the same was held by the applicant and the 2<sup>nd</sup> respondent.

10. The trial court upon hearing the suit found from the 1<sup>st</sup> respondent and awarded her the sum of Kshs. 4,875,000/= against the applicant and the 2<sup>nd</sup> respondent jointly and severally for loss of user.

11. The trial court having found this, denied the application for stay pending appeal on the ground that the applicant had failed to demonstrate substantial loss.

*“In the court’s considered view the plaintiff (herein 1<sup>st</sup> respondent having been entrusted with a financing agreement by the defendants (herein applicant and 2<sup>nd</sup> respondent) cannot be said to lack the means to refund the decretal sum should the appeal succeed.”*

12. **Order 42 rule 6(1) and (6)** provide;

**“6(1) .....**

**6(2) no order for stay of execution shall be made under Sub rule (1) unless**

**(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application had been made without unreasonable delay; and**

**b) such security as the court orders for the due performance of the decree and on order as may ultimately be binding on him has been given by the applicant.”**

13. The application must demonstrate that it shall suffer substantial loss (see **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another**) which is the cornerstone for granting stay.

This is tied to evidence that the respondent will be unable to pay the money in the event the appeal succeeds. The onus is on the applicant to provide evidence of both limbs – See **Section 109** of the **Evidence Act Cap 80 Laws of Kenya**.

**“The burden of proof of any particular fact lies with the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

14. In **Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirju and Another [2015] eKLR** the Court of Appeal was of the view that courts normally felt that where a money decree was involved in an application for stay of execution **“the success of the appeal would not be rendered nugatory”** if the stay was not granted. The only caution was that the court is making that consideration would ascertain that;

**“the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant”**

15. How does the court ascertain that the respondent is a man of straw? Only through evidence that is availed by the applicant, where as in a case like this the evidence available clearly shows that he is capable of paying that amount by the mere fact that he has made similar payments to the applicant before without duress.

16. It was the court’s further guide that in certain cases, undue hardship would be caused to the applicant if the stay was granted even in a money decree.

17. Question is, has the applicant demonstrated that it will suffer any undue hardship? The supporting affidavit sworn by Prakash Shah speaks to the legal issues;

- The anticipated success of the appeal.
- The timeous filing of the application.
- The dismissal of the application for stay by the lower court.
- The ability and willingness to furnish security including depositing the entire decretal sum in a joint interest earning account
- The fact that the 1<sup>st</sup> respondent will suffer no prejudice as he merely will be secure.
- It is not obvious as set out by the Court of Appeal that the applicant herein will suffer undue hardship of the application is denied.

18. I join voices with the court in **David Jihara Murage v Jacinta Karuana Nyangi & Another [2015] eKLR**;

**“To justify the grant of stay, the applicant must show or establish facts to satisfy the court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant’s case**

as the successful party in the appeal.”

19. It is in M/s Portreitz Maternity v James Karanja Kabia Civil Appeal Number 63 of 1997 where the court said and I agree;

**“The right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”**

20. In this matter I have anxiously considered the key requirement for granting stay. The applicant has clearly not demonstrated that it will suffer substantial loss or undue hardship if the stay is not granted.

21. The applicant has expressed fear that the 1<sup>st</sup> respondent has not indicated the willingness/ability to repay the decretal sum should the appeal succeed. This however is well taken care of by the 1<sup>st</sup> respondents own affidavit. That he is able and willing to repay the decretal sum in the event that that appeal succeeds.

22. Let me echo the words of my brother *Justice Gikonyo* in the case of Sankale Ola Kantai T/A Kantai & Company Advocates v Housing Finance Company Limited [2014] eKLR that where there is a finding that substantial loss has not been established, the court will not make an order for security. More importantly, the court must balance the two rights; right of appeal and right to enjoy the fruits of ones judgment.

23. Ideally this application would be up for dismissal the applicant having failed to establish substantial loss or undue hardship.

24. This is a court of justice and discretion cannot be, and ought not to be exercised mechanically but conscientiously taking into account the interests of justice.

25. I have noted also that the 1<sup>st</sup> respondent is willing to meet the applicants along the way. See Sankale ole Kantai above.

26. Hence in the interests of justice I find the following order appropriate;

**1. The application is allowed for stay in the following terms:-**

**i) The applicant to pay to the 1<sup>st</sup> respondent 2/3 of the decretal sum within thirty (30) days hereof.**

**ii) The applicant to deposit the balance in a joint interest earning account in the names of counsel for each of the parties within 45 days hereof pursuant to order 45 rule 6(2) in default of either (i) or (ii) or both, the stay will lapse.**

**iii) The 1<sup>st</sup> respondent will have cost of this application.**

Orders accordingly.

**Dated, delivered and signed at Nakuru this 9<sup>th</sup> day of December, 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of

Court Assistant Martin

Mr. Muriuki for Kisila for Applicant

Ms Wamuma holding brief for Murimi for respondent