



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 53 OF 2018

BHACHU ENGINEERS LIMITED.....APPELLANT

VERSUS

SAMWEL OTIENO ORWA.....RESPONDENT

RULING

1. This ruling seeks to determine a Notice of Motion dated 7th February, 2018 brought under the provisions of Order 10 Rule 11, Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1 and 3 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. The Application seeks orders that;

(a) there be a stay of execution of the interlocutory judgment entered in CMCC No. 5715 of 2015 pending the hearing and determination of this Application and the Appeal.

(b) the Court be pleased to order Ms. Mbusera auctioneers to return and or surrender to the appellant its motor vehicle registration number KAS 124 V.

(c) the interlocutory judgment and decree entered in CMCC No. 5715/2015 against the Appellant on 19th January, 2017 be set aside and the Appellant be at liberty to file its defence out of time

(d) the costs of the application be in the appeal.

2. The Application is premised on the grounds on the body of the application and the Supporting and Supplementary Affidavits sworn by **GAGANDEEP SINGH BHACHU**. The grounds in support of the application are that the Appellant had filed an application seeking stay of execution and setting aside of the interlocutory judgment from the lower court which application was dismissed. As a result, the auctioneers have attached the Appellant's motor vehicle and the Appellant is now apprehensive that the same could be auctioned hence rendering the Appeal nugatory. The Appellant depones they were never served with a demand letter and the summons in the suit. It is the Appellants contention that it was not until the auctioneers visited their premises to proclaim that they got to know about the matter. They have offered to deposit a sum of KSH. 300,000/= as security.

3. The Respondent filed a Replying Affidavit dated 7th March, 2018 sworn by **MUSILI MBITI**, the Respondent's Advocate. He deponed that the Appellant was served with all documents including demand letter and summons. He has annexed an Affidavit of Service stating that the summons were received by the Appellant's secretary one Cecilia. It was the Respondent's case that the Appellant ignored filing a defence and a Response to the Applications in the lower case. It was deponed that should the court deem it fit to allow the Application, the Appellant should deposit the whole of the decretal amount in a joint account.

4. The Application was canvassed by way of oral submissions. The Applicant submitted that the interlocutory judgment was entered irregularly as they were not served with the summons. The Appellant's Advocate further told the court that the Appellant had not employed anyone by the name Cecilia and though the issue was raised at the trial court, the same was ignored. On the other hand, the Respondent insisted that the summons were served and requested that the entire amount be deposited as security.

5. I have considered the Application, the grounds advanced by the Respondent and the submissions of both Counsels. The Appellants have challenged the interlocutory judgment on the grounds that the summons were never served upon them. The Appellant had made an application in the lower court seeking to have the judgment set aside but the application was dismissed.

6. **Order 42 Rule 6 of the Civil Procedure Rules** provides the conditions for granting an order of stay of execution which are;

(a) That the application has been made without unreasonable delay;

(b) That security for the decree or order has been given; and

(c) That substantial loss may result to the Applicant unless the order for stay is made.

7. What constitutes unreasonable delay varies from the circumstances of each case. The instant application was filed on 7th February, 2018 whereas the interlocutory judgment sought to be stayed was entered on 19th January, 2018. The delay in this matter cannot be said to be unreasonable.

8. The Appellant’s fear is that the Respondent will proceed with execution and sell the motor vehicle which has already been proclaimed by the auctioneer. The law is quite clear that execution is a lawful process and therefore cannot constitute a ground for substantial loss. However it is the Appellants’ argument that if the vehicle is sold the Appeal will be rendered nugatory. On security, the Appellants offer to deposit the sum of Kshs. 300,000 on the ground that the injuries suffered by the Respondent were soft tissue injuries. On the other hand, it’s been submitted by the Respondents that the injuries were severe and that the Appellant should deposit the whole decretal amount of Kshs. 1,432,075.03 in a joint account.

9. Both the Appellant and the Respondent have conflicting interests which this Honourable Court should protect. The Respondent has a decree which he would like to execute and on the other hand, the Applicant has a right of appeal against the decree. The Appellant contends that he was never served with the summons whereas the Respondent insists that the Appellant was served. The summons were not stamped with the stamp of the Appellant to acknowledge receipt but the Affidavit of service states that the Appellants secretary one Cecilia received but refused to acknowledge receipt. However the appellant states that they have never employed anyone by the name Cecilia. The court appreciates that it is not dealing with the Appeal at this point and this issue is better preserved for determination in the appeal. In dealing with the conflicting interests, the Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** stated that, “*In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruits of judgment in their favour and their rights are safeguarded.*”

10. Similarly, **Justice Aburili** dealt with the same issue in the case of **Selestica Limited v Gold Rock Development Ltd [2015]** where she held that -

“the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose.

*To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent. See **M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997**”*

11. The Appellant has committed to offer security for the decree but the Respondent feels the same is insufficient. This court will grant the Applicant a conditional stay on the terms that the Applicant will deposit one half of the decretal sum in a joint interest earning account to be operated by the parties’ Advocates. Such amount is to be deposited within 30 days from the date of this ruling failure to which the stay orders shall lapse. Consequentially, the auctioneer Ms. Mbusera Auctioneers is hereby ordered to return to the Appellant motor vehicle registration number KAS 124 V upon the Appellant depositing the said one half of the decretal sum and also upon payment of the Auctioneers Charges which charges the Respondent shall reimburse if the Appeal succeeds..

Dated, Signed and Delivered at Nairobi this 3rd Day of May, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

.....*For the Respondent*