



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC APP NO. 1 OF 2018

TASSAM LOGISTICS LTD.....APPELLANT

VERSUS

DAVID MACHARIA.....1ST RESPONDENT

WARSAME ALI.....2ND RESPONDENT

RULING

1. The matter is for Application for stay of judgment/Decree pending hearing and determination of the appeal inter alia.
2. The Notice of Motion anchored on the provisions of Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1&3, Order S 3 & 3 of CPA and CPR.
3. Same is based on the grounds on the foot of the motion and reiterated in the Affidavit of Abdirizak Adan Osman sworn on 10/01/2018.
4. The Application is opposed and a Replying Affidavit was filed sworn by Evans M. Mochama on 17/01/2018.
5. The parties agreed to canvass application via submissions which they filed and exchanged.

APPELLANT SUBMISSIONS

a. Whether the appeal has merit and a high chance of success.

6. The applicant submits that the appeal is arguable and has high chances of success based on the grounds that the appellant was a stranger in the trial suit and was never served with either the pleadings nor did he instruct the advocate who entered the consent judgment to act on its behalf. The appellant only came to know of the case upon being served with the warrants of attachment.
7. The appeal lodged is meritorious, arguable and raises pertinent issues of law and it is thus contended that unless stay of execution is granted, the entire appeal will be rendered nugatory should the applicants be successful.

b. Whether substantial loss would emerge from refusal to grant stay.

8. The respondent intends to execute the decree against the appellant and thus worth noting that the respondent's physical and financial means are unknown to the appellant. The Appellant is apprehensive that if the decretal amount which is for a substantial sum of money is paid to the respondent, the respondent will not be in a position to refund the same if the intended appeal is successful.
9. If the orders of stay are not granted until the application filed in this Honorable court is heard and determined, the said application shall be rendered nugatory and the applicants shall suffer irreparable loss and damages such that even if the application is successful, the applicants may not be able to recover the loss suffered.
10. It is also submitted that substantial loss will result as both if execution proceeds application and appeal, which has high chances of success, will be rendered nugatory if the execution of the costs is allowed to continue.

11. Under Order 42 Rule 6 Sub-rule 2(a) of the Civil Procedure Rules 2010, it is provided that for a court to grant stay of execution pending appeal it has to be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

12. The applicant relies on authority of Esther Wanjiru –vs- Jackline Arege [2014] eKLR where she asserted that an order of stay of execution will be granted where the court is satisfied that substantial loss may result to the applicant.

13. And also applicant is guided by the case of Mukuma –vs- Abuoga where it termed substantial loss as being the cornerstone of the discretion by the high court in the granting stay of execution under order 42 of the CPR, when it stated that;

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

c. Whether the Applicants are ready and willing to furnish security.

14. Under order 42 Rule 6 Sub-rule 2(b) of the Civil Procedure Rules 2010, it is provided that the applicant is obligated to furnish such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.

15. The applicants state that, they are ready and willing to furnish such reasonable security to be deposited in court as guided by this honourable court.

16. They cite the authority of Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others [2012] eKLR where it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

17. In a bid to balance the two competing interests, the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal. This position has been ascertained in Tabro Transporters Ltd –vs- Absalom Dova Lumbasi [2012] eKLR where the requirement to furnish security was considered as the just thing to do when balancing the two competing interests.

d. Whether Application done without unreasonable delay.

18. The application herein has been brought without any unreasonable delay and the same will not occasion any prejudice to the respondent.

19. Interim orders of stay were granted by the honourable trial court on the 6th September 2017, the application came up for inter parties on the 19th October 2017 when the counsel for the respondent sought for the application to be disposed by way of written submissions, the application was dismissed following the ruling on the 7th day of December 2017.

20. The appellants followed up on acquiring the said ruling and noting that the high court was on vacation, the appellant proceeded to seek leave to have the same determined then.

21. It is submitted that the essence of an application for stay pending appeal is to preserve the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. It is therefore in the interest of justice that the application be granted as prayed.

22. It is further submitted that, the need of this honourable court to employ the principle that a right to a hearing and therefore fair trial as enshrined in Article 50(1) of the constitution is a fundamental human right and the cornerstone of the rule of law. It also ties up with the right to access justice under Article 48 of the constitution. It is the duty of this court therefore to accord or ensure every person who has submitted themselves to its jurisdiction, an opportunity to ventilate their grievances.

23. The essence of an Application for stay pending appeal is to preserve the matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. It is therefore in the interest of justice that the application be granted as prayed.

1ST RESPONDENT SUBMISSIONS

1. Incompetence of the Appeal

24. The first respondent submits that, the instant Appeal Makeni High Court Civil Appeal No. 1 of 2018 is incompetent, invalid and same should be struck out for having been filed without leave of the court.

25. It's not in dispute that this Appeal emanated from a Ruling of Chamber Summons dated 18th September 2017 which had been brought under;

a. Order 22 Rule 22(i)

b. Order 9A Rule 10

26. It is clear that an appeal under above Orders do not lie under Order 43 Rule 1 which ordinarily lies as an Automatic right.

27. As per Order 43 Rule 3 of civil procedure rules, it was incumbent and mandatory upon the applicant to seek leave from court before lodging the said Appeal No. 1 of 2018 and failure to seek for such leave renders the said Appeal incurably defective, incompetent and a Non-starter and ought to be dismissed with costs.

28. It is therefore applicants' contention that in absence of such leave renders the Appeal incompetent and the court cannot therefore exercise its discretion to grant stay of execution pending Appeal as there is no Appeal.

29. It is submitted that if at all such leave had been obtained or sought, the applicant could have even attempted to attach such evidence to clear the air than ignoring the issue raised. Respondent relies on the case of **Nrb HCCA 364 OF 2010 Bruce Trucks & Equipment [E.A] Ltd –vs- Bob Morgan Services Ltd** whereby it was held in absence of leave, the appeal is therefore rendered incompetent.

2. Is the firm of Hassan Madowa Said properly on record?

30. It's submitted that the appeal is incompetent as it has been lodged by a stranger and a firm of advocates who were not on record at the time the said judgment was delivered and therefore improperly on record as they came on record without leave or seeking for the same from court.

31. As per provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010, it is clear that the firm of Hassan Madow Said were expected to seek for such leave before coming on record and in absence of such leave renders the Appeal incompetent for having been filed by a stranger as the proceeding in the lower court file clearly confirms that it's the firm of Morara Apiemi and Nyangito Advocates who were legally on record till Judgment was delivered on 27th April 2017.

32. Its therefore trite law that the firm of Hassan Madowo Said ought to have sought for leave to come on record or obtain consent from the former advocate to come on record and in absence of such leave being granted or sought renders the proceeding null and void ab initio. Therefore without there being a valid appeal one cannot be entitled to a stay pending appeal as there is no valid appeal.

33. It's contended that Order 9 Rule 10 of the Civil Procedure Rules cannot cure the situation by filing Notice of Appointment or change of Advocate as order 9 Rule 9 has been coached in mandatory terms. The respondent relies on the authority of

NKR ELC NO. 224 OF 2010, William Charles Fryda –VS- Assumption Sisters of Nairobi Registered In Support Trustees & St. Mary's Mission Hospital.

3. Failure to attach certified copy for the Order appealed against.

34. As per Order 42 Rule 2.1 of Civil Procedure Rules, the applicant ought to have filed certified copy of the order appealing against. In absence of attaching certified copy of the order, the applicant ought to have gone extra mile of even attaching letter addressed to the Magistrate's Court requesting for the said certified copy to justify its absence. Such failure is Fundamental and renders the Appeal incompetent and invalid.

35. It is submitted that the applicants appear not to be sure of which prayers they are seeking.

i. Is it staying of execution against the Ruling/Order of 7th December 2017 by Hon. G.M. Mutiso at Makindu?

ii. Is it staying of execution of Judgment/Decree entered on 1st August 2017 by Hon. G. M. Mutiso?

iii. Or is it stay of execution of the Judgment entered on 27th April 2017 by Hon. D.M. Ndungi?

36. It's submitted that, that the applicant has approached this court with unclean hands and is underserving the court's discretion to exercise in his favour for deliberately misleading the court that the said Judgment was delivered on 1st August 2017 by Hon. G.M. Mutiso instead of 27th April 2017 by Hon. D.M. Ndungi. With due respect, was the misrepresentation intentional or by error?

37. Be it as it may, even if it is assumed that the applicant herein is seeking for stay of execution against the judgment entered on 27th April by Hon. D.M. Ndungi respondent reiterates that the Applicant is not entitled to the prayers sought for stay no valid appeal has been lodged against the same as the purported Civil Appeal No. 1 of 2018 was lodged without leave of the court and by a stranger.

4. Merits of the Appeal.

38. It's undisputed that the appeal herein originates from a chamber summons dated 18th September 2017 and its Ruling delivered on 7th December 2017 by Hon. G.M. Mutiso which had been brought under;

i. Order 22 Rule 22 (i)

ii. Order 9A Rule 10 of Civil Procedure Rules.

39. The Chamber Summons having been brought under wrong provisions of the Law and Procedure would not definitely see the light of the day and it's submitted that learned counsel should be acquainted with regular amendments and repeals of the Civil Procedure Rules.

40. It's also contended that even if a valid appeal had been dully filled the same has no chances of success as the said Judgment of 27th April 2017 was obtained by consent and can only be set aside by consent or as provided by law.

5. Consent Judgment.

41. The applicants herein are appealing from a judgement obtained by **consent which can only be set aside by consent or by grounds that would allow a contract be vitiated. These grounds includes ;**

- a. Fraud.
- b. Collusion.
- c. Illegality.
- d. Mistake.
- e. An agreement being contrary to the policy of the court.
- f. Absence of sufficient material facts.
- g. Ignorance of material facts.

42. That none of these grounds have been alleged or proved to justify setting aside the said consent judgment entered on 19th January 2017 and hence the purported appeal cannot succeed whatsoever.

6. Whether the Applicant will suffer substantial loss.

43. That no substantial loss will be occasioned to the applicant in the event the orders being sought are not granted because the said judgment is monetary and it's has not been alleged or proved that in the event execution is done and goods sold, the respondent will be unable to refund the same. The respondent relies on the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto in Misc Appl No. 42 of 2011 [2002] eKLR** Gikonyo J. stated that;

“No doubt, in law the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

44. It's submitted that the Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.

7. Willingness to deposit security.

45. It's submitted that there is no valid appeal to warrant deposit of security and therefore there being a judgment the respondent is entitled to enjoy his full fruits of judgment and not vice versa. The said willingness to deposit security would have only worked well and there been a competent Appeal.

46. In a nutshell, it is submitted that the applicant has failed to prove his case on balance of probability to warrant the court exercise its discretion in his favour thus application should be dismissed with costs to the Respondent.

ISSUES, ANALYSIS AND DETERMINATION

47. After going through submissions, pleadings and the record before the court I find the following issues arising;

- a. Whether the application before the court is competent and meritorious?**
- b. If answer in affirmative, what conditions to be imposed in grant of orders sought?**
- c. What is the order as to costs?**

48. The legal basis for grant of stay pending appeal is **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. Basically, the Defendant/Applicant is required to demonstrate that:

“Substantial loss may result unless the order is made; the application has been mad without unreasonable delay; such security as the court orders for the due performance of the decree has been given before the applicant”

49. In the case of **MOHAMMED SALIM T/A CHOICE BUTCHERY –vs- NASSERPURIA MEMON JAMAT (2013)eKLR**, The court upheld the decision of **M/S PORTREITZ MATERNITY –vs- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997** and stated that:

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

50. In the case of **METEINE OLE KILELU & 10 OTHERS –VS- MOSES K. NAILOLE, CIVIL APPEAL NO. 340 OF 2008**, the court opined that where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence.

51. In the case of **NGANGA KABAE VS KAHUNYO KIMANI H.C.C.A NO. 182 OF 1999, NAIROBI ALNASHIR VISRAM J.** stated that it was improper for the lower court to grant stay orders without security.

52. In the case **HCCA NO.716 OF 2003 JOHNSON MWIRUUTI MBURU –VS- SAMUEL MACHAIA NGURE JUSTICE NYAMU** held that a respondent’s possible inability to pay the decretal amount was sufficient to justify grant of stay of execution pending appeal on the condition that the decretal amount be secured.

53. The court has gone through the application, supporting affidavits and replies thereto. The court has not yet had an advantage of perusing the record as the trial court record has not been forwarded to this court. The parties have not helped the court either. The technicalities being raised by the respondent will be better served in the appeal.

54. The court finds that it is not denied that the appeal is filed and subsisting and it has not been established that there is an application to strike out the same. Further motion in court is based under **ORDER 42 R 6 CPR** which has thus as per the set parameters therein.

55. It is not demonstrated that the motion was filed with unreasonable delay. The substitution loss may occur if payment is done and same is not recovered in event the appeal is successful.

56. The decretal amount subject of the appeal is about 5million and million respectively for this matter and misc 2 2018.The respondent has not shown ability to refund the same. However the applicant is ready to deposit security.

57. Thus court finds it fair to make the following orders;

- a. The stay of execution of the decree is granted as prayed.**
- b. The applicant will however deposit decretal amount in interest earning account in the joint names of the advocates of the parties within 30 days from date of this ruling and in default execution to proceed.**
- c. Costs in the main cause.**
- d. This ruling to apply in HCCA 2 OF 2018.**

SIGNED, DATED AND DELIVERED THIS 9TH DAY OF MAY, 2018.

C. KARIUKI

JUDGE

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