



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 8 OF 2018

CENTRE FOR MATHEMATICS, SCIENCE AND TECHNOLOGY

EDUCATION IN AFRICA (CEMASTE).....APPELLANT

VERSUS

APEX SECURITY SERVICES LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 15th January 2018 was brought pursuant to the provisions of Order 51 Rule 1, Order 42 Rule 6 sub-rule (1) and (2), Rule 4 sub-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 prayers:-

1. Spent.

2. Spent.

3. THAT there be an order of execution of the summary judgment and or decree arising from Nairobi Milimani Chief Magistrate Court Civil Case No 4552 of 2016 between Apex Security Services Limited and Center for Mathematics, Science and Technology Education in Africa delivered on 14th December 2017 and all subsequent orders pending the hearing and determination of this appeal being Nairobi, High Court Civil Appeal No 8 of 2018 between Centre for Mathematics, Science and Technology Education in Africa and Apex Security Services Limited.

4. THAT the costs of this application be provided for.

THE APPELLANT'S CASE

2. The Appellant's application was supported by the Affidavit of its Finance Officer, Bradon Musyoki Sila, that was sworn on 15th January 2018. Its Witness Statements were dated and filed on 21st May 2018.

3. Its case was that it was aggrieved by the Ruling of Honourable Orengo K.I, Senior Resident Magistrate that was delivered on 14th December 2017. It was its contention that the said Ruling decreed that it pay the Respondent a sum of Kshs 6,088,000/= despite it not having rendered to it any security services. It pointed out that the said Ruling was also erroneous as it purported to order a sum in excess of what the Respondent had pleaded in his Complaint and hence it had an arguable appeal.

4. It submitted that it stood to suffer substantial loss if it paid the Respondent the said sum of Kshs 6,088,000/=. It stated that it was willing to deposit the decretal sum in a joint account with the Respondent's advocates.

5. It averred that it had satisfied all the conditions of being granted a stay of execution as it filed its application expeditiously.

6. It therefore urged this court to allow its application as prayed.

THE RESPONDENT'S CASE

7. In opposition to the said application, the Respondent filed Grounds of Opposition dated 31st January 2018 on 7th February 2018. The said Grounds were as follows:-

1. The Appellant was not deserving of the orders sought as it deliberately withheld relevant material documents from the court which if disclosed the court would not have granted the orders of 16th January 2018.

2. The Appellant's appeal did not stand any chance of success both in law and fact.

3. The Appellant did not stand to suffer any substantial loss or prejudice if execution of the decree proceeds.

4. The issue on who between the Respondent and an entity referred as Apex Security Services Limited, Hurlingham was entitled to the claimed amount was adjudicated upon by the lower court and a decision on it rendered which no appeal was preferred by the appellant herein.

5. In light of the ruling pursuant to the Appellant's Chamber Summons dated 25th August 2007 the defence was rendered a mere sham which raised no triable issues at all.

6. The Appellant's application was unmerited and it was only meant to delay the Respondent's enjoyment of the fruits of its judgment.

8. Its Director, Charles Ndungu Ndirangu also swore a Replying Affidavit on 31st January 2018. The Respondent submitted that the Appellant had failed to disclose to this court material fact that the Appellant's application dated 25th August 2017 seeking to enjoin Interested parties was allowed by the lower court but that they failed to plead their claim despite being summoned to appear in court.

9. It pointed out that the contents in the Appellant's said application contradicted the averments in the affidavit in support of the present application. It termed the Appellant's present application as unmerited and intended to deny or delay its enjoyment of the fruits of judgment.

10. It therefore urged this court to dismiss the said application with costs to it.

LEGAL ANALYSIS

11. The Appellant did not submit on the grounds that ought to be demonstrated before a stay of execution pending appeal can be granted. He, however, referred this court to two (2) Court of Appeal cases, **Job Kilach vs Nation Media Group Ltd & 2 Others [2015] eKLR** and **Civil Application No NA 1107 of 1993 (44/93UR) Kenindia Assurance Company Limited vs Patrick Muturi (unreported)** where the Court of Appeal granted a stay of execution pending appeal.

12. Notably, the grounds under which a Court of Appeal and High Court can grant a stay of execution are different. Under Rule 5(2) (b) of the Court of Appeal Rules, a stay of execution pending an intended appeal will be granted if the intended appeal is not frivolous, if the intended appeal is an arguable one and where if the intended appeal was to be successful, it would be rendered nugatory if the stay was not granted.

13. Be that as it may, the Appellant alluded to the conditions for the grant of a stay of execution pending appeal in the High Court in the grounds of the face of its application and in its Affidavit in support of its present application.

14. On the issue of substantial loss, the Respondent argued that the Appellant had not demonstrated that it would suffer substantial loss if the stay of execution was not granted as was held in the case of **Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR**. It, however, pointed out that it would suffer substantial loss if the Appellant were to be wound up. It added and that in any event, the Appellant's assets and resource base were unknown.

15. It also submitted that although the Appellant had shown willingness to deposit the decretal sum in a joint interest account with its advocates, it had failed to demonstrate what substantial loss it would suffer.

16. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant must demonstrate the following before he or she can be granted an order for stay of execution:-

a. THAT substantial loss may result to the applicant unless the order was made;

b. THAT the application was made without unreasonable delay; and

c. THAT such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.

17. 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.

18. It was clear that the Appellant filed its application timeously. The Ruling that it intended to appeal against was delivered on 14th December 2017 and it filed its Memorandum of Appeal and present application of 15th January 2018. The Appellant had satisfied the first

ground under Order 42 Rule 6 (2) of Civil Procedure Rules.

19. This court perused the Respondent's Complaint dated 14th July 2016 and filed on the same date and noted that the Respondent had claimed a sum of Kshs 5,450,000/=. In its Notice of Motion application dated 6th October 2016 and filed on 10th October 2016, it sought entry of judgment against the Appellant herein in the sum of Kshs 6,088,000/=. As was rightly pointed out by the Appellant, there was a glaring disparity that would need to be interrogated.

20. It was the considered view of this court that although the difference between Kshs 6,088,000/= and Kshs 5,450,000/= may only have been Kshs 638,000/= and by no means not too colossal, it was apparent that if the Appellant's appeal was to be successful, then it could suffer substantial loss if the Respondent was not able to refund the same. Indeed, the Respondent had not disclosed its assets or demonstrated its financial status. To that extent, this court was of the view that the Appellant had satisfied the third ground for the granting of a stay pending appeal.

21. On the issue of security, the Respondent admitted that the Appellant had proposed that the decretal sum be deposited in a joint interest earning account in the names of their advocates. This would safeguard the monies as if any of the parties were to be wound up as the successful party would be assured of recovering the entire decretal sum.

22. Notably, in the case of **Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered the preservation of the status quo pending the hearing and determination of the appeal. The court therein observed thus:-

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

23. There was obviously an issue that was raised regarding the exact amount of the decretal sum which raised an issue of regularity of the judgment, whether or not there was a breach of contract between the Appellant and the Respondent amongst several other issues that had been raised in the Memorandum of Appeal. There were irregularities in the decision of the Learned Trial Magistrate. The question of quantum would need to be determined to bring certainty of the said decision.

24. From the foregoing, it was evident that the Applicants were able to demonstrate that they had satisfied the requisites of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 and that if a stay of execution was not granted to them:-

a. Substantial loss could result to them applicant unless the order was made;

b. The application was made without unreasonable delay; and

c. Provide such security as the court would order for the due performance of such decree or order as may ultimately binding on them.

25. Accordingly, having considered the parties' pleadings, affidavits, oral submissions and the case law relied in support of their respective cases, it was the view of this court that it was in the interests of justice that a stay of execution pending the hearing and determination of the intended appeal be granted herein.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's ruling was that the Appellant's Notice of Motion application dated and filed on 15th January 2018 was merited and is hereby allowed in the following terms:-

1. THAT there shall be a stay of execution of Judgment that was delivered by Hon Orange K.I on 14th December 2017 in Milimani CMCC NO 4552 of 2016 pending the hearing and determination of the appeal on condition the Appellant shall deposit into an interest earning account in the joint names of the Appellant's and Respondent's advocates the entire decretal sum of Kshs 6,088,000/= within the next sixty (60) days from the date hereof i.e. by 21st November 2018.

2. For the avoidance of doubt, in the event, the Appellant shall default on either on Paragraph 26 (1) hereinabove, the conditional stay of execution shall automatically lapse.

3. THAT the Appellant shall file and serve its Record of Appeal within sixty (60) days from today i.e by 21st November 2018.

27. Each party shall be at liberty to apply.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of September 2018

J. KAMAU

JUDGE