



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APEAL NO. 69 OF 2015

KENYA ORIENT INSURANCE CO. LTD.APPELLANT

VERSUS

1. RASHID LIBONDO HAMISI

2. RAAPU ALI JUMA RESPONDENTS

RULING

1. The application before me for consideration is dated 12th November, 2015. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That after hearing of this application *interpartes* the court be pleased to order a stay of execution of the judgment of the Mombasa Principal Magistrate delivered on 23rd April, 2015 pending the determination of this appeal.

The application is supported by the affidavit of Terence Mang'eli Swalehe filed on 13th November, 2015.

2. The respondents' Advocate filed a replying affidavit on 29th January, 2016 to oppose the said application. Counsel on record thereafter filed their written submissions which they highlighted as hereunder.

APPLICANT'S SUBMISSIONS

3. Mr. Jengo, Learned Counsel for the applicant argued that they have fulfilled the conditions for grant of stay of execution. Counsel stated that Judgment was delivered on 23rd April, 2015 and on 20th May, 2015 he filed the appeal. On 26th May, 2015, he filed an application for stay of execution which was struck out on the basis that their law firm was not properly on record. The said ruling was delivered on 27th October,

2015 and on 13th November, 2015, they filed the present application. He submitted that the period that elapsed was 16 days not over 30 days. Counsel informed the court that the respondents' counsel then filed a Notice of preliminary objection which was dismissed.

4. Mr. Jengo argued that there is a Judgment for the sum of Ksh.1,607,050/= against the appellant which stands to lose a substantial amount if stay of execution is not granted. Furthermore, the appellant's Counsel had not shown that the respondents are not men of straw. In his view, if the orders sought are not granted, the appeal will be rendered nugatory.

5. Counsel submitted that on 23rd November, 2015, the decretal amount was deposited in court. He referred the court to the case of **Halai & Another vs Thornton & Turpin (1963) Ltd.**, 1990 KLR 365 where the Court of Appeal held that the court should take into account the substantial loss likely to be suffered by the applicant, adequate security and expeditious filing of the application. Mr. Jengo contended that the court should aim towards substantive justice by giving them an opportunity to ventilate the appeal.

6. In addition, he cited the case of **KCB vs KPCU**, C.A No. 85 of 2010 where the Court of Appeal held that it is always good to maintain the status for an appeal to be determined on merit. He also relied on the case of **Jatco Transporters and Tours Agency Ltd. & Another vs Jason Njiru Kithinji & Another**, HCC No. 197 of 2003, where the court held that the 5th defendant did not place any material before the court from which it could be concluded that they have financial ability to repay the money in the event that the plaintiffs objection were to succeed the court cannot make assumptions.

7. He also cited the case of **Tobias Ongany Auma & 5 Others vs Kenya Airways Corporation Ltd.**, HCC No. 4434 of 1992, where Mbogholi J. held that the defendant has a right of appeal as a matter of right that right should be exercised.

Mr. Jengo prayed for the application to be allowed

RESPONDENTS' SUBMISSIONS

8. Mr. Ananda, Counsel for the respondents opposed the application. He informed the court that the original suit was Kwale PMCC NO. 143 of 2010 but the suit was thereafter transferred to Mombasa where it was heard and determined on 23rd April, 2015. Judgment was entered against the appellant for the sum of Kshs. 941,340. Counsel for the appellant filed his Memorandum of Appeal on 25th May, 2015 as at that time he was not properly on record. The matter was argued before Judge P.J. Otieno who held that he was properly on record.

9. Mr. Ananda submitted that Counsel for the appellant stayed for eight (8) months before filing an application for stay of execution in the High Court. As such, they did not meet the requirements of Order 42 rule 6 of the Civil Procedure Rules. They did not disclose that their application for stay of execution in the lower court had been struck out. He added that the decretal sum stands as at Kshs. 1,790,044/= and what is deposited in court is security for a lesser amount. He cited the case of **Thomas Kiplel Sum vs Philip Kipkorir Samich & 3 Others**, Eldoret E&L No. 495 of 2012, where the Court considered forty (40) days as unreasonable delay in filing of an application for stay of execution.

10. On the issue of substantial loss, Counsel referred to the case of **Osero & Co. Advocates vs easy Properties Ltd**, Misc. Civil Application No. 419 of 2011, where the Judge held that the fact that the applicant deposited the decretal sum is not proof that substantial loss will occur unless the court issues a stay of execution of the decree.

11. Mr. Ananda submitted that judgment was entered in the year 2010 and that the appellant had not placed any material before the court to prove that the respondents cannot refund the decretal sum. In winding up his submissions, he relied on the case of **Mbago & Another vs Shah** (1968) EA at P. 94 where Sir Clement De Lestang held:-

“as I understand his judgment, that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the course of justice which in his view, the company had done in the present case.”

Mr. Ananda prayed for the application to be dismissed.

APPLICANT’S REJOINDER

12. Mr. Jengo responded that under the provisions of Order 42 rule 6(1) of the Civil Procedure Rules, a party makes an application for stay of execution in the instant court. He stated that the court dealt with their application on 27th October, 2015, thus they did not delay for 8 months but they waited for the court to make a ruling.

ANALYSIS AND DETERMINATION

The issue for consideration is if the applicant has satisfied the principles set down for grant of stay of execution pending appeal.

13. The provisions of Order 42 rule 6(1) of the Civil Procedure Rules provide as hereunder:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just, and any other person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such an order set aside”.

14. The respondent in his replying affidavit of 29th January, 2016 has given the background of this case from the lower court to the present application. Although he has submitted that the applicant took eight (8) months to file the present application, the record is clear that at the first instance, the applicant filed its application for stay of execution in the lower court, being the court that passed the judgment in issue. The said application was struck out on 27th October, 2015 as the applicant's Advocates were not properly on record. This was a fact that counsel for the applicant brought to the attention of this court when highlighting his submissions. The striking out of the application in the lower court necessitated the applicant to file the present application on 13th November, 2015. The applicant could not have simultaneously filed applications before the lower court and the High Court on the same issue.

15. Order 42 rule 6(2) of the Civil Procedure rules provides as follows:-

“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 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.”

16. On the 1st limb of the principles laid down for grant of stay of execution, Mr. Ananda submitted that the decretal sum stands at Kshs. 1,790,044/=. Mr. Jengo submitted that on 23rd November, 2015, Kshs. 1,607,050/= was deposited in court by the applicant. It is therefore my finding that the interest of the respondents are to a great extent secured. The concern of the respondents is that the said amount continues to accrue interest. The applicant's concern on the other hand is that it may suffer substantial loss

if stay of execution is not granted. Further, according to Counsel for the applicant, the court was not shown that the respondents are not men of straw.

17. In the case of **National Industrial Credit Bank Ltd. Vs Aquinas Francis Wasike & Another**, Nairobi Civil Application No. 238 of 2005 (unreported) the Court of Appeal stated thus:-

“This court has stated before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because an appellant would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to show what resources he has since that is a matter which is peculiarly within his knowledge”

18. Although the respondents herein would like to enjoy the fruits of their judgment, there has been no indication at all of the assets that they are seized of that would be used to offset the payment if the appeal was successful. Section 112 of the Evidence Act provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. Since the respondents failed to prove that they are persons of means, a burden that fell squarely on their shoulders, it is my finding that the applicant stands to suffer substantial loss if stay of execution is not granted.

19. On the issue of whether the application has been filed timeously, I am in agreement with Mr. Jengo that the applicant had to exhaust the laid down procedure of filing of an application before the Magistrate’s court before moving the High Court with a similar application. It is my finding therefore the delay in filing the present application cannot in the circumstances be considered as unreasonable. The delay has been explained and the reason behind it is plausible. The present case is distinguishable from the one cited by Counsel for the respondents in **Thomas Kipkel Sum vs Philip Kipkorir Samich** (supra) where the court held that forty (40) days was inordinate for filing an application for stay of execution.

20. The reasoning behind the case of **Mbago & Another vs Shah** (supra) cited by Counsel for the respondents, was dictated by circumstances that were not similar to the present application. The respondents' counsel did not bring to the fore the manner in which this matter has been conducted that would lead the court to draw the inference that the applicant is trying to delay or obstruct the course of justice. I am of the considered view that the appeal will be rendered nugatory unless the orders sought are granted. I am persuaded by the decision cited by Counsel for the applicant in **Tobias Ongany Auma & 5 others vs Kenya Railways Corporation** (supra) that an order for stay of execution does not deprive a decree holder of fruits of the said decree. It merely delays such an execution in the event that the appeal does not succeed, and in a decree such as the one in issue, the delay can always be compensated by the award of interest.

21. In its supporting affidavit sworn on 13th November, 2015 at paragraph 9, the applicant’s deponent Terence Mang’eli Swalehe deposes that the applicant is prepared to give appropriate security for the amount due under the decree if so required. This court notes that the decretal amount was deposited in court and a receipt thereof issued on 3rd May, 2016. In my considered view, the said deposit cushions the interest of the respondents in the appeal. In the case of **Halai vs Thorton Thurpin** (supra) the Court of Appeal stated that it was not prevented from granting a stay execution where no substantial loss is established and no security is forthcoming if it seems just to the court for such orders to be made.

22. I have said enough to show that the applicant is deserving of the orders sought. The application dated 12th November, 2015 is hereby allowed. Costs to the applicant.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of February, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the applicant

Mr. Ananda for the respondents

Oliver Musundi - Court Assistant