



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 473 OF 2016

ELGON KENYA LIMITED.....APPELLANT/APPLICANT

VERSUS

PETER MUSYOKA KAMUYA.....RESPONDENT/RESPONDENT

RULING

1. The appellant has filed a notice of motion dated 7th October, 2016 under Articles 165 (3)(a), (6), (7) and Article 159 (2) of the Constitution of Kenya, Order 22 rule 22 (1) & (3), Order 42 rule 6 (1), (2) & (3) and Order 51 rule 1 of the Civil Procedure Rules and section 3A, 63 (c) and (e) of the Civil Procedure Act. It seeks the following orders:

- i. Stay of execution of the judgment delivered on 6th July, 2016 and ruling delivered on 28th September, 2016 in Milimani CMCC No. 7277 of 2012 Peter Musyoka Kamuya v. Elgon Kenya Limited pending hearing and determination of this application.
- ii. Stay of execution of the judgment delivered on 6th July, 2016 and ruling delivered on 28th September, 2016 in Milimani CMCC No. 7277 of 2012 Peter Musyoka Kamuya v. Elgon Kenya Limited pending hearing and determination of this appeal.
- iii. That the Superior Court in its unfettered discretion and inherent powers do order the original lower court file in Milimani CMCC No. 7277 of 2012 Peter Musyoka Kamuya v. Elgon Kenya Limited to be availed during the hearing of the appellant's application herein.
- iv. That the respondent be orally examined on oath as to whether he has the financial capability to repay half the decretal sum (KShs. 2,024,018/=) in case the appeal herein is successful.
- v. Costs of the application.

2. The motion is based on the grounds on the face of the application and the supporting affidavit of Rehema Mwikali Mutunga who is the appellant's legal officer. She stated that judgment was entered in favour of the respondent in Milimani CMCC No. 7277 of 2012 Peter Musyoka Kamuya v. Elgon Kenya Limited. The court therein ordered the appellant to pay KShs. 4,048,036/= to the respondent. Subsequently, the appellant filed an application for stay of the said judgment. She lamented that the court granted untenable orders in the said application which orders she said might compromise this appeal thus:

- a) That the defendants to pay half the decretal amount (KShs. 2,024,018/-) to the plaintiff within twenty one days.

b) That the balance (KShs. 2,024,018/=) to be deposited in a joint account opened by both law firms.

c) In the event of default of any of the above orders, the stay shall lapse.

She contended that the appellant is apprehensive that substantial loss shall be visited on it and the appeal rendered nugatory if the orders sought are not granted since the respondent left employment with the appellant's company and has not been in any gainful activity as was stated by the respondent in his testimony in court. That the orders requiring the appellant to pay/deposit KShs. 4,048,036/= may jeopardize the company's operations since it is a going concern and that the company prays to be allowed to deposit a title deed or a bank guarantee of the judgment value. It was stated that this motion has been brought without delay.

3. In response thereto, the respondent filed a replying affidavit on the 19th October 2016. In the said affidavit, it is averred that the applicant had in the lower court offered to provide security but in the present application, it states that the court granted stay on untenable conditions. That, the operations will be jeopardized if it pays or secures the sum of Ksh.4,038,030/= and has instead offered to deposit a title deed or a bank guarantee.

4. That it would be most unjust to continue to deny him enjoyment of the fruits of his judgment which in his very unfortunate circumstances was caused by the negligence and/or breach of duty on the part of the applicant. That he has asked the court to order that he be paid half of the decretal sum and the other half be deposited in court. In the alternative he has urged the court to make a order that the whole decretal sum be deposited in court or in a joint account. He has opposed a bank guarantee or a title deed. He has averred that the Appellant's appeal has no chance of success.

5. The Respondent further avers that the appellant has not disclosed its means, balance sheet or profit and loss account and the court has no way of knowing the same and therefore, the court cannot grant the application on the basis of the alleged jeopardy to its undisclosed operations. The location or worth of the alleged title deed is not disclosed either or the bank proposed to give the guarantee as some banks may not be sound financially. He has asked the court to dismiss the application and order the Appellant to comply with the order by the lower court.

6. In its submissions, the appellant stated that its appeal has high chances of success. That the learned trial magistrate erred in apportioning liability at 90% upon it, yet the respondent's injury was as a result of his own negligence among other grounds. That if stay is not granted, the appeal shall be rendered nugatory. The appellant cited **Kenjap Motors Limited v. Isaac Kuto (2016) eKLR** where the court stated:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.”

7. It was submitted that the appellant will suffer substantial loss if the orders sought are not granted since the respondent will not be in a position to refund the decretal amount to the detriment of the appellant. The appellant on this issue relied on **Rhoda Mukuma v. John Abuoga (1988) eKLR** where the court held as follows:

“where a party is exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard. The granting of a stay of execution in the High Court is governed by Order XLI rule 4 (2), the questions to be decided being whether substantial loss may result unless the stay is granted, whether the application is made without delay and whether the applicant has given security...but 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. The stay ought to be made on terms that the applicant provides security.”

The appellant further cited **Wells Fargo Limited v. Cyrus Kioko & 48 others [2015] e KLR**, **Antoine Ndiaye v. African Virtual University [2015] e KLR** and **Edward Kamau & another v. Hannah Mukui Gichuki & another [2015] e KLR**.

8. The appellant intimated that it is ready and willing to provide security as a prerequisite of good faith and is willing to comply with such terms as the court will deem fit and just to impose. It was submitted that the appeal is not meant to frustrate the respondent in any way. It was stated that the decretal amount is in excess of KShs. 4,000,000/= which is guttural to the company in light of the harsh economic times. It was stated that the company would be affected to immediately deposit the entire amount in such a limited period of time. To support the said argument, the appellant cited **New Stanley Hotel Limited v. Arcade Tobacconist Ltd [1986] KLR** and **Blue Shield Insurance Co. Limited v. Samuel Kamau Muhindi [2009] e KLR**. It was submitted that the application was brought timeously since the application for stay of execution before the lower court was brought 14 days after the date of judgment and this motion, 10 days after the ruling was delivered.

On the respondent's allegation that he is being discriminated upon, the appellant contended that the respondent is seeking sympathy from the court. That the respondent has not demonstrated how those provisions of the Constitution have been violated. The appellant stated that such allegations must be pleaded. To support that argument, the appellant cited **Annarita Karimi Njeru v. Republic (1976 – 1980) 1KLR 14** and **Edward Kamau & another v. Hannah Mukui Gichuki & another [2015] eKLR**. It was submitted that the reason behind seeking stay of execution is not based on his disability but on the financial inability of the respondent to refund the money. The appellant expressed in submissions that it is willing to deposit KShs. 100,000/= to the respondent's account.

The respondent on his part reiterated the averments in his affidavits and cited **Nairobi COA Application No. 252 of 2000 (UR) Mohan Meakin (K) Limited v. Mutunga Kiundi and Trustees of Catholic Diocese of Muranga and another v. Samuel Ngugi & another [2008] eKLR**.

9. The court has considered the application and the arguments by the parties. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and 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.

10. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. See **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410** and **Mukuma vs. Abuoga [1988] KLR 645**.

As was stated by Kuloba, J in **Machira T/A Machira & Co Advocates v. East African Standard (No 2) [2002] KLR 63**:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

11. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others v. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

12. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this case it is contended that the respondent in his evidence before the trial court stated that he was a person of meagre means. That if true, would in my considered view amount to a reasonable ground for believing that the respondent is unlikely to refund the decretal sum if the appeal succeeds. It is, however, upon the applicant to lay a basis for this belief. However, it is noteworthy that in this case, the respondent has in his replying affidavit in fact stated that he has been unable to be engaged in any activity that would support his livelihood since the accident occurred. It follows therefore that he has in his own affidavit admitted that he is of meagre means.

13. In the circumstances I find that the appellant has satisfied this court that it stands to suffer substantial loss in the event the orders sought are not granted. I hereby grant the application dated 7th October,2016 on condition that the whole decretal sum is deposited in a joint account in the names of both advocates. The money to be deposited within 30 days failing which the stay order shall lapse.

Dated, signed and delivered at Nairobi this 30th day of March, 2017.

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L NJUGUNA

JUDGE

In the presence of

..... *For the Appellant*

..... *For the Respondent*