



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO.123 OF 2016

ROYAL MEDIA SERVICES LIMITED.....APPELLANT/APPLICANT

VERSUS

J.A. MAKAU

t/a J. A. MAKAU & CO. ADVOCATES.....DEFENDANT

RULING OF THE COURT

1. The Appellant/Applicant has filed a Notice of Motion dated 7th November, 2016 seeking for the following prayers namely:-

(1) The Application is supported by an Affidavit sworn by a legal officer of the *THAT there be stay of execution of the judgement and decree made on 18th May, 2016 in MACHAKOS CMCC. NO.470 of 2006 pending the hearing and determination of the appeal.*

(2) *THAT costs of the Application be provided for.*

The Application is supported by an Affidavit sworn by a legal officer of the Applicant and on the following grounds namely:-

(a) *The Applicant will suffer substantial loss since the amount it is ordered to pay is colossal and will definitely affect its operations negatively.*

(b) *The Applicant was unable to meet the conditions imposed on it by the ruling on stay of execution delivered on 5th October, 2016 by the lower court.*

(c) *The stay of execution granted by the lower court has lapsed.*

(d) *The Appellant continues to trade and will in all probability still be trading when the appeal is determined hence there is no possible danger that it will be unable to settle the decretal sum should the appeal fail.*

(e) *The application has been brought without unreasonable delay.*

(f) *The Applicant is ready and willing to furnish such reasonable security as the court may order for the due performance of the judgement.*

(g) *The overriding objective of the Act and the rules is to facilitate the just expeditious and*

proportionate and affordable resolution of the Civil disputes and this will be defeated if the Defendant is made to pay the decretal sum.

(h) It is settled law that court should not act in a manner that will render the right of appeal conferred by a statute nugatory.

(i) The Appellant has a right of appeal has a right of appeal to the high court which will be rendered nugatory if the application is denied.

(j) It is also settled law that where an application for stay of proceedings or execution is sought, the court balances the relative hardships of the Applicant and the Respondent and the balance favours the stay of execution for the reasons a –f above.

2. The Applicant's case is that it is aggrieved by the decision of the lower court and has already lodged an appeal against the judgment. The Applicant further avers that the period granted for stay of execution of the decree has since lapsed and has come to this court for stay of execution pending the determination of the appeal. It is the Applicant's further contention that the lower courts order that it deposits the entire decretal sums, in court will not only cripple its operation but that the sums would not earn interest as the appeal is being determined. The Applicants finally averred that it will suffer substantial loss if stay is not granted and that it is ready and willing to furnish reasonable security. It finally averred that the Application herein has been filed without unreasonable delay and that its appeal which has high chances of success will be rendered nugatory if the stay is not granted.

3. The Response

The Respondent has opposed the Application by way of Replying Affidavit sworn on 28/11/2016 and a further one on 23/02/2017 by his learned counsel wherein he depones that the Application is made in deviance of the lower court orders which were made pursuant to the Applicant's Application for stay of execution and which ordered the decretal sum be deposited in court. It was further deponed that the Applicant has come to court with unclean hands and further the purported Memorandum of Appeal had been filed outside the stipulated period and no leave of court has been sought. It was further deponed that the Applicant seems to contradict itself when it avers it is a leading company in the media industry and a going concern and then claim inability to deposit the sum of Kshs.6,500,000/= . Finally it was deponed that the Respondent is a judge of the High Court whose means are well known and who will refund the sum if appeal succeeds and further that the said sums had been ordered to be deposited into court and hence Applicant should not worry about the safety of its money. The Respondent seeks for the dismissal of the Application.

4. The Submissions:

Counsels for the parties herein made oral submissions. It was submitted for the Applicant that stay of execution is crucial in order not to render the Appeal nugatory and further that the Application has been made without unreasonable delay and that the Applicant will suffer substantial loss if stay is not granted. It was further submitted that an earlier order issued in the lower court could not be complied with as the Applicant's operations would be crippled. It was finally submitted that the Applicant is ready to furnish security and suggested that the sum could be deposited into an interest earning account in the joint names of both counsels. The Applicant's counsel relied on several cases that had been filed in a list of authorities.

On the part of the Respondent, it was submitted that the Applicant is not deserving of stay of execution since it had disobeyed an earlier order to deposit the decretal sum into court within 30 days. It was further submitted that no leave has been sought for the filing of appeal out of time. It was also submitted for the Respondent that he is a judge of the High Court and his financial means are known and will refund the sums if appeal succeeds. Finally it was submitted for the Respondent that the Application is a delaying tactic meant to frustrate the Respondent.

I have considered the above submissions together with the Application and the rival affidavits. I have also considered the authorities cited. The only issue I raise for considerations is whether this court should under Order 42 rule 6 of the Civil Procedure Rules stay the execution of decree in **Machakos CMCC. No. 470 of 2006.**

5. Order 42 rule 6 of the Civil Procedure Rules grants this court power to order stay of execution if sufficient cause is shown. Rule (2) thereof lays down the conditions to be fulfilled for the stay orders to be given. These conditions were outlined in the case of **(AGGREY MAULA MALUNGU VS JOSEPH =VS= SANYA MWAKAVI (2015] eKLR)** where court noted as follows:-

“For a stay of execution to be granted, an Applicant must satisfy three (3) conditions stated in rule 6 (2) to the effect that:-

(a) The Application for stay must be made without unreasonable delay from the date of the decree or order to be stayed.

(b) The Applicant must show that he will suffer substantial loss if the orders of stay are not granted.

(c) The Applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.”

The Court went further to state that:-

“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 as paper judgment”.

6. The Applicant has submitted that it has met the above threshold.

On the first issue the applicant submits that its application was brought without unreasonable delay. The judgment in the lower court was delivered on the 18/05/2016 and that the Applicant filed a notice of appeal the following day and applied for typed proceedings and judgment. Upon the lapse of the stipulated thirty (30) days right of appeal, the Applicant filed an application for stay of execution in the lower court which was determined on the 05/10/2016 wherein the Applicant was ordered to deposit the entire decretal sums of Kshs.6,500,000/= into court within 30 days. It seems the applicant was unable to comply with the same and filed the present Application dated 7/11/2016 for stay of execution. Even though the Respondent has claimed that the applicant has disobeyed the order issued on 5/10/2016 to deposit the sums, I find the Applicant is entitled to move to the appellate court for grant of stay of execution. I am unable to find fault at the Applicant’s action in moving to the Appellate court and seeking for stay of execution of a decree that they intend to appeal against. Already there is a Memorandum of Appeal lodged and even though it may have been filed outside the stipulated period as contended by the Respondent, the parties will address court over the status of the same at a later stage. Hence what is crucial is whether the Applicant has made its intention to challenge the lower court decree in an appeal. Under those circumstances I find the application for stay has been filed without unreasonable delay.

7. With regard to the issue that the Applicant must show that it will suffer substantial loss if the order of stay is not granted, the Applicant has stated that the Respondent has already taken out warrants with a view to execute the decree of the lower court and if it is done and the appeal later turns out successful then the Applicant will have suffered. Indeed the merits or otherwise of the appeal is yet to be determined. The Applicant has further stated that the Respondent might not be able to refund the sums in the event the appeal succeeds. On the other hand the Respondent maintains he is a Judge of High court whose financial means are well known. It is noted that the Respondent did not file an affidavit of means on the ground that his financial status is well known. Indeed all civil servants and state officers routinely file wealth declarations forms and which are out there for public scrutiny. The Applicant has not indicated that upon such scrutiny it has discovered that Respondent is a person of straw. Indeed the sum

of Kshs.6,500,000/= is by no means little and if paid out it can cause a dent on the Applicant financial operations without a clear assurance that the same would be refunded back upon the successful appeal. The anxiety of the likely loss is to be taken care of under the third condition of grant of stay of execution.

8. On the third condition, I note the Applicant has indicated that it is ready and willing to offer or furnish security by way of depositing the sums into an interest earning account in the joint names of both Advocates. Indeed the Applicant expressed its concerns in the Affidavit in Support over the sums being deposited into court which will not earn any interest thereon. Both parties will not suffer any prejudice if the decretal sum aforesaid is deposited into an interest earning account in the joint names of both Advocates as they canvass the appeal.

In the result, I find the Applicants Application dated 7th November, 2016 has merits. The orders of stay of execution granted by the trial court on the 05/10/2016 are hereby set aside. The Applicant herein is granted stay of execution on condition that the entire decretal sums is deposited in an interest earning account in the joint names of both Advocates for the parties herein within thirty (30) days from the date hereof. The costs of the Application herein shall abide in the appeal.

Dated, signed and delivered at Machakos this 4th day of **April** 2017.

D. K. KEMEI

JUDGE

In the Presence of:

Mrs Mutuku for Karanja for Applicant.....

Muthama for Mulwa for Respondent

C /A- Munyao.....