



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 56 OF 2012 (FAST TRACK)

FREIGHT FORWARDERS KENYA LIMITED.....PLAINTIFF

VERSUS

ELSEK & ELSEK (K) LTD.....DEFENDANT

R U L I N G

1. It is now a fully settled and crystalised principle of law on whether or not to grant an order for stay pending appeal that the court seeks to balance the right of the appellants that the appeal be preserved and not rendered nugatory as against the right of the successful litigant not to be unfairly kept away for his decree which in any event is a property and therefore guaranteed from arbitrary deprivation.

2. It is also cardinal consideration that in monetary decrees, an order of stay would ordinarily not be granted unless it is shown that it would be difficult on the part of the decree-holder to effect a refund if the sum is paid over and the appeal subsequently succeeds – where the decree-holder is demonstrated to be a person of the straw. These are the considerations that shall inform this court's decision in determining the judgment-debtors application dated 30/3/2016 which seeks orders that:

a) That this application be certified as urgent and service be dispensed with at the first instance.

b) That there be stay of release of the security of Kshs.1,500,000.00 deposited in court by the defendant as a conditional stay of execution herein pending the hearing and determination of this application inter-parties.

c) That there be stay of release of the security of Ksh 1,500,000.00 deposited in court by the defendant as a conditional stay of execution herein pending the hearing and determination of the appeal filed in the court of appeal.

d) That the costs of this application be borne by the plaintiff.

3. The way I understand the matter the appellants intend to pursue at the court of appeal is that it is limited to the question whether or not the decree-holder is entitled to a stay for interest pursuant to the default judgment it obtained against the Defendant applicant on the 28/3/2012.

4. Although I have considered in the decision sought to be appealed against, the merits of the defendant's claim that the interest sought to be recovered by the decree holder may not be contestable, I note that it is my said ruling the judgment debtor seeks to challenge on appeal. I take notice and appreciate that the

Court of Appeal will determine the matter based on their own jurisdiction donated by the law and the constitution. I am not able to predict what their decision would be but it is not lost to me that one of the available options to it is to reverse my findings.

5. That being the case, an order of stay would be necessary to ensure that the appeal is not rendered nugatory. But, however, this is a money decree and there are two factors that I have eagerly consider on whether or not a refusal to grant stay will result in the appeal being rendered nugatory and therefore substantial loss to the judgment debtor.

6. The two issues are:-

i) Has the decree-holder been demonstrated to be unable to effect a refund should the appeal succeed and the sum claimed in declared irrevocable?

ii) Is the judgment debtor contending that no sum at all is due and outstanding to the decree holder on the decree?

7. By an affidavit sworn by one SHAHAME AZIZ MWIDANI before F.M. VANANI, Commissioner for Oath, the defendant stated on oath and gave a tabulation that in the absence of contractual interest rate a commercial rate of 16% is applicable and using that rate arrived at a figure of Kshs.1,601,190/= as the sum due and payable to the decreeholder as the minimum and Kshs.3,774,252 as the maximum when rate of 3% every 45 days is applied.

8. Essentially the judgment took the stand that atleast a sum of Kshs.1,601,190 was due and payable upon the decree. With that confession, that is the sum I do not think the decreeholder need to be kept away from. It needs to be paid forthwith and in any event within 30 days from today.

9. On whether or not the decreeholder would be able or unable to effect a refund if the decree is enforced now and the appeal later on succeeds, the judgment debtor has merely said that is shall suffer substantial loss without stating the nature of such a loss. To the contrary, the Replying affidavit by the decreeholder sworn by RAJESH JAYSUKHKAL CHUDGAR has sworn, without contradiction, that the decreeholder is a large and reputable company with well-established premises in Mombasa and should the appeal succeed it shall be very well able to effect a refund or the refund can be enforced against it. Evidently there is no evidence that should the decretal sum be paid now it would be difficult or impossible to recover it for the decreholder. To this court therefore no substantial loss has been proved.

10. However, grant of stay is essential a discretionary matter whose overriding purposes is to secure a balance between the rival interest of both the decreeholder and the judgment debt.

11. In this matter even though I honestly doubt the arguability of the appeal to the court of appeal, I will still give to the judgment debtor the assurance to enable it pursue his appeal undisturbed by a feeling that it has been pushed too hard. I therefore grant stay but on terms. The terms are that:

i) The undisputed sum of Kshs.1,601,190.19 shall be paid to the plaintiff forthwith but in all event within 30 days for today.

ii) The balance of the decretal sum as disclosed in the calculations by the decreeholder as at 27/4/2017 being Kshs.6,032,192 and not Kshs.6,110,865 in the warrants of 23/10/2015, being Kshs.2,931,002. (Note having been taken of the undisputed sum and the sum earlier on deposited in court) shall be deposited into an escrow account operated in the joint names of the advocates of the parties to be opened within 45 days for today. The parties may also consider the deposit of Kshs.1,500,000 already in court for deposit into an interest bearing account in the names of their advocates.

iii) The Defendant/judgment-debtor shall within 60 days from today file and serve a Record of Appeal to the Court of Appeal.

iv) In default of compliance with any of the three foregoing conditions the stay herein granted shall stand lapsed and discharged and the plaintiff decree holder shall be at liberty to execute.

12. On costs, let each party bear own costs.

Dated and delivered at Mombasa this 12th day of July 2017.

HON. P. J. O. OTIENO

JUDGE