



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 549 OF 2015

LUXUS WOODS (K) LIMITED. APPELLANT

VERSUS

PATRICK AMUGUNE KAMADI. RESPONDENT

(An Appeal against the Judgment dated 23rd October, 2015 delivered by the Honourable E. Isui (Mrs.) Senior Principal Magistrate in Milimani Commercial Courts).

R U L I N G

The Application before me is dated the 23rd November, 2015 by way of a Notice of Motion. The same is brought under Order 42 Rule 6, Order 51 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 65 of the Civil Procedure Act Cap 21 Laws of Kenya.

The Appellant/Applicant seeks the following orders: -

1. Spent
2. That there be a stay of execution of the judgment and decree herein and of any other consequential orders arising therefrom pending further orders of this Honourable court and pending the hearing and determination of this application.
3. That the costs of the application be in the cause.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by Aggrey Luka Oponga on the 23rd November, 2015.

In the said affidavit the deponent who is the Director of the Appellant states that the cause of action that gave rise to the appeal herein arose out of an accident that occurred on the 6th April, 2014.

The judgment in the matter was entered on 23rd October, 2015, in favour of the Respondent in the sum of Ksh.2,109,930.40. The Appellant has appealed against the said judgment and since an appeal does not operate as a stay of execution, it has brought the application herein for stay pending appeal.

He avers that the Appellant is at risk of losing its property hence the need to apply for a stay of execution pending the outcome of the appeal which has already been lodged. That, the Appellant has already applied for certified copies of the proceedings and the judgment.

He further depones that the Appellant/Applicant stands to suffer irreparable loss and prejudice if the

application herein is not granted since the Appellant is a timber processing company and any attachment of its goods will affect the smooth operation of its business contracts while the Respondent will not suffer such loss. He avers that if the decretal sum is paid out before the determination of the appeal, the Respondent will not be in a position to refund the same in the event that the appeal is successful as he has no known means of restitution. That the appeal is meritorious and has high chances of success.

The application is opposed vide a replying affidavit sworn by James Ngochi Ngugi sworn on the 7th day of December, 2015. The deponent states that the applicant ought to satisfy the provision of Order 42 Rule 6(2) (b) by providing security for the decree. That in the absence of security, the Respondent risks losing the fruits of the judgment in the event that the applicant's appeal is not successful.

He avers that if the court is to grant an order of stay of execution then the Applicant must be compelled to provide security for costs for the decretal sum.

The application was argued orally in court and the learned counsels relied on their respective affidavits.

I have considered the application together with the affidavits both in support and in opposition to the application. The Applicant has sought for an order of stay of execution pending the hearing and determination of the application. I would like to assume that it was a mistake on the part of the counsel for the Applicant in the way prayer 2 is worded in that it has sought for stay pending the hearing and determination of the application. The same is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules which provision deals with stay pending appeal. Since the application has also been brought under Sections 1A, 1B, 3A of the Civil Procedure Act, I will proceed to consider it on merits. I will also invoke the provisions of Article 159(2) (d) of the Constitution which enjoins the court to do justice without due regard to technicalities.

The conditions for granting a stay of execution pending appeal are now settled. Though an order for stay of execution is a discretionary one, that discretion is fettered by the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules. This legal proposition was discussed by the Court of Appeal in the case of **Halan & Another Vs Thornton & Turpin (1963) Limited (1990) KLR** where the court stated as follows:-

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would emerge from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without delay.”

In fact Order 42 Rule 6(2) is more specific and it sets out three conditions which are: -

1. The application must be made without undue delay.
2. That the Applicant must demonstrate that they will suffer substantial loss unless the order sought staying execution is granted; and
3. That the applicant should provide such security as may be ordered by the court.

On the first condition whether the application has been brought without undue delay, I note that judgment in CMCC No. 4140/2014 was delivered on the 23rd October, 2015 and the application herein was filed on 24th November, 2015. That is a period of one month. The Respondent did not address the court on this issue and I am prepared to find which I hereby do, that the application was brought within a reasonable time.

Regarding the second issue of the loss that is likely to be suffered by the Applicant if the application is not granted; the applicant deponed that it stands to suffer irreparable loss and prejudice if this application is not allowed since it is a timber processing company and attachment of its goods will affect the smooth operation of its business and that if the decretal sum is paid to the Respondent he will not be in a position

to refund if the Appeal succeeds as he has no known means of restitution.

The Applicant has not satisfied this court that if the decretal sum is paid to the Respondent, it will affect the smooth running of the company's business. This Honourable court has not been shown the size of the company to be able to weigh the effect that the payment of the money will have on it. In my view, the size of the company and the volume of the business that it undertakes were very material in this case. However, in the case of **Equity Bank Limited Vs Taiga Adams Company Limited Civil Appeal No. 722 of 2000** the court stated as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that if execution is carried out – in the event the appeal succeeds the Respondent would not be in a position to pay – reimbursement as he/it is a person of no means. Here, no such allegation is made much less established by the Appellant/Applicant.”

In the case before the court the Applicant is apprehensive that the Respondent may not be able to refund the money should the appeal succeed as his means are not known. The Respondent did not deny that assertion by way of an affidavit. In my view, the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in the case of Nairobi Civil Application No. 238 of 2005 (**National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & Another (UR)**) stated: -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent 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 respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

The Respondent was unable to discharge this burden.

On the third condition, it is noted that the applicant did not offer any security at all. Though in her submissions, counsel submitted that the applicant is ready and willing to deposit part of the decretal sum, those facts are not made on oath and have not been captured in the affidavit in support. It is trite law that submissions are not evidence unless those facts are made under oath. The case of **Equity Bank Limited Vs Taiga Adams Company Ltd (2006) eKLR** sums it all on this issue as follows: -

“..... of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.... Let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay” which principle was also emphasized in Carter & Sons Limited Vs Deposit Protection Fund Board & 3 Others, CA Nairobi 291/1997.

Before I conclude I must state that, the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so, the court will weight this against the success of a litigant who should not be deprived of the fruits of his judgment. The court is called upon to ensure that neither party suffers prejudice. This was well stated in the case of **M/s Portreitz Maternity Vs James Karanja Kabia – Civil Appeal No. 63 of 1997** where the court had this to say: -

“That right of Appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

In the upshot, I find that the Application dated 23rd November, 2015 is not merited and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 2nd day of June, 2016.

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L NJUGUNA

JUDGE

In the presence

..... ***for the Applicant.***

.....***for the Respondent.***