



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 124 OF 2014

MOHAMED HUSNA.....1ST APPELLANT
ABDUL ALEEN 2ND APPELLANT
CMC MOTORS GROUP LTD 3RD APPELLANT

V E R S U S

NYEVU CHARO MWAWISHO (*Suing as the legal Administrator of the Estate of
SHABAN CHARO MWAWISHO*).....RESPONDENT

*(Being an appeal from the judgment and Decree delivered by Hon. Gatheru – SRM Mariakani on
10th September 2014 in SRMCC No. 144 of 2012)*

RULING

1. Judgment was entered in favour of Respondent at the Resident Magistrate’s Court at Mariakani in **Civil Case No. 144 of 2012**. The Appellant being aggrieved by that judgment has filed this appeal, but only against quantum because liability was entered by consent. Appellant has filed Notice of Motion dated 9th October 2014 seeking stay of execution of that judgment pending the hearing and determination of this appeal.

2. I have considered the parties affidavit evidence, written and oral submissions. The only issue to consider is whether Appellant has satisfied the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

3. Order 42 Rule 6(2) provides-

“(2) 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 that 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.”**

4. Appellant in the affidavit in support of the application after stating that they are aggrieved by the lower Court’s judgment then deponed that if order of stay is not granted the Respondent will execute the

judgment which would render “*this Application nugatory and greatly prejudicing the Defendants (sic).*” In other words the basis for seeking stay is to ensure the Notice of Motion is not rendered nugatory. That is the only ground which is directed to the provisions of Order 42 Rule 6(2). It does not take much imagination to note that that ground alone does not meet the conditions of granting a stay pending appeal.

5. The conditions of granting a stay pending appeal was subject of the decision in the case **KENYA SHELL LIMITED –Vs- KIBIRU (1986)KLR** where it was stated-

In Kenya Shell Limited vs. Kibiru [1986] KLR 410, Platt, Ag.JA (as he then was) at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

On the part of Gachuhi, Ag.JA (as he then was) at 417 he stated-

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

6. Appellants’ application must and does therefore fail for having failed to meet the threshold of Order 42 Rule 6(2). In considering an application of stay it is important to also consider that the Respondent has a right to enjoy the fruits of his judgment. This is well captured in the decision of **SOCFINAC COMPANY LIMITED –Vs- NELPHAT KIMOTHO MUTURI (2013)eKLR** where the Learned Judge referred to another case as follows-

“In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

“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 judgment 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”.

7. In the end and in view of the above finding the Notice of Motion dated 9th October 2014 is dismissed with costs to Respondent.

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE