



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 190 OF 2015

BURKEN ENTERPRISES LTD.....APPLICANT

VERSUS

PAUL NGURU MWAI.....RESPONDENT

RULING

1. Before this court for determination is a notice of motion dated 28th April, 2015 seeking stay of execution of the order issued on 8th April, 2015 and stay of proceedings in Milimani Commercial Court CMCC No. 7341 of 2014 pending hearing and determination of the intended appeal against the ruling and order of 8th April, 2015.
2. The application is premised on the grounds set out on the face of the application, the supporting affidavit and supplementary affidavit sworn by Stephen Mackenzie.
3. The lower court record shows that by a plaint dated 5th December, 2014, the respondent herein filed suit against the appellant seeking for payment of a liquidated sum of Ksh 2,000,0000, costs and interest, which sum was alleged to be the principal sum together with interest at the rate of 25% per annum compounded monthly from July 2013 when the appellant acknowledged the plaintiff's investment of Kshs 800,000 by the respondent to December, 2014.
4. The defendant /appellant was served with summons to enter appearance on 30th December, 2014. an appearance was entered on 15th January, 2015 but no defence was filed within the stipulated period as a result of which the respondent did on 29th January, 2015 request for judgment in default of defence for the liquidated sum of 2 million, which judgment was duly entered in favour of the plaintiff against the defendant on 2nd February, 2015 and a certificate of costs drawn together with decree issued on 5th February, 2015.
5. On 6th February, 2015, the respondent applied for execution of decree and requested for warrants of attachment and sale to be issued to M/s Jovan Kariuki T/A Moran Auctioneers. the said warrants were issued on 10th February, 2015
6. On 12th February, 2015, the appellant filed an application under certificate of urgency seeking to set aside the exparte judgment entered against it, to be granted leave to file defence out of time and for stay of execution of decree pending hearing and determination of the said application. through the supporting affidavit of Mr Stephen Mackenzie, the appellant contended that it had a good defence to the respondent's claim and that the default in filing of defence within the stipulated period was due to the non availability of the court file, which prompted their lawyers to write to court on 6th February, 2015 but no response was received from the lower court registry.
7. The application by the appellant was opposed by the respondent contending that it was not merited and that the appellant's purported defence was a sham. The parties canvassed that application by way of written submissions.

8. In her ruling dated 8th April, 2015, the trial magistrate Hon Chesang, Mrs found that the exparte judgement as entered was regular. Nonetheless, she exercised her discretion and set it aside conditional upon the appellant depositing in court the whole of the decretal amount of kshs. 2,038,795 within 21 days from date of ruling.
9. being dissatisfied with that order for depositing of the whole of decretal sum into court as a condition precedent to defending the suit, the appellant filed this appeal challenging that order of the trial magistrate and contending that the trial magistrate improperly exercised her discretion in placing unreasonable and punitive condition on the applicant to deposit the entire decretal amount to court within 21 days and that she improperly gave a reprieve with one hand while taking it away with the other hand hence denying the appellant access to justice and that she failed to consider that the court's discretion to grant an order for stay ought to be exercised to avoid injustice or hardship resulting from an inadvertent mistake. That the delay in filing the defence was not inordinate or inexcusable to warrant such a punitive condition. In the appellant's view, the execution would visit ridicule and odium upon the Applicant and irredeemably and immeasurably affect the Applicant in a manner not compensable by an award of costs.
10. The appellant in his appeal prays that this court do set aside the punitive order of the trial magistrate and allow the setting aside of exparte judgement on favourable conditions.
11. In this application for stay of proceedings and of execution of decree of the lower court pending hearing and determination of the appeal filed herein, the appellant contends that the said orders of the trial magistrate and execution process if allowed to proceed would cripple the Applicant's business and bring it to ridicule and further that the principal sum which was the subject matter of the suit was KShs. 800,000/= In addition, the appellant states that it is willing to abide by any conditions that this court may make for the ends of justice.
12. In response thereto the Respondent filed a replying affidavit sworn on 20th May, 2015. He essentially contended that despite the condition placed on the Applicant to deposit the decretal sum within 21 days from the date of the order, by 30th April, 2015, the Applicant had not deposited the money in court yet the judgment that was set aside was a regular judgment. That no material has been placed before court to show that the trial magistrate improperly exercised her discretion in ordering the Applicant to deposit the decretal sum in court.
13. The parties' advocates agreed and filed written submissions to dispose of the application, which I have considered together with the grounds, the supporting affidavit and replying affidavit by the respondent.
14. The only issue for determination is whether the appellant is entitled to the orders of stay of execution of decree in the lower court pending hearing and determination of the appeal herein and if so, on what terms.
15. The application herein is one for stay of execution and proceedings pending an intended appeal. However, as the exparte judgment that was entered was for a liquidated sum and therefore final, there are no proceedings pending other than execution process that had already commenced and the appellant having failed to meet the condition placed on it to deposit the whole decretal sum in court within 21 days from date of ruling to enable it defend the suit.
16. For stay of execution, the applicable procedural law is Order 42 Rule 6 (1) and (2) of The Civil Procedure Rules which provides:

“6.(1) No appeal or second appeal shall operate as a stay of a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (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.”

17. The above provision was discussed in the case **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** also cited by the Applicant. It was held as follows in the said case:-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

18. In the exercise of its mandate under **Section 63(e)** of the *Civil Procedure Act* as regards the issuing of interlocutory orders and pursuant to the provisions set out under **Order 42 Rule 6(2)(a)** and **(b)**, of the Civil Procedure Rules, the Court has the power to issue stay orders pending appeal should the Applicant satisfy the conditions set out under the said provisions of the Civil Procedure Rules and these are:

a. Substantial loss

19. To support its contention that it stands to suffer substantial loss, the Applicant cited **James Wangalwa & Another v. Agnes Naliaka Cheseto (2012) eKLR** where it was observed that an applicant must establish factors which show that execution would create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. The learned Judge then went ahead and emphasised that a frivolous appeal could therefore not be rendered nugatory but warned that the High Court should not only base the exercise of discretion under Order 42 rule 6 on chances of success of appeal.

20. In this case, the appellant argued that the trial court failed to consider that the decretal sum was not a liquidated sum rather it was inclusive of the principal and the interest. It was further submitted that should the appeal succeed, the Respondent would not be in a position to make full restitution as the amount is substantial. On this point the Applicant relied on **Halai & Another v. Thornton & Turpin (1963) Ltd (1990) KLR 365** where it was observed that courts would not normally grant stay where a money decree is involved unless the money in question is substantial and the Respondent has no known assets from which the Applicant can recoup in the event the appeal is successful.

21. In this case, however, I note that there was no such deposition by the appellant in the affidavit in support, to the effect that the respondent is man of straw and or that should the amount be paid to him and the appeal succeeds, then the respondent would not be in a position to refund the same thereby rendering the appeal nugatory. The issue of the Respondent's inability to refund the decretal amount has only been raised from the bar through submissions by counsel not raised in the affidavits in support of the application.

22. The Respondent on the other hand took the stand that the Applicant had not demonstrated the loss it would suffer and that it was not enough to merely state that it stood to suffer loss. The Respondent cited **Butt v. Rent Restriction Tribunal (1982) eKLR** and **Machira t/a Machira & Co. Advocates v. East African Standard (No. 2) (2002) 2KLR 63** where it was held that stay will not be granted where the loss is not pecuniary or tangible. It was argued that granting an order of stay would mean that the status quo before the order remains. That since the appeal will be limited to analysing the evidence on record which was the basis of the order, the appeal is frivolous and has no chances of succeeding.

23. The court in **Mukuma v. Abuoga (1988) KLR 645** held as follows on the issue of substantial loss:-

“...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.” (emphasis own)

24. Similarly, as regards Order 42 **Rule 6(2)(a)**, Musinga, J (*as he then was*) in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civil Case No. 368 of 2001** held that:-

“...“substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that the applicant is therefore forced to pay the decretal sum.” (emphasis own)

25. It follows therefore that other than demonstrating that that execution has commenced or is likely to commence, the Applicant should establish that execution will irreparably affect it as the successful party in the appeal.
26. The circumstances of this case are similar to those in **Twiga Chemical Industries Limited v Allan Stephen Reynolds [2010] eKLR** (Court of Appeal) to the extent that in both cases, the applicants were aggrieved by the court's decision to have them deposit the entire decretal amount which sums they felt was substantial. Stay was in that case not granted on the basis that the applicant had deposited the decretal sum and that the applicant was still trading and could not be said to be exposed to substantial loss. It was further found that the applicant did not demonstrate that the amount deposited exceeded the decretal sum. From the holding in **Twiga Chemical Industries Limited** (supra) an inference can be drawn that to succeed in this application, the onus is on the Applicant to demonstrate that the sum ordered to be deposited was too high and oppressive and that it would ground the appellant's operations.
27. The Applicant termed the sum too high on the basis that it was not a liquidated sum rather it was inclusive of the principal and the interest thereon. It was further submitted that execution would cripple the Applicant's business and bring it to ridicule but the appellant gave no details of how the business was doing. There was no statement of account to demonstrate the financial status of the appellant company.
28. If the depositing of the decretal sum in court would cripple the applicant's business, surely nothing prevented the director of the appellant company Mr Stephen Mackenzie from swearing to such serious matters. The court shall not permit an advocate to submit from the bar such serious issues of fact which the other party or the court has not other means of verifying. An advocate remains an advocate and not a witness for the party. In other words, it has not been demonstrated that depositing the decretal sum in court will cripple the appellant. In addition, the applicant has submitted that it is willing to abide by any reasonable conditions that this court may give.
29. On the other facet, this court is not yet seized of the appeal. *Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without it being derived from the Constitution or statute. Such power enables the courts to deliver on their constitutional mandate.*
30. The Respondent being a successful litigant in the lower court ought to be given the opportunity to enjoy the fruits of his lawfully obtained judgment while considering the Appellant's right of appeal.
31. Balancing between the two rights, it's worth noting that the Appellant can be considered to have come to court with clean hands considering that it did not decline to deposit the sum, rather it sought redress before the lapse of the time within which it was meant to deposit the said sum. In my view, the applicant could simply have sought for review, variation of the order of depositing of the whole decretal sum in court. But it opted for an appeal which is a right and an avenue for challenging decisions of the subordinate court. The Applicant can be said to have upheld the rule of law by so doing.

Time

32. The Applicant submitted that this application was brought barely 21 days from the date of the ruling and is thereby timeous. The Respondent on the other hand argued that the Applicant moved this court to avoid execution hence the application has failed to satisfy the provisions of Order 42 with respect to delay. That in the absence of evidence that the Applicant stands to suffer substantial loss coupled with the fact that the Respondent has a judgment in his favour, there would be a larger risk of injustice if this court finds in favour of the Applicant.
33. An application for stay should be filed within the statutory time given for lodging an appeal in the High Court, that is, within thirty (30) days. The ruling that the Applicant intend to appeal against was delivered on 8th April, 2015 and this application was filed on 28th April, 2015. Clearly, this application has been filed within the prescribed time.

Security

34. The Applicant has in the submissions expressed its willingness to abide by *any reasonable orders as to security*. It was argued in line with the finding in **James Wangalwa & Another v. Agnes Naliaka Cheseto** (supra) that the kind of security a party should give is a dictate of the court. On this issue, the Respondent relied on the holding in **Rosengrens Ltd v. Safe Deposit Centres Ltd [1984] WLR** cited with approval in **Gitahi & Another v. Warugongo [1986] KLR 621**. The Court of Appeal in **Gitahi** (supra) held that:-

" the security a court orders in any given case should be least disadvantageous to the party to provide it. However, the onus was on the applicant to present material to show, at least on a prima facie basis, that the sums ordered to be deposited were too high, and oppressive. "

35. It was argued that if this application is allowed, the Applicant would give security as ordered by this court. That since the Applicant has not made any offer of security, an inference is made that it is not ready to make any. Citing **Thomas Chakua v. Brian Ondieki (minor) Next friend and mother Joyce Nyamisa., Kisii HCCA 36 of 2011** where the court was of the view that all the three requirements must be satisfied in unison, the Respondent argued that in absence of an offer for security, the application ought not succeed.
36. The Applicant has not offered security since that offer was expressed in the submissions. In such absence, the court in **Machira t/a Machira & Co. Advocates v. East African Standard (No. 2) (2002) KLR 63** found that an order of stay ought not be granted. However, it is worth noting that Order 42 Rule 6 (2)(b) does not provide for an applicant to make such an offer rather it mandates on the court to order security for the due performance of the decree and it is that order that is ultimately binding to the applicant. The finding in **James Wangalwa & Another** is in line with the provisions of Order 42 Rule 6 (2)(b) that the kind of security a party should give is a dictate of the court. It is stated nowhere in the said provision that an applicant must offer security. The case of **Rosengrens Ltd v. Safe Deposit Centres Ltd [1984] WLR** cited by the Respondent in my view is irrelevant to the issue of security under Order 42 Rule 6 (2)(b).
37. The Applicant also sought stay of proceedings. The decision on whether or not to grant the order is a matter of judicial discretion to be exercised in the interest of justice. The discretion is unlimited save that it should be exercised rationally. In determining the question, the Court exercises its inherent power under Sections 1A, 1B and 3A of the Civil Procedure Act. See **Halsbury's Laws of England 4th Edition Vol. 37 P. 330**, on implication of granting the order where the Scholars therein stated as follows:-

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."

38. In the case of **Global Tours and Travels Ltd Winding Up Cause No. 43 of 2000 (UR)** it was held that:-

“...Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of this character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.” (Underlining provided)

39. Therefore, in determining whether or not to grant the order for stay of Proceedings, this Court ought to consider whether or not the motion has been brought timeously and the appeal is arguable. As has been opined above, this application was filed within reasonable time. For this court to determine the status of the appeal so said it should not delve into the merits of the appeal but consider whether or not it raises arguable grounds.
40. Amongst the grounds raised in the intended appeal is that the trial magistrate erred in law by failing to take into consideration sum ordered to be deposited was inclusive of interest on the principal sum of Kshs. 800,000/= and that the delay in filing the defence was not inordinate to warrant such a punitive condition. In my view, the said ground calls for a determination on merit and is therefore arguable.
41. The applicant did not expound on what reasonable security is and neither did it indicate to court the financial status of the company. Accordingly, in the interest of justice, I exercise my discretion in favour of the appellant and order for stay of execution and stay of proceedings in the subordinate court pending hearing and determination of this appeal conditional upon the applicant depositing in court the sum of Kenya Shillings One Million, Six Hundred Thousand only (Kshs 1,600,000) as security within 21 days from the date hereof.
42. I further order that the appellant do compile, file and serve the respondent with a complete record of appeal within 30 days from the date hereof to facilitate the consideration of this appeal under section 79B of the Civil Procedure Act.
43. The respondent shall have costs of this application.

Dated, signed and Delivered at Nairobi this 9th day of November, 2015.

R.E.ABURILI

JUDGE