



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 71 OF 2015

*(Being an appeal from a Judgment of the CM'S Court Naivasha by P. Gesora (CM) dated 21st May 2015
in Civil Case No. 204 of 2014)*

H. YOUNG & CO. LIMITED.....APPELLANT

-VERSUS-

SAMSON OKOTH ORENKO.....RESPONDENT

RULING

1. The outstanding prayers in the Notice of Motion filed on 31/7/2015 are basically 3, 4 and 5 which seek:-

“3. THAT this Honourable Court be pleased to order the release of Appellant’s Motor Vehicles attached on 1st July 2015 and 2nd July 2015 on a running attachment pending the hearing and determination of this application.

4. THAT there be a stay of execution of judgment delivered in NAIVASHA CMCC 206 of 2014 together with all the consequential orders pending the hearing and final determination of the appeal filed herein.

5. THAT this Honourable Court be pleased to allow the Appellant deposit an insurance bond or bank guarantee as security as opposed to a cash deposit.”

2. The application is supported by the affidavits sworn by **Audrey Namwakira** and is expressed to be brought under Order 42 Rule 6 (i) and (6) of the Civil Procedure Rules.

3. The Respondent opposed the application through his Replying affidavit filed on 4/9/2015.

4. The facts of this matter are that the Respondent sued his employer the Appellant, for damages following an accident at work, resulting in injuries. After a full hearing the lower court (Gesora, CM) entered judgment for the Respondent in the sum of Shs 2,367,290/=.

5. The Appellants, dissatisfied with the decision, have now filed an appeal on the issues of liability and quantum. The provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules state:-

“(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.”

6. The Appellants contend that their attached vehicles, which are tools of trade will remain in the custody of the auctioneer if the orders sought are not granted, occasioning substantial loss to the Appellants, who are currently involved in a project at Kedong. Mr. Wahome for the Appellants relied on the authority of **Kenya Orient Insurance Co. Ltd –Versus- Mohamed Dulto Dima [2013] eKLR** and **Teachers Service Commission –Versus- Ratemo [2014] eKLR** to bolster his submission that the Respondent has not shown ability to refund the decretal sum should the appeal succeed, and hence the Appellants stand to suffer loss. The Appellants offered to deposit the decretal sum into court.

7. For his part the Respondent through Ms Amboko asserted that the likelihood of suffering substantial loss has not been established. She cited the case of **Socfinaf Co. Limited –Versus- Nelphat Kimotho Muturi [2013] eKLR**.

8. In **Kenya Shell Limited –Vs- Kibiru [1986] KLR 410**, (cited in the Respondents authority – **Socfinaf**) the court stated:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence as 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 cornerstone of both jurisdiction for granting 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..... it is not enough merely stating that the sum of Shs 20,380.00 is a lot of money and the Applicant would suffer loss of the money is paid.....”

9. There is no doubt that the sum involved in this case is large and the Appellant is doubtful of recovering it from the Respondent should the appeal succeed. As **Kasango J** observed in **Kenya Orient Co. Ltd – Vs- Paul Mathenge Gichuki & Others [2014] eKLR**:

“.....the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the Appellant states that it is unaware of [the] Respondent’s resources”;

Upon such doubt being cast on the Respondents’ financial ability the onus shifts to him to rebut the Appellants’ position.

10. In this case the Appellant has not attempted to show that he has the wherewith all to refund the decretal sum if the appeal succeeds. Clearly, if a sum of over Shs. 2 million paid over to the Respondent could not be recovered by the Applicants, they would suffer substantial loss. Alternatively they probably would have lost their presently held vehicles in an auction and would have to replace them at a higher cost, possibly jeopardising their operations.

11. I am satisfied that the Appellants have demonstrated likelihood of suffering substantial loss. The application was brought timeously as soon as the court allowed the Appellants to file their appeal out of time. The Appellants have also offered to deposit the decretal sum as security for the performance of the decree.

12. I am persuaded to grant the Appellant’s application in terms of prayer (4) of the Notice of Motion, conditional upon the Appellant depositing 50 % of the decretal sum into a bank account in the joint names of the parties’ advocates within 7 (seven) days of today’s date. Upon compliance by the Appellants, the motor vehicles stated in prayer (3) will be released to the Appellants on payment of auctioneer fees. The costs of the application will abide the outcome of the appeal.

13. Finally, I note that the matter in the lower court arose from injuries that occurred at the place of work. In the circumstances, I would direct that the appeal be removed to the Employment and Labour Relations Court registry in Nakuru. The case will be mentioned before Radido J. on 25th November, 2015 for directions as to the hearing of the appeal.

Delivered and signed at Naivasha this **6th day of November, 2015.**

In the presence of:

Mr. Wahome for the Appellant

N/A for the Respondent

Court Assistant Stephen

C. W. MEOLI

JUDGE