



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL 300 OF 2010

MULTIPLE HAULIERS LIMITED.....DEFENDANT

VERSUS

RAHAB MUTHONI KIMANI.....PLAINTIFF

RULING

Before me in the application dated 30/11/2011. Multiple Hauliers Ltd seek an order of stay of Nakuru CMCC 1081/05 – **Rahab Muthoni Kimani Vs Multiple Hauliers (EA) Ltd**, pending the hearing and determination of Civil Appeal No. 300/2010 and stay of proceedings in matters listed at paragraph 4 of the Notice of Motion namely:-

a) **Nakuru CMCC No. 2182 of 2007**

Felista Wanjiru Gachara vs Multiple Hauliers Co. Ltd & 2 Others;

b) **Eldama Ravine RMCC No.5 of 2007**

Josiah Kariuki Kuria vs Multiple Hauliers Co. Ltd & Another;

c) **Eldama Ravine RMCC No.4 of 2007**

Mary Wangui vs Multiple Hauliers Co. Ltd & Another;

d) **Eldama Ravine RMCC No.3 of 2007**

Philip Njoroge Waithiru vs Multiple Hauliers Co. Ltd & Another;

e) **Nakuru CMCC No. 1311 of 2006**

Emma Wanjiku Ndegwa vs Multiple Hauliers 9E.A.) Ltd;

f) **Eldama Ravine RMCC No. 23 of 2006**

Patrick Njuguna vs Multiple Hauliers Co. Ltd & Another;

g) **Eldama Ravine RMCC No.24 of 2006**

Mary Njoki Ndungu vs Multiple Hauliers Co. Ltd & Another.

The Notice of Motion is supported by grounds found on the face of the application and the affidavit of Clive Critchlow, the General Manager, Operations and Customer Relations of the appellant. The appellant is dissatisfied with the judgment of the lower court; it has filed an appeal which raises serious grounds; that the appellant will suffer irreparable loss; the application was made without unreasonable delay; that the respondent will not suffer any prejudice and lastly, that the applicant is willing to give security for due performance of the decree.

A brief background of this case is that the appellant's motor vehicle KAT 135M ZB 9835 was involved in a traffic accident with the respondent's vehicle KAP 397M on 1/5/2005. The vehicles were extensively damaged, 3 passengers in the respondent's vehicle died while many others sustained serious injuries. The respondent filed CMC 1081/05 for recovery of general damages and it was treated as a test case. Seven (7) passengers who were aboard the respondent's vehicle also filed suits for recovery of damages for injuries they sustained. The other suits were stayed. The court found in favour of the respondent awarding him Kshs.650,000/- against which this application is brought. The lower court had granted an order of stay on condition that the applicant paid in full Kshs.650,000/- to the respondent. The appellant claims that the counter claim in the lower court was for Kshs.1,147,505/- and if the appeal succeeds, they risk losing both the Kshs.650,000/- and sum of the counter claim. They are willing to deposit the money in an interest earning account of both advocates.

Mr. Wamaasa, counsel for the respondent, relied on the decision in **Savings & Loan Kenya Ltd v Odongo (1987) KLR 294** and **Ruben & 9 Others v Nderitu & Another (1989) KLR 459** where the courts held that the court should exercise its discretion as not to deny a party his day in court and exercise its powers so that the stay of execution will allow the appellant to be heard.

In opposing the application, Mr. Kamau relied on the grounds of opposition filed and a replying affidavit sworn by the respondent. Counsel urged that the application is bad in law, misconceived and an abuse of the court process; that the applicant has not demonstrated that the respondent will be unable to repay the decretal sum in the event the appeal succeeds; that the application is meant to deny the respondent the enjoyment of the fruits of her judgment and also to delay the other pending suits against the appellant which are yet to be determined. It was also counsel's contention that the appellant is in contempt of the court order having failed to pay part of the decretal sum to the respondent as ordered by the trial magistrate. Counsel relied on the decision in **Mary Kina v Menengai Oil Refineries CA 60/2003**.

I have now considered the affidavits filed herein by both parties, grounds and submissions of both counsel. The respondent's counsel urged that by failing to pay part of the decretal sum to the respondent the appellant is in contempt of the court order. However, my view is that **Order 42 Rule 6(1)** allows the appellant to apply for stay to the appellate court. It even after making such application in the lower court and it does not matter whether the application was granted or not. That provision reads as follows:-

“O.42 R6(1).a No appeal or second appeal shall operate as a stay of execution or proceedings under 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.”

The appellant had a right to approach this court to seek an order of stay. Whether or not this court will grant stay is an exercise of its discretion under **Order 42 R.6(2)** of the **Civil Procedure Rules**. The court is guided by the threshold created thereunder which is that:-

“1. The court must be satisfied that substantial loss may result to the applicant if stay is not granted;

2. **The application must have been brought without unreasonable delay;**
3. **The applicant should provide security for the due performance of the decree or order.”**

In the instant case, I am satisfied that this application was filed timeously because the lower court issued its order directing the appellant to pay part of the decretal sum to the respondent on 6/10/2012 and the appellant moved this court on 25/10/2011.

Will the appellant suffer substantial loss if the decretal sum is paid to the respondent? In **Charity Muthoki Mulei v William Mutsyo Muindi CA 32709**, J. Lenaola cited the case of **Lalji Bhanji Sanghani Builders & Contractors vs Nairobi Gold Hotels (K) Ltd HCC 1900/1995**, where J. Ringera was quoted as saying:-

“he (the applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh impossible or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.”

In the affidavit sworn by Critchlow, he depones that the respondent has not supplied any history of his means and hence the applicant’s fear that if paid part of the decretal sum, the respondent may not be able to pay both that sum and the sum claimed in the counter claim in the event the appeal succeeds. Mr. Wamaasa, in his submissions added that the respondent used to rely on matatu business which matatu was written off in the accident. In her replying affidavit, the respondent merely stated that she is able to repay the decretal sum but did not endeavour to show what her means are. Having been challenged to prove her worthiness, the respondent should have endeavoured to do so. This matter was seriously contested on the issue of liability. Unfortunately, none of the parties exhibited the judgment of the trial court and this court is not even aware what the full decretal amount is. There being a counter claim for such a colossal sum and the respondent having failed to show any evidence of her worthiness or means, I do find that if the decretal sum is paid to be respondent, she may not be able to repay it if the appeal succeeds and the appellant is likely to suffer substantial loss.

I am alive to the fact that the respondent has a valid judgment and this case is 4 years old. However, this court cannot lose sight of the appellant’s right to appeal. Both rights have to be balanced.

The appellant is willing to deposit the sum of Kshs.650,000/- in an interest earning account of both counsel for the plaintiff and respondent. That is a commitment to the applicant’s keenness to appeal and that right cannot be denied. In that respect, I will grant an order of stay on condition that the Kshs.650,000/- is deposited in an interest earning account of both counsel for the appellant and respondent within ten (10) days hereof, pending hearing of the appeal.

I take cognisance of the fact that there are other cases pending awaiting the determination of this appeal. So that the order of stay is not abused, I will give further orders that the appellant do prepare the record of appeal and have it ready for hearing within the next 4 months. This court will mention this matter on 9/11/2012, to confirm compliance by the appellant. Costs to abide the appeal.

DATED and DELIVERED this 6th day of July, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Ngure holding brief for Mr. Wamaasa for the appellant

Mr. Mbiyu holding brief for Mr. Enonda for the respondent

