IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO NAI 63 OF 1984

KIMAKIA BUS SERVICES LTD.....PLAINTIFF

VERSUS

ELECTROCOM INTERNATIONAL LTD.....DEFENDANT

(Appeal from Judgment of High Court, Civil Suit No 1430 of 1983)

JUDGMENT

Cases

- Davis & Shirtliff Ltd v AG [1978] KLR 274.
- Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12
- Wilson v Church [1879] 12 Ch D 454;

Texts

- Halsbury's Laws of England Vol 17 page 256
- Halsbury's Laws of England, 4th edition 1973 volume 1 paragraph 454 Statutes
- Civil Procedure Rules order XLI rule 4(1)
- Court of Appeal Rules rule 5(2)(b)

November 19, 1985, Kneller, Nyarangi JJA & Platt Ag JA, delivered the following

Mr D N Khanna moved the court under the court's inherent jurisdiction provided for in rule 1(3) of the Court of Appeal Rules and the new rule 5(2)(b) of these Rules. The object of the motion is to provide for a stay and security after execution pending an appeal.

The High Court gave judgment for the plaintiff, Electrocom International Ltd, against the defendant, Jogoo Kimakia Bus Services Ltd, for two sums viz Kshs 151,050, being the total of Kshs 137,100 (which is half the contractual price) plus Kshs 13,950 for materials supplied and work done, together with Kshs 100,000 awarded as general damages. This judgment was given on June 27, 1984.

www.kenyalawreports.or.ke The defendant gave notice of appeal on July 5, 1984 and then applied for a stay of execution on August 15, 1984 under Order XLI rule 4(1) of the Civil Procedure Rules. This application was heard and dismissed in October 1984, and this motion has been taken so that this court can consider the matter afresh.

It came on for hearing first in October 1984. At that time, no replying affidavit had been filed as there was no time to do so, and an interim order was made to the effect that:-

> ***1. the sum so far received by the court broker auctioneer, less his fees, charges and disbursements be paid into court, and then deposited by the registrar in an interest bearing account;***
>
> ***2. there was to be a stay of execution generally of the bus or buses scheduled for sale on November 10, 1984, under rule 5(2)(b) of the Court of Appeal Rules.***

The motion having been reheard it appeared that the registrar had not deposited the moneys received, namely, Kshs 65,000. There was a balance of Kshs 90,000 with the auctioneer still to be paid into court. The buses were still under attachment.

Mr Khanna and Mr Gathuku disputed a point of law; whether or not the execution had been completed. When the auctioneer received Kshs 65,000 Mr Khanna submitted that execution was not complete on this or any other part of the case until the money was received by the judgment – creditor; while Mr Gathuku argued that at least as to the Kshs 65,000 once the auctioneer court broker had received the money execution was complete. Therefore a stay of execution could not be granted. He relied upon the judgment of Law, JA in Davis & Shirtliff Ltd v AG [1978] KLR 274. Mr Khanna described Law, JA's decision as that of the minority. But that does not seem to be correct. Both Madan & Law, JJA, took the view that the execution, in that case, was complete, when the court broker received the proceeds of the sale of the attached moveable property. Thereafter he held the money to the use of the judgment – creditor. Both members of the court also held the view that the technical completion of the execution was immaterial to that case, since the court broker was still engaged in his duties concerning execution until he paid out. The third member agreed.

The problem that then arises is whether a stay of execution relates to a factual matter or is controlled by the effect of the legal completion of the execution. In other words, if there are still steps to be undertaken in fact, as a consequence of which the court can still prevent the proceeds of sale reaching the judgment creditor, can the court take these steps, or is the court precluded from taking those steps because in one sense execution is complete when the proceeds reach the hands of the court broker?

The views expressed in the Davis & Shirtliff case can be illustrated from a passage in Halsbury's Laws of England Vol 17 page 256. It is there explained that the Sheriff (in Kenya the court broker) has a duty to judgment-creditor to carry out the execution as soon as opportunity arises, and after deducting his costs, the Sheriff must hand the proceeds of the execution to the judgment-creditor, and if he does not do so he or his personal representatives may be sued for money had and received to the use of the judgment-creditor.

In the present case, however, the warrant of execution ordered the court broker to hold the proceeds until further order of the court. That has been accepted to mean that he must pay over the proceeds into court. In these circumstances as is pointed out in the same paragraph of Halsbury on page 256 noted above, the court broker owes a duty to the court to carry out the terms of the warrant. Apart from the warrant, the earlier order of this court was to deposit the sum of Kshs 65,000 in an interest bearing account; and the court broker was ordered to pay over the remaining Kshs 90,000 in his hands into court. Therefore if the court broker is ordered to pay into court a different situation arises from that which is envisaged in the explanation given in Halsbury (supra) where no payment into court has been made. It would seem to follow that the court broker must have a good defence to a claim for money had and received by producing the warrant since he cannot simply pay out to the judgment-creditor. Consequently there is no legal bar to the stay of execution arising out of the concept of a complete execution as stated in Davis & Shirtliff case and illustrated in the passage of Halsbury already referred to.

It is sometimes inconvenient to create such a bar as complete execution as indeed the Davis & Shirtliff case illustrates. For even if there had been a complete execution, the court broker in that case, was still carrying out duties in relation to the execution. It follows therefore that whether there is a complete

execution or not, the court has control over the proceeds of the sale until the time that the judgment-creditor receives them in his hands, and therefore a stay of execution can be ordered until that event has occurred.

Apart from this, the decision of Lord Denning in the case referred to in Davis & Shirtliff v AG (supra) namely, Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12 is a special example of where execution was deemed to be complete by the Companies Act in England. In the case of attachment for debt, execution is to be deemed complete by receipt of the proceeds by the debtor. This led Lord Denning to observe that there was to be execution in fact. It is doubtful whether Lord Denning's judgment is helpful in the present case, and probably was not of great use to Simpson, J(as he then was) in the David & Shirtliff case.

The result seems to us to be, that there is no legal bar to treating the application for stay in the present case on merely a factual basis. The problem resolves itself by finding that as in fact there were still steps to be taken before the judgment-creditor got hold of his money a stay order could in principle be ordered.

Mr Gathuku then referred to this court's discretion in granting a stay. He objected to a stay being granted, because the situation did not warrant it.

Before we come to the facts we should deal with two preliminary matters. The first is under what jurisdiction the stay is granted. The second is whether the delay, complained of by Mr Gathuku debarred the applicant from applying for a stay?

The High Court was asked to grant a stay of execution under Order XLI rule 4 of the Civil Procedure Rules. That rule also provides for a reference to this court if the application to the High Court fails; except of course, when the High Court has dismissed the action, in which case the High Court has no jurisdiction to stay execution, (except for costs) the application may then be made to the Court of Appeal, (see Halsbury's Laws of England, 4th edition 1973 volume 1 paragraph 454). But while it is open to the applicant, since the first application failed, to apply under Order XLI to this court, this application is made under rule 5(2)(b) of the rules of this court, which gives the Court of appeal its own special discretion. The application may be granted on "such terms as the court may think just." Hence, although the court will no doubt have in mind such matters as substantial loss that may result, delay, and security given for the performance of such decree or order appealed from, as may ultimately be binding on the applicant, the Court of Appeal will normally bear in mind the general principle that an appeal must not be rendered nugatory. (See Wilson v Church [1879] 12 Ch D 454; Halsbury's Laws of England, 4th edition, 1973 volume 1 paragraph 454). While the discretion is unfettered, the applicant will be required to show on affidavit that he has sufficient grounds for a stay. They may be, inter alia, that a respondent's poverty may be such that he may never be able to perform the decree if it is against him; or that the substratum of the appeal may be destroyed; or that there will be substantial loss.

Having then described the principles to be applied in this application, we pass on to the dispute concerning delay. Order XLI rule 4(2)(a) provides that the application must be made without unreasonable delay. But it is also a matter of general concern. Mr Gathuku complains that there was delay between June 27, 1984 when judgment was given and August 15, 1984 when a stay was applied for, although it could have been applied for informally when judgment was given. The bill of costs was taxed on July 31, 1984. The application itself was dated August 3, but only filed on August 15. Then the application was placed before the vacation judge, Todd, J on August 24, 1984, but he refused to entertain the application, and it was put before the trial judge on September 17, 1984. The ruling was delivered on September 21, 1984, and this application was brought on October 19, 1984.

Perhaps we should add that notice of appeal was filed on July 9, 1984 and that at around that time execution by way of attachment of moveable property was processed. It seems to have been within a month of execution being applied for that the application for stay was filed. It is true therefore that the stay application could have been brought before execution proceedings and certainly, if it is allowed, the applicant will have to pay the costs occasioned by and thrown away due to his delay. But looking at the matter generally it is not such great delay that the application cannot be effective, on that it would cause

great harm at this stage. It cannot be said that it is such delay as would bar the application.

Therefore we must now turn to the merits of the application, and the principal question is whether the appeal will be rendered nugatory because the applicant will suffer substantial loss or that the respondent company will be unable to carry out the decree of this court, if judgment is given against it. The subsidiary issues are the comparative losses to the parties, in their particular situations, and whether the appeal has a reasonable chance of success. The sums at stake are:-

> ***1. Kshs 65,000 in court;***
>
> ***2. Kshs 90,000 with the court broker***
>
> ***3. The bus or buses valued at the huge sum of Kshs 600,000 and deteriorating, without evidence that they are under proper care.***

All these items can be covered by a stay order, but while the first two can be deposited in income bearing accounts, the buses are liable to deteriorate. The first two sums amount to Kshs 155,000 out of a debt of Kshs 255,050 with interest and costs. The costs were taxed at some Kshs 30,000 and the interest will bring the debt up to a figure over Kshs 300,000; about Kshs 330,000 according to Mr Gathuku. Of this sum about half ought to be available. If the buses are worth Kshs 600,000 to cover Kshs 175,000, then it seems that there would be a great potential loss to the judgment-debtor. It would appear from the warrant that the electrical apparatus had already been sold, and then if two further buses are sold, the value of which more than covered the debt in the ratio of a little less than three to one, it would be a staggering blow to the applicant. In addition there would be huge garaging charges until the appeal is heard. It really seems unnecessary to take both buses; and that some form of security for the remaining debt ought to be arranged in lieu of the attachment of the buses. It will be difficult for the applicant to replace the buses, if he succeeds, and by then the buses have been sold by auction; but it is very costly for both sides to keep the buses under attachment, so that in one sense a stay is not the real answer, although it is better than sale. Here Mr Gathuku refused to raise the attachment, which decision he might well reconsider. No doubt it would make things easier if the Kshs 90,000 were in deposit; but that may be held against the garaging charges, if the buses are deteriorating.

Another aspect of this matter is the chance of success in the appeal. There seem to be greater chances above Kshs 137,100. It was apparently part of the contract that Kshs 137,100 should be paid as half the contract price, when equipment was brought to the site which was found to be the position. Kshs 13,950 lies outside the main contract, and Kshs 100,000 is the figure awarded by the learned judge. Of course, we must make it clear that all these items are disputed; the only point made here is that the more difficult part of the appeal from the successful respondent's point of view lies from sums awarded above Kshs 137,100. That again reflects upon the wisdom of holding the buses, and increases the chances of great loss to the prospective appellant, if the buses are sold.

The last issue is the financial position of the judgment-creditor. It is not assured on the affidavit evidence. The financial state of the young respondent company seems precarious. If the respondent company's business had improved since 1982, balance sheets would have been prepared and produced in support. There was no concrete evidence such as bank statements to support Mr Gathuku's plea for this court to accept that one year from today the respondent's financial position will improve.

The managing director of the respondent company deponed that he owns two houses in Nairobi. No particulars were given. The two houses may have been used to secure a loan. We do not know. There was no evidence that the other director is the registered owner of the land, the value of which is put at Kshs 1 million. There is no certainty that the respondent company could repay the sums raised on attachment.

For these reasons then it is clear that there should be a stay of execution:

> ***a) by depositing the Kshs 65,000 in an interest bearing account as already ordered which must now be carried into effect;***

b) by ordering the court broker to pay over the Kshs 90,000 into court, which must also be placed in an interest bearing account; www.kenyalawreports.or.ke

c) by ordering that the sale of the buses be stayed unless the respondent raises their attachment in exchange for other satisfactory security (if such is available).

The last question concern the security called for under Order XLI rule 5 of the Civil Procedure Rules.

That rule requires security to be taken for the restitution of property which may be or has been taken in execution of the decree. But that is not in every case. It is only when sufficient cause has been shown. Now if all the property taken on execution can be restored because execution has been stayed, then there is no need for further security for restitution. That seems to be the position here and therefore no security is ordered.

During argument, another type of security was considered, namely the security to be given by the applicant for a stay, for the due performance of the decree or order ultimately binding upon the applicant. This concept comes from Order XLI rule 4(2)(b). If the applicant in this case loses the appeal, the judgment debt has already been secured in the property taken in execution. All that is left is the costs of the appeal. Even this sum has also been secured, and therefore no further security need be given.

Accordingly, we allow the application and grant a stay of further execution on the terms set out above. We grant the costs of this application to the applicant, but the respondent will have the costs thrown away due to the applicant not applying for a stay at the earliest opportunity before the respondent moved to attach the applicant's property. These are the orders of the court.

Dated and Delivered on the **19th November, 1985**

A A KNELLER

.....

JUDGE OF APPEAL

J O NYARANGI

.....

JUDGE OF APPEAL

H G PLATT

.....

AG .JUDGE OF APPEAL