



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, SICHALE & KANTAI, J.J.A.)

CIVIL APPLICATION NO. E258 OF 2020

BETWEEN

AISHA MOTOR DEALERS LIMITED.....APPLICANT

AND

KELVIN KINYUA MACHARIA1ST RESPONDENT

WASHINGTON NJOGU WARUGURU.....2ND RESPONDENT

(Being an application for stay of execution of the Judgment of the High Court of Kenya at Nairobi (Njuguna, J.) dated 4th April, 2019 in H.C.C.C. No. 440 of 2013)

RULING OF THE COURT

In the Motion brought under **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and **rule 5(2) (b)** of the **Rules of this Court** we are asked in the main to stay execution of the Judgment delivered on 4th April, 2019 (**Njuguna, J.**) and the resultant decree pending the hearing of the application and of an intended appeal. In grounds in support of the Motion and in an affidavit of **Safaraz Mohamed, Managing Director** of the applicant (**Aisha Motor Dealers Limited**) it is said among other things that the Judgment was entered against the applicant for **Ksh.5,399,350** plus interest and costs; that, aggrieved, the applicant intends to appeal and did file a Notice of Appeal; that the applicant, in an application for stay of execution at the High Court, was ordered to deposit **Ksh.2,699,675** in a joint account (presumably of the lawyers for the parties) and give a bank guarantee for a similar amount; at paragraphs 6 and 7 of the affidavit; it is deposed thus:

“6. THAT vide a Notice of Motion dated 20th February 2020, the Applicant applied to the High Court to vary the conditions imposed principally on the ground that they were too onerous for the Applicant. The application was dismissed on 30th July 2020 save that time for compliance was extended by a further thirty (30) days from that date (I annex and mark as SM-4(a) & (b) respectively a copy of the Notice of Motion dated 20th February 2020 and ruling delivered on 30th July 2020).

7. THAT the Applicant is now forced to move the Court of Appeal to exercise its original jurisdiction to consider the application afresh, and if satisfied, grant such orders as the justice of the case demands.”

It is further stated that the intended appeal is meritorious because, in the applicant’s view, the trial Judge did not appreciate exceptions to the principle of parties being bound by their pleadings; whether the Judge erred in law and fact in failing to find that the applicant had dislodged the presumption of ownership in **Section 8** of the **Traffic Act**; whether the Judge erred in law and fact in setting aside an interlocutory judgment that had been entered against the 2nd respondent and whether the sum awarded was inordinately high. The applicant deposes that if stay of execution is not granted and the sum of **Ksh.5,399,350** is paid out it may not be recovered and substantial loss would therefore result. At paragraph 10 of the affidavit; it is deposed *inter alia*:

“10. THAT although the Applicant obtained a conditional stay of execution, it has found the orders too onerous and greatly prejudicial to its business because;

a. The bank guarantee that Equity Bank Limited had proposed to grant to the Applicant will attract interest of at least 14% per annum thus increasing the cost to the Applicant with each passing month.

b. The interest payable on the joint interest earning account will be 7% per annum while the interest at court rates will be 12% per annum. Effectively, the Applicant, in the event of an unsuccessful appeal, will still be required to make up for the 5% difference.

c. The Applicant's business of importation of cars is cash intensive and requires continuous cash flows. It will be greatly prejudiced if a whopping Kshs.5,399,350.00 is tied up and made unavailable to it when there is a significant possibility of the appeal succeeding.

d. Given the Applicant's undisputed trade, the 1st Respondent will still be able to attach and sell any of the motor vehicles that will then be available at the Applicant's premises."

The 1st respondent **Kelvin Kinyua Macharia**, in opposing the application filed a replying affidavit in which he depones *inter alia* that the application is an abuse of the court process; that in the application for stay of execution in the High Court the applicant had deponed that it was willing to provide security inclusive of a bank guarantee; that a joint account had been proposed to be opened at Equity Bank but this was not to be as the applicant filed the current Motion in this Court; at paragraphs 14, 15 and 16 of the affidavit; he swore:

"14. THAT in response to paragraph 10 of the Supporting Affidavit, I further wish to state that I am a professional Software Engineer and a shareholder and director at Fortis Innovation Limited that specializes in medical and health software. The Company has a turnaround profit of Kshs.300,000.00 per month which translates to an annual income of Kshs.3,600,000.00.

Attached herewith and marked as KKM-5 is a copy of the Copy (sic) of the Company CR-12.

15. THAT I also own a Subaru Legacy KBK 781F that is registered under my name which makes me financially capable of refunding the decretal sum in the unlikely event that the Appellate Court overturns the High Court's decision.

Attached herewith and marked as KKM-6 is a copy of the current motor-vehicle search.

16. THAT in any event half the decretal sum if paid will deposited (sic) with Counsel for both parties and can easily be transferred back to the Appellant in the event of successful Appeal, the same applies to the Bank Guarantee covering the other half of the decretal sum."

The principles that apply in an application of this nature are now well settled. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that it is not frivolous. Secondly, such an applicant must show that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR**.

We have considered the Motion, the rival affidavits and the submissions filed by the applicant and the 1st respondent and also List of Authorities filed on behalf of the applicant.

It is proposed to be argued in the intended appeal whether the trial Judge properly appreciated and applied the exceptions to the principle of parties being bound by their pleadings. It is also intended to be argued as a ground of appeal whether the Judge erred in law and fact in *suo moto* setting aside the interlocutory judgment that had been entered against the 2nd respondent. We find these to be arguable points; they are not frivolous; an arguable point is not one that must succeed – See the case of **Josephine Koki Raymond v Philoma Kanini Maingi [2018] eKLR**.

What about the nugatory aspect which, as we have seen, an applicant must also satisfy to be entitled to the protection accorded by **rule 5 (2) (b) of the Rules of this Court?**

The record shows that the Judge, after a trial, found that the applicant owed the 1st respondent the sum of money we have set out in this ruling. The applicant thereafter applied for stay of execution pending appeal and, upon consideration, the Judge ordered that half the sum be deposited in a joint interest earning account and a bank guarantee be provided by the applicant for the balance. Therefore the Judge gave a conditional stay of execution which the applicant complains is onerous.

The 1st respondent says that he has the means to pay back the money decree in the event that the intended appeal succeeds.

Considering what is said by the applicant and the position taken by the 1st respondent, and considering that the applicant was granted a conditional stay by the High Court which it says is onerous, we do not think that the intended appeal would be rendered nugatory if we do not grant a stay of execution.

Half the decretal sum would be safe in the joint interest earning account of the lawyers for the parties and the other half be secured through a bank guarantee. We see nothing onerous in the orders granted by the High Court. The Judge was entitled to give that conditional stay order in the case where there was a money decree in favour of the 1st respondent.

The applicant having failed to satisfy the second limb which we consider in applications of this nature the Motion fails and is dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 29th Day of January, 2021.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR