



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

APPEAL CAUSE NO. 24 OF 2019

MULTI PACKAGING LIMITED T/A PRINTPAKAPPELLANT

VERSUS

TITUS KYALO KILATYA.....1ST RESPONDENT

ERICK OMONDI OKUKU.....2ND RESPONDENT

RULING

1. The Appellant filed Memorandum of Appeal herein on 14.8.2019 challenging the whole judgment of Senior Principal Magistrate Hon. G.A Mmasi delivered on 15.7.2019. On 23.9.2019, the Appellant filed the Notice of Motion dated even date seeking the following orders;

1. That the Honourable Court be pleased to certify this application urgent.
2. That the service of the application herein be dispensed with owing to the urgency of the matter.
3. That there be stay of execution of the judgment and decree made on 15th July, 2019 in Nairobi CMEL No. 113 of 2018 pending hearing and determination of this application.
4. That there be stay of execution of the judgment and decree made on 15th July, 2019 in Nairobi CMEL No. 113 of 2018 pending the hearing and determination of the appeal.
5. That the costs of this application be provided for.

2. The application is supported by the affidavits sworn by Janet Munyiva Mutunga on 23.9.2019 and 9.10.2019. The gist of the motion is that the applicants right to fair hearing will be prejudiced if the stay order is withheld, that if the order is denied she will suffer substantial loss because colossal sum is involved; that the application was made without unreasonable delay; and is ready to offer security as the court directs.

3. The respondents opposed the application vide the grounds of opposition and the replying dated 27.9.2019. In brief, the respondents contended that the court has jurisdiction to determine the appeal herein but not the application because a similar application was dismissed by the trial court. She further contended that the application does not meet the threshold for granting stay pending appeal, it is an act of forum seeking. The respondents further contended that the applicant is buying time to enable her wind up before paying the decree. They therefore prayed for the application to be dismissed with costs.

4. In her further affidavit sworn on 9.10.2019 the applicant contended that the court has jurisdiction to hear and determine fresh application for stay. She further contended that the respondent have no ability and capacity to refund the decreed sum if the appeal succeeds after the sum has been paid.

5. The court granted interim stay of execution pending hearing and determination of the application and the The application was disposed of by written submissions.

Applicants submissions

6. The applicant submitted that granting stay of execution will uphold the principle of fair trial as envisaged in Article 50 of the Constitution. She further contended that failure to grant the order will occasion substantial loss to her because the respondents will not be able to refund

the decreed colossal sum of if the appeal succeeds and as such the appeal will be rendered nugatory. She relied on section 65 (1) of the Civil Procedure Act stay, pending appeal should ordinarily be granted provided security is furnished.

7. She further relied on Amal Hauliers Limited –v- Abdulnasir Abukar Hassan[2017]eKLR where Korir J quoted Butt v Rent Restriction Tribunal[1982]KLR where Court of Appeal held that:-

“1. The power of the court to grant or refuse an application for stay is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.”

Respondents’ submissions

8. The respondents submitted that the application is an abuse of the court process because the applicant filed a similar application before trial court and it was dismissed from non attendance. They contended that instead of filing a fresh application for stay, the applicant should have appealed against the dismissal of the lower court application or sought review.

9. On the other hand the respondents submitted that the application does not meet the threshold from granting stay pending appeal as provided under Order 42 Rule 6(2) of the Civil Procedure Rules. They submitted that the applicant has not demonstrated that substantial loss will result to her unless stay of execution is granted. In their view the applicant has only made general statements without showing any possible loss or any loss at all that would render the intended appeal nugatory. They contended that the applicant has failed to prove that they will not be able to refund the decreed sum if the appeal succeeds. They contended that as deposed in their Replying Affidavit, they have the necessary means of refunding the decreed sum if the intended appeal succeeds.

10. They rely on Peter Mutuku Nthuku v Perimeter Protection Limited [2019]eKLR where this court held that the burden of proof of inability to repay the decreed sum if stay is denied rests with the applicant for stay. They reiterated their fear that the stay sought is meant to buy time for the applicant to wind up and before settling the decree herein.

Issues for determination

11. There is no dispute that the trial court delivered the impugned judgment on 15.7.2019 and the applicant filed appeal on 14.8.2019. There is no further dispute that the applicant applied for stay pending appeal before the trial court and it was dismissed for non-attendance.

The issues for determination are:

- (a) Whether the court has jurisdiction to entertain the instant application.
- (b) Whether the application meets the threshold for granting stay pending appeal.

12. The respondents objects to the instant application on ground that the applicants had filed a similar application in the lower court which was dismissed and as such their court cannot entertain a fresh application for stay. In their view the applicant should have appealed against the dismissal of the application for stay. However the applicant contends that the court has jurisdiction to hear a fresh application even after the lower court dismisses a similar application.

13. Order 42 Rule 6 (1) provides that:

“No appeal or second appeal shall operate as stay of execution or proceeding 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 make such orders thereon as it may seem just, and any person aggrieved by the 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.”

14. Arising from the foregoing provision, it is clear that the respondents objection is bereft of merits since this court has been given the jurisdiction to entertain fresh application for stay after a similar application is dismissed by the trial court. I therefore find that the application herein dated 23.9.2019 is competent and I now proceed to determine its merits.

Threshold for stay pending appeal

15. The threshold for granting order for stay of execution pending appeal is set out in a prohibitory manner under order 42 rule 6 (2) of the Civil Procedure Rules, thus:

“(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 applicants 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 performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

16. The applicant contends that she has met the said threshold while the respondents are of a contrary view. After careful consideration of the rival affidavits and submissions filed I am satisfied that the application herein was made without unreasonable delay. It is clear that the impugned judgment was delivered on 15.7.2019 and the applicant filed the first application before the trial court on 23.8.2019. It is also clear that the said application was dismissed on 5.9.2019 and the applicant brought the instant application on 23.9.2019. I am therefore satisfied that a delay of 18 days after the dismissal of the first application by the trial court was not unreasonable.

17. As regards the issue of substantial loss the applicant is apprehensive that if the sum of Kshs. 918120.23 is paid to the respondents they will not be able to refund the same if the appeal succeeds. In her view the said sum is colossal and if the appeal succeeds, it will be rendered nugatory. The respondent did not deny in their Replying Affidavit the allegations that they lack capacity to refund the decreed sum in the appeal succeeds after they are paid the same. I am therefore satisfied that a substantial loss may result to the applicant if stay order is withheld.

18. Finally, the applicant has offered to deposit security as a condition for stay, if ordered to do so by the court. However, she contends that paying the whole decreed sum will affect her operations.

19. The respondents, are apprehensive that the applicant is buying time to windup so that the decree of the court is left unsettled. After considering the submission by the two sides, I am satisfied that depositing of the whole decreed sum in this court will protect the interest of both sides.

Conclusion

20. I have found that the application dated 23.9.2019 is properly before the court and the court has jurisdiction to determine it. I have further found that the applicant has met the threshold for granting orders for stay of execution pending appeal. Consequently I grant stay pending appeal as prayed on condition that the appellant/applicant deposits the sum of Kshs. 918,120.23 in court as security within 14 days of today. In default the stay order shall lapse automatically.

Dated, signed and delivered in open court at Nairobi this 24th day of January, 2020.

ONESMUS MAKAU

JUDGE