



**REPUBLIC OF KENYA**  
**IN THE COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 188 OF 2016**

**ALIOS FINANCE KENYA LIMITED .....APPLICANT/APPELLANT**

**Versus**

**PHILIP MWANGI THEURI**

**GLADYS WAMBAIRE WACHIRA.....RESPONDENT**

**RULING**

1. **Alios Finance Kenya Limited** the Applicant herein took out a motion dated 14<sup>th</sup> April, 2016 where he sought for the following orders:

- i. That the application be certified urgent and it be heard ex-parte in the first instance.*
- ii. There be a stay of execution of the ruling and subsequent order of the Hon. Mburu, PM dated 1<sup>st</sup> April, 2016 pending the hearing inter parties hereof.*
- iii. That there be a stay of execution of the ruling and subsequent order of the Hon. Mburu PM dated 1<sup>st</sup> April, 2016 pending the hearing and determination of the appeal filed herein.*
- iv. That the costs of this application be provided for.*

2. When the matter came up for hearing on 3<sup>rd</sup> May, 2016, I directed that the application be disposed of by way of written submissions which directions the parties complied with. I have taken into consideration the grounds set out on the face of the motion, the facts deponed in the affidavit for and against the application.

3. The Applicant contends that a ruling was delivered in the lower court where a mandatory order of injunction was issued to the effect that the Applicant by itself or by its servants or agents disburses to Kenya Coach Industries Limited in respect of Respondents'/Plaintiffs' loan facility of Kshs. 4,734,060/- and to authorize forthwith Kenya Coach Industries Limited to release to the Respondents/Plaintiffs motor vehicle registration number KCF 801 Q Isuzu NQR 33 seater Mini Bus Engine number 378091 Chassis No. JAANIR66RF7100064 in a mechanical and roadworthy condition complete with its spare tyre, tool box, tool kits, ignition keys and service manual and restraining the Applicant thereafter from interfering with the Respondent s'right to ownership possession and use of the said motor vehicle KCF 801 Q for any cause other than breach of terms for the hire/ lease thereof as stipulated in the agreement of the letter dated 26<sup>th</sup> August, 2015.

4. The Applicant therefore seeks to have the order stayed on the grounds that it would suffer substantial

loss should the orders be executed by the Respondent. In particular, the Applicant aver that the effect of the orders is that the lower court suit is effectively determined since the prayer granted above was the only substantive prayer in the plaint. It argues further that, the order was directed to a third party, the Kenya Coach Industries Limited which was not a party to the suit. The Applicant is therefore apprehensive that it will suffer loss since it will be forced to pay a third party a colossal sum of Kshs. 4,734,060/=, yet the Respondent has not complied fully with the condition precedent to qualify for the applied loan as a result of which the agreement between the parties was not executed hence not enforceable. It argued that should the order for stay fail to issue, the Respondents who are unqualified loan applicants will secure release of the motor vehicle before the Appeal is heard.

It further stated that the application is made without unreasonable delay since the court's ruling was delivered on the 18<sup>th</sup> April 2016 and immediately thereafter, it preferred the Appeal on 18<sup>th</sup> April, 2016 and the current application. The Applicant further asserted that it is willing to offer security as the court may order.

5. In response the Respondents argued that the application by the Applicant is incompetent for the reasons that the Applicant ought to have filed an application for stay of execution in the lower court and only file the same in the instant court if the orders sought are denied. They further averred that in the absence of the lower court decision/ruling and the proceedings, this court will commit an injustice to the Respondents as it's not abreast with the facts. Since it lacks the material for the appellate court to consider, let alone to be satisfied whether or not the appeal is arguable and whether or not substantial loss might result to the Applicant.

6. Order 42 Rule 6 (1) of the Civil Procedure Rules is in the following terms:

***“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.*”**

7. In my understanding, the argument advanced by the Respondent in response to the application is that the Applicant ought to have filed an application for stay of execution in the lower court before filing in the instant court and that it ought to have only sought orders for stay of execution if the orders sought were denied in the Lower Court. On the face of it Order 42 Rule 6(1) of the Civil Procedure Rule presumes that the Applicant should pray for orders of stay of execution from the court it is appealing from since the appeal does not act as a stay of execution. The provision further gives the Applicant leeway to have the appellate court set aside the orders of stay of execution from the Court it is appealing to and if denied, then he can seek the order for stay of execution. In the present case, a literal reading of Order 42 Rule 6 of the Civil Procedure Rules, implies that the Applicant was required to pray for orders of stay of execution from the lower court in the first instance. Thereafter, the Applicant is at liberty to then pray for orders of stay of execution from the High Court whether he is aggrieved by the Orders or not.

8. Be as it may, I am of the considered view that the omission by the Applicant to pray for orders of stay of execution in the lower court is not detrimental to his Appeal. According to practice, an aggrieved party can chose to pray for orders of stay of execution from either the trial court or the appellate court. Furthermore, even if I was to consider the arguments advanced by the Respondent, the contention arising therein is a procedural issue. It is in my humble view that, since the execution is yet to be effected, then the Appellant has a latitude within which to pray for orders of stay of execution in this court. It would be prejudicial to the Appellant to deny him a chance to be heard on merit merely because he failed to seek for an order for stay of execution in the Lower Court yet he has sought the same from this court. I believe it is only just that this court considers the application for stay of execution by the Applicant.

9. The Respondent has also argued that the subject application should not be considered since the proceedings and the judgment have not been annexed to the application. He pegs his argument on the reasoning that the court will not be in a position to establish whether the Applicant will suffer substantial loss. I disagree with the respondents sentiments. The gist of the case in the lower court can at this preliminary stage of the appeal be derived from the facts as presented in the application before this court and the affidavit filed in response therein. The Applicant claims that that the **Honorable Principal Magistrate**, granted mandatory injunctive orders to the effect that the appellant disburses to Kenya Coach Industries Limited the loan facility amounting to kshs 4, 734,060/= and that it be authorized to release to the Respondent motor vehicle registration number KCF 801Q and further that the Applicant be restrained from interfering with the Respondents' ownership of the motor vehicle. The Respondents are not denying that such orders were granted by the Court and I am therefore convinced even without the proceedings and the Ruling that that was indeed the position of the Trial Court that has necessitated the instant application and appeal.

10. In the application before me, the Applicant is seeking orders for stay of execution of the ruling and order of **Hon Mburu PM** pending the hearing and determination of the Appeal. The principles to be considered in an application for stay of execution are well settled. Firstly, there must be threat of substantial loss on the part of the applicant if the orders of stay fail to issue. Secondly, the application must have been brought without delay and thirdly, the provision for security for due performance of the decree must be determined.

11. On the first principle the applicant is required to show that it will suffer substantial loss. The cornerstone of the jurisdiction of the court in determining whether or not to grant stay of execution pending appeal is the fact that substantial loss will occur upon the Applicant unless a stay order is granted. The legal burden of proof lies with the Applicant. In the present case, the Applicant claims that it will suffer substantial loss since the orders of the lower court summarily dismissed the suit at the preliminary stage. It further claims that it will suffer substantial loss because it will be forced to pay Kshs 4,734,060/= to a 3<sup>rd</sup> party, the Kenya Coach Industries Limited which was not a party to the suit. I have perused the prayer as sought in the plaint and the application by the Respondents as filed in the lower court. Indeed as averred by the Applicant, the application is seeking for inter alia a mandatory order of injunction to compel the Applicant to disburse to Kenya Coach Industries Ltd a total sum of kshs 4,734,060/= being an alleged loan facility advanced to the Respondents by the Applicant and to further compel it to authorize the release of motor vehicle registration number KCF 801Q. This is the same prayer as that sought in the plaint. Should the execution of the Order as granted by the Lower Court be effected, then the Applicant will indeed suffer substantial loss of kshs 4,734,060/=.

12. On the 2<sup>nd</sup> principle of filing the application without unreasonable delay. It is apparent that the order by the lower court was made on 1<sup>st</sup> April 2016 by the Learned Principal Magistrate and the Applicant filed this application seventeen days, specifically on 18<sup>th</sup> April 2016. The application was brought without undue delay.

13. On the third principle that requires the Applicant to offer security, I note that the Applicant in its application failed to offer any security and instead intimated that it is owed money which debt continues to accrue upwards hence it is unconscionable to have it give security. It however, stated in its submissions that it is willing to offer security as the court deems fit. In the interest of justice, I grant the order for stay pending appeal on condition that the Applicants deposit the decretal sum of kshs.4,734,060/= in an interest earning account in the joint names of advocates and or firms of advocates from both sides within 30 days from the date hereof. In default the motion will be treated as having been dismissed. Costs of the motion to await the outcome of the Appeal.

Dated, Signed and Delivered in open court this 19<sup>th</sup> day of August, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

.....for the Respondent