



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL APPEAL NO. 18 OF 2017

AMAL HAULIERS LIMITED.....APPLICANT

VERSUS

ABDULNASIR ABUKAR HASSAN.....RESPONDENT

RULING

[Notice of Motion dated 4th July, 2017]

1. The only prayer that remains for the determination of this court in the Notice of Motion dated 4th July, 2017 is the request by the Applicant, Amal Hauliers Ltd for a stay of execution of the judgement delivered on 3rd March, 2017 in Kilifi SPMCCC No. 237 of 2016, Abdulnasir Abukar Hassan v Amal Hauliers Ltd pending the hearing of the Applicant's appeal.
2. The Respondent, Abdulnasir Abukar Hassan opposed the application through his replying affidavit sworn on 13th July, 2017.
3. The application is premised on the grounds that the Applicant being aggrieved with the judgement delivered by the trial court on 3rd March, 2017 has filed an appeal. It is the Applicant's position that the appeal, if successful, will be rendered nugatory and substantial loss will be suffered if the execution is not stayed pending the appeal. The Applicant avers that it is willing to deposit security for due performance of the decree and the Respondent shall not suffer any prejudice if the application is allowed. Further, that it is in the interest of justice that the application be allowed.
4. The application is supported by the affidavit of Philomena Theuri, the Claims and Legal Services Manager of the Applicant's insurer averring that the appeal was filed on 22nd March, 2017 and a letter dated 17th March, 2017 had been written to the court requesting for certified typed proceedings. It is the deponent's averment that the Respondent had shown signs of execution through a letter dated 19th June, 2017. The affidavit also reiterates the grounds on the face of the application.
5. The Respondent in opposition to the application, averred that the application is fatally defective; that the Applicant has not offered an explanation about the delay in seeking the stay orders, the application having been filed four months after judgement making the delay inordinate; that the Applicant has not demonstrated evidence of the substantial loss it would suffer; that the application is a ploy to delay the Respondent, who is in dire need of money for treatment as a result of the injuries sustained, from enjoying the fruits of the judgement; that the Applicant is insured by a big company and should not be

granted stay simply because it can furnish security; that there is need to strike a balance so that it is not only the tortfeasor, who has not suffered any harm, who benefits from an order of stay of execution; that the appeal has no chances of success; and that the right of appeal ought to be balanced with the right of the decree holder to enjoy the fruits of judgement.

6. It is the Respondent's assertion that if the court is inclined to grant a stay then it should direct that half the decretal amount be paid to him and the other half be deposited in an interest earning account in the joint names of the advocates for the parties within thirty days from the date of the order.

7. The advocates for the parties agreed to dispose of the application through written submissions.

8. The Applicant urged the court to exercise its discretion in its favour as per the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** where the Court held that discretion ought to be exercised in a manner that would not prevent an appeal. The Applicant submitted that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay. According to the Applicant, substantial loss would occur if its appeal succeeds and the Respondent is unable to refund the decretal sum.

9. The Applicant contends that although it is stated that the Respondent has a source of income it is not clear whether the Respondent will be able to refund the decretal amount if the appeal succeeds. The Applicant relies on the Court of Appeal decision of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** to buttress the point that the onus lies on a respondent to show proof of ability to refund the decretal sum were the applicant to succeed.

10. The Applicant also relied on the Court of Appeal decision in the case of **Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai No. 322 of 2006** reiterated by the Court of Appeal in **House Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** to emphasize that even in an application involving a money decree a stay of execution pending appeal may be granted so as to alleviate any undue hardship the applicant would suffer if stay is refused.

11. On the issue of the alleged delay in filing the application, the Applicant submitted that the delay is not unreasonable and referred to the High Court decision in **Florence Hare Mkaha v Pwani Tawakal Mini Coach & another [2014] eKLR** where the court allowed a similar application though it was filed almost a year after the delivery of judgement by the trial court.

12. The Applicant indicated that it is willing to furnish security for due performance of the decree. Further, that the appeal raises an arguable point. Reliance was placed on the decision of the High Court in **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** in support of the submission.

13. In reply, the Respondent asserted that the judgement was issued by a competent court and for stay of execution pending appeal to issue, the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 ought to be met. It was emphasized that the court must be satisfied that substantial loss would be suffered by the applicant.

14. The Respondent discounted the Court of Appeal decisions relied upon by the Applicant stating that those decisions referred to stay of execution as governed by the rules applicable to matters before the Court of Appeal. The Respondent instead urged the court to follow the decisions of the different judges of this Court in **Pamela Akinyi Opundo v Barclays Bank of Kenya Ltd [2011] eKLR; Karunguru Estate Limited v Beatrice Wamere Karanja [2012] eKLR; Nairobi HCCC No. 1900 of 1995 Lalji Bhimji Sanghani Builders & Contractors v Nairobi City Council; and Mombasa HCCC No. 63 of 1997 M/S Portreiz Maternity v James Karanga Kabia**. According to the Respondent, the decisions put the onus on an applicant to prove the substantial loss he would suffer.

15. Finally, the Respondent submitted that the ability to furnish security should not give an unfair advantage to the Applicant as Article 27(1) of the Constitution provides for equality of all persons before the law.

16. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

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

17. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution 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.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

18. I do not buy into the argument by the Respondent that the Court of Appeal decisions are inapplicable to applications for stay of execution pending appeal before the High Court. A perusal of the decisions of both courts show that the principles to be applied when considering an application for stay of execution pending appeal are the same.

19. In the Court of Appeal decision in the case of **National Industrial Credit Bank Limited** (supra) as followed by the High Court in **Stanley Karanja Wainaina** (supra) it was held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such

an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

20. In the case at hand, the Respondent has not disclosed any source of income that he would use to refund the Applicant the decretal amount should the appeal succeed. Indeed the Respondent’s averment that he is in dire need of money to continue with treatment for the serious injuries received in the accident can only confirm that he will not be able to refund the decretal sum were the Applicant’s appeal to succeed. The Applicant has thus established that it will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

21. Was the application filed without unreasonable delay? The application has been filed four months after the delivery of the judgement. It is noted that the appeal was filed on 22nd March, 2017 soon after the delivery of judgement thus signaling the Applicant’s interest in pursuing the appeal. It is only after the Respondent’s counsel wrote to the Applicant’s counsel on 19th June, 2017 about the intention to execute that the Applicant found it necessary to file the instant application. There is thus no inordinate delay on the part of the Applicant.

22. The Applicant has indicated its readiness to furnish security for the due performance of the decree. The Respondent asserts that he is entitled to equal treatment before the law and the fact that the Applicant is insured by a big company should not be used to trample on his rights. The answer to the Respondent’s concern is that his interests will be taken care of by the Applicant depositing the decretal amount. Once the appeal is determined, the winner will have ready access to the money.

23. A perusal of the memorandum of appeal shows that the Applicant is appealing against the decision on liability and quantum. Much as I do not want to speculate on the outcome of the appeal, I do not think that the Respondent will leave this court empty-handed. He says he needs the money for treatment. His proposal that he gets half the decretal amount is therefore reasonable.

24. In the circumstances, I direct that half the decretal amount be released to the Respondent’s counsel within 30 days from the date of the delivery of this ruling. The other half of the decretal amount shall be deposited in an interest earning account in the joint names of the advocates for the Applicant and the Respondent within 30 days from the date of the ruling.

25. The costs of the application shall abide the outcome of the appeal and shall follow the cause.

Dated, signed and delivered at Malindi this 3rd day of November, 2017

W. KORIR,

JUDGE OF THE HIGH COURT