



**Agunga t/a Net International v China Communication Construction Company Limited
(Civil Suit E002 of 2021) [2024] KEHC 16888 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E002 OF 2021
F WANGARI, J
DECEMBER 19, 2024**

BETWEEN

ALFRED NYADIMO AGUNGA T/A NET INTERNATIONAL PLAINTIFF

AND

**CHINA COMMUNICATION CONSTRUCTION COMPANY
LIMITED DEFENDANT**

RULING

1. For ruling is the Defendant's application dated 19th July, 2024 seeking among other orders, stay of execution of the judgement delivered on 28th June, 2024 since it had already lodged an appeal against the said judgement.
2. The application is strenuously opposed by the Plaintiff through his affidavit sworn on 7th August, 2024 for among other grounds that the Defendant has not met the three (3) conditions for grant of stay. According to the Plaintiff, the Defendant has not demonstrated any substantial loss other than the averment the amount is substantial and will ground its operations.
3. Directions were taken to have the application heard by way of written submissions. Both parties duly complied. The Defendant's submissions are dated 28th October, 2024 while the Plaintiff's submissions are dated 28th October, 2024. I am grateful for the parties' industry and compliance with the court's directions. They have filed detailed submissions and cited various authorities urging their respective rival positions which the court has duly appreciated.
4. They are a useful guide to the court in crafting a just decision in respect to the parties. The tragedy of the adversarial system is that it is not possible to please all the parties in the case. A decision will please one of the divide while the other walks away sad. However, it is the duty of this court to render a decision that is just, not that pleases a party. I shall endeavor to do so in the present matter and all other matters.



Analysis & Determination

5. This Court has carefully considered the application dated 19th July, 2024, the response, the parties rival submissions, the authorities cited as well as the law and the following issues falls for this Court's determination: -
 - a. Whether the application has merits;
 - b. What orders should issue; and
 - c. Who bears the costs.
6. This is an application for stay of execution and the law is settled and I need not to re-invent the wheel. It is provided for under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows: -
 - “(1) No appeal or second appeal shall operate as a 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 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.
 - (2) No order for stay of execution shall be made under sub rule (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.”
7. The three conditions to be fulfilled can therefore be summarized as follows: -
 - a. that substantial loss may result to the applicant unless the order is made;
 - b. application has been made without unreasonable delay; and
 - c. security as the court orders for the due performance.
8. The above requirements were well enunciated by the Court of Appeal in the case of Butt v Rent Restriction Tribunal [1979] eKLR. The three conditions must be fulfilled together for stay to be granted. On substantial loss, it is not in dispute that the amount in issue is quite substantial and therefore, this condition has been met. I also consider that the Plaintiff has not stated that in the event the appeal succeeds, he has the capacity to repay back the decretal sum.
9. On the application being filed without unreasonable delay, the judgement which is sought to be appealed was delivered on 28th June, 2024. The application herein was filed on 19th July, 2024 which is clearly within time. This condition is equally complied with.
10. On the requirement to provide security for due performance, the same is closely related to the issue of substantial loss. I note that the Defendant has offered to place an insurance bond equivalent to 50% of



the decretal sum. However, being a money decree, the Defendant ought to deposit the decretal sum in an escrow account in the name of the parties' advocates or in court or in the alternative, issue a bank guarantee for an equivalent sum. I thus find the application merited.

11. On costs, the same shall abide the outcome of the appeal.

12. The upshot of the foregoing is that the court renders itself as hereunder: -

- a. The Notice of Motion Application dated 19th July, 2024 has merit and it is allowed on the following conditions: -
 - i. The Defendant/Applicant to deposit the entire judgement sum of Kshs. 100,112,768/= in an escrow account in the names of Counsel on record for the parties within the next sixty (60) days excluding the period between 21st December and 13th January;
 - ii. In default of (i) above, stay granted shall lapse and the Plaintiff/Respondent is at liberty to execute.;
- b. Costs to abide the outcome of the Appeal; and
- c. File is deemed as closed and either party is at liberty to move the court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

Mr. Kimutai Advocate for the Defendant/Applicant;

Ms. Mboya Advocate for the Plaintiff/Respondent;

Brian, Court Assistant

