



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO E053 OF 2021**

**PORT FLORENCE COMMUNITY HEALTH CARE....APPELLANT**

**-VERSUS-**

**CROWN HEALTH CARE LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. In its Notice of Motion application dated and filed on 23<sup>rd</sup> June 2021, the Appellant sought that an order for stay of proceedings pending hearing and determination of its Appeal be granted. The other three (3) prayers were pending the hearing and determination of the present application and were thus spent. Joshua Odongo Oron, the Appellant's Director swore an Affidavit in support of its application on 23<sup>rd</sup> June 2021.
2. The Appellant stated that it entered into an Agreement with the Respondent herein where the Respondent was to supply it with various pharmaceutical products, medical equipment, chemicals and other related goods worth Kshs 32,648,110/= on credit. It was to pay this amount by 31<sup>st</sup> March 2021. It paid a sum of Kshs 19,320,021/= leaving a balance of Kshs 13,328,044/=. However, on 10<sup>th</sup> March 2020, the Respondent sent auctioneers to attach its property.
3. It further stated that its application seeking an order for temporary injunction was heard and dismissed with the interim injunctive orders being set aside. It averred that it was aggrieved by the said decision and intended to appeal against the same.
4. It was apprehensive that if this court did not grant it the orders it had sought, it risked being condemned unheard. It added that it would suffer irreparable loss and its appeal which had high chances of success would be rendered nugatory. It pointed out that the Respondent would not be prejudiced if its application which was filed without delay was allowed and indicated that it was ready and willing to abide by any directions and conditions.
5. In opposition to the said application, on 30<sup>th</sup> July 2021, Brian Sitima, a Legal Officer with the Respondent swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 3<sup>rd</sup> August 2021.
6. The Respondent restated the terms of the Agreement between it and the Appellant herein and added that it was a term of the contract that in the event of default of any instalment, it would attract a minimum of Kshs 300,000/= per month which amount was not paid diligently prompting it to instruct auctioneers to execute. It was its contention that the court dismissed its application as it was not merited.
7. It was emphatic that the Appellant was a big company with flourishing branches in Kisumu and that to state that it could not afford to remit the monies was a waste of the court's precious time.
8. It contended that the present application was for buying time and that the same had not satisfied the test as set out in the case of **Giella vs Cassman Brown**. Further, it averred that the appeal raised no serious issues of law and that it would not suffer irreparable harm. It therefore urged this court to dismiss the aforesaid application.
9. The Appellant's Written Submissions were dated 30<sup>th</sup> August 2021 and filed on 31<sup>st</sup> August 2021 while those of the Respondent were undated but filed on 21<sup>st</sup> September 2021. The Ruling herein is based on the Written Submissions that both parties relied upon in their entirety.

**LEGAL ANALYSIS**

10. Both the Appellant and the Respondent were in agreement on the conditions of granting an order for stay of execution and stay of

proceedings as provided in Order 42 Rule 6 of the Civil Procedure Rules, 2010. On its part, the Appellant relied on several cases amongst them the case of **Kenya Power & Lighting Co Ltd vs Esther Wanjiru [2014] eKLR** while the Respondent placed reliance on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** amongst other cases to argue that the Appellant had not met the threshold of being granted an order for stay of proceedings.

11. Notably, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified. However, the conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) of the Civil Procedure Rules.

12. Order 42 Rule 6(1) of the Civil Procedure Rules states that:-

**“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.**

13. **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.”**

14. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. Gikonyo J addressed the question of an order for stay of proceedings being an important consideration in the case of **Lucy Waihera Kimanga & 2 Others vs John Waiganjo Gichuri** (Supra).

15. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.

16. Going further, this court was cognisant of the fact that an arguable appeal only needed to raise a single *bona fide* point worthy of consideration and need not be one that must necessarily succeed as was held in the case of **Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015]eKLR**.

17. As the Court of Appeal also held in the case of **UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR**, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

18. In the case of **David Morton Silverstein vs. Atsango Chesoni** (Supra), the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another [1998] e KLR** held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.

19. Further in the case of **Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya) [2001] e KLR**, Onyango-Otieno, J (as he then was) held that:-

**“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”**

20. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.

21. The court noted that the Ruling the Appellant intended to appeal was delivered on 21<sup>st</sup> April 2021. The Memorandum of Appeal was filed on 21<sup>st</sup> May 2021 while the present application was filed on 23<sup>rd</sup> June 2021. Two (2) months could not be said to have been inordinate. This court was thus satisfied that the present application was filed without any delay.

22. A perusal of the aforesaid Memorandum of Appeal led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court was whether or not the lower court exercised its discretion correctly in not granting an interim temporary injunction pending the hearing of an application for injunction dated 12<sup>th</sup> March 2020.

23. Although the Respondent had submitted that the application herein was an abuse of the court process, frivolous and vexatious, this court found and held that in the event it did not grant an order for stay of proceedings and the Appeal herein was heard and was successful, the

proceedings in the lower court would have been rendered unnecessary, even though an appropriate order for costs could have been made to remedy that.

24. Notably, a perusal of the proceedings of 22<sup>nd</sup> April 2021 showed that the matter was fixed for record setting on 25<sup>th</sup> May 2021. Accordingly, having considered the affidavit evidence and the Written Submissions and the case law by the respective parties, this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises.

25. As was held in the case of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009]eKLR**, the Court of Appeal rendered itself as follows:-

**“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”**

#### **DISPOSITION**

26. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated and filed 23<sup>rd</sup> June 2021 was merited and the same be and is hereby granted in terms of Prayer No (3) therein on condition that:-

1. **THAT the Appellant shall file and serve his Record of Appeal within forty five (45) days from the date of this Ruling.**
2. **THAT in the event the Appellant shall default in the order given in Paragraph 26(1) hereinabove, the order of stay of proceedings will automatically lapse and the Respondent will be at liberty to move the lower court as provided by the law to proceed with Kisumu CMCC No 108 of 2020 Port Florence Community Hospital vs Crown Healthcare Limited.**
3. **Costs of the application will be in the cause.**
4. **Either party is at liberty to apply.**

27. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JANUARY 2022**

**J. KAMAU**

**JUDGE**