



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E279 OF 2021

ADIX PLASTICS LIMITED.....APPLICANT

VERSUS

JANE NDANU KAVINGO

T/A GENTEX GEN AGENCIES.....RESPONDENT

RULING

1. The motion dated 25th May, 2021 by **Adix Plastics Limited** (hereafter the Applicant) seeks an order to stay execution of the judgment and decree delivered on 27th April 2021 in favour of **Jane Ndanu Kavingo t/a Gentex Gen Agencies** (hereafter the Respondent) in **Milimani CMCC No. 7815 of 2017**, pending the hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rules 6 of the Civil Procedure Rules, *inter alia*. The grounds on the face of the motion are amplified in the supporting and further affidavits sworn by **Chetan Sanghrajka**, who describes himself as the Chief Finance and Operations manager of the Applicant as such is familiar with the facts in issue. To the effect that being dissatisfied with the judgment, the Applicant has preferred this appeal; that the Applicant is apprehensive that unless stay is granted, the Respondent may commence execution of the substantial decree putting the Applicant at the risk of suffering substantial loss thereby rendering its appeal nugatory. Arising from the fact that the financial capability of the Respondent to reimburse the decretal sum in the event the appeal succeeds is unknown. The deponent states finally, that the motion has been filed without unreasonable delay and expresses the Applicant's willingness to furnish security in the form of a bank guarantee for the entire decretal sum.

2. The motion is opposed through a replying affidavit sworn by Respondent. She deposes that whereas the court is obligated to balance the Applicant's right of appeal against her right to enjoy the fruits of successful litigation, the Applicant has not demonstrated how it will suffer substantial loss if stay is denied; that she is capable of refunding the decretal sum in the unlikely even the Applicant's appeal succeeds; and points out that the security proposed by the Applicant for due performance of the decree is not acceptable and the Court ought to require the Applicant to deposit the entire decretal sum in an interest earning account. She prays that the motion which asserts to be prejudicial to her be dismissed.

3. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicant's counsel anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the case of **Butt v Rent Restriction Tribunal [1982] KLR 417**. Counsel asserted that the motion was filed timeously before the lapse of the statutory period of appeal. On substantial loss he relied on the cases of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** and **Banking Insurance and Finance Union v Barclays of Kenya Limited [2019] eKLR** to submit that the appeal is meritorious and given substantial decree, the Applicant had reasonably discharged its legal burden in establishing substantial loss in light of the failure by the Respondent to tender evidence of her means to refund the decretal amount in the event of a successful appeal. Therefore, counsel contended that the Applicant had met all the requirements and especially concerning the requirement for the provision of security and urged the court to allow the motion.

4. For his part, counsel for the Respondent similarly based his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Concerning substantial loss, he relied on several decisions including **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410**, **Machira T/A & Co. Advocates v East African Standard (2002) 2KLR**, **Pamela Akinyi Opundo v Barclays Bank of Kenya Ltd [2011] eKLR** and asserted that the Applicant has not established the actual substantial loss it is likely to suffer; that the Respondent had duly demonstrated her capacity to refund the decretal sum, and that ultimately the court ought to balance the competing rights of parties by declining to grant the orders sought. Counsel concluded by contending that the proposed security is not appropriate and urged that the Court requires the Applicant to deposit the entire decretal sum in a joint interest earning account.

5. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the court to stay the execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See **Butt V Rent Restriction Tribunal [1982] KLR 417**.

6. The motion herein is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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”.

7. The key consideration in the exercise of the court’s discretion is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay were denied. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 therein are especially pertinent:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

8. The decision of Platt Ag JA, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise. The **Platt Ag JA** (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”

9. The learned Judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (Emphasis added)

10. Earlier on, **Hancox JA** in his ruling observed that

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton L J in **Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said: -**

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

11. The Applicant’s affidavit material asserts apprehension that if the court does not grant its prayers, it will suffer substantial loss and the

appeal rendered nugatory the Respondent's means are unknown. The Respondent countered that the Applicant has not demonstrated substantial loss and went ahead to aver that she is able to refund the decretal sum in the unlikely event the Applicants appeal is successful. However, the Respondent did not tender any evidence or provide particulars of her means.

12. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicants 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 Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that 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 – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

13. The Applicant has made out the case that it is apprehensive that the Respondent may be unable upon their successful appeal, to refund payments made to her on the decree. The decree in the lower court was for a sum of **Kshs 1,098,700/-** with interest. This is a substantial sum as rightly asserted by the Applicant. Upon the Applicant expressing apprehension about the Respondent's capacity to repay, the burden shifted on her to controvert the assertion by proving her own means. She has not tendered evidence of her means; her bald depositions do not amount to much. In the scenario, it seems likely that the Applicant stands to suffer substantial loss and the appeal rendered nugatory if stay is not granted. As stated in the **Shell** case, substantial loss in its various forms, is the cornerstone of the court's jurisdiction for granting stay, and what has to be prevented.

14. The Applicants have expressed willingness to provide security by way bank guarantee for the entire decretal sum. The Respondent has rejected the proposed form of security and urged that the Applicant deposits the entire decretal sum in a joint interest earning account. The court must balance the competing interests of the parties so as not to prejudice the matter pending appeal and the words stated in **Nduhiu Gitahi & Another v Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** and others, are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....”

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

15. The Court finds, in view of all the foregoing, that the motion dated 25th May 2021 is merited and will allow it on condition that the Applicant deposits the entire decretal sum into an interest earning account, in the joint names of the parties' respective advocates, within 45 days of today's date. The cost of the motion will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF FEBRUARY 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mrs Ochieng h/b for Mr Makori

For the Respondent: Mr Musyoki

C/A: Carol