**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. E048 OF 2021**

**SHELL ENGINEERING & CONSULTANCY LIMITED.....APPELLANT**

**-VERSUS-**

**KINGWAYS TYRES LIMITED.....RESPONDENT**

**RULING**

1. On 9th April, 2021, the applicant/appellant filed a Notice of Motion of even date brought under the provisions of Sections 1A, 3 & 3A, of the Civil Procedure Act, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. The appellant seeks the following orders-

(i) Spent;

(ii) That this Court be pleased to order stay of execution of the Judgment and resultant decree passed on the 20th May, 2020 by the learned Senior Principal Magistrate and all resultant orders pending the hearing and determination of the applicant's appeal against the ruling delivered on 7th April, 2021; and

(iii) That costs of the application be provided for.

2. The application is premised on the supporting affidavit sworn on 9th April, 2021 by Shahzid Ahmed Yusuf, a director of the appellant herein. In opposition thereto, the respondent on 15th April, 2021 filed a replying affidavit sworn on the same day by Mohamed Mustansir, the Field Sales Executive of the respondent company herein.

3. The application was canvassed by way of written submissions. The appellant's submissions were filed on 20th May, 2021 by the law firm of J.O Magolo & Company Advocates, while the respondent's submissions were filed on 4th May, 2021 by the law firm of Kagwima Karanja & Company Advocates.

4. Mr. P. Magolo, learned Counsel for the appellant indicated that the appellant has been the respondent's customer for a long period of time, who would take goods on credit and pay regularly. He submitted that the appellant had drawn cheques in favour of the respondent and that the said cheques were solely to act as security, while the appellant would always pay in cash and claim back the cheques. It was stated that out of malice, the respondent decided to bank the cheques against the arrangement it had with the appellant and the cheques were dishonoured

5. It was submitted that the respondent caused the arrest of the appellant's director who was later released after the Director of Public Prosecutions (DPP) found no merit in the accusations leveled against him. That thereafter, the respondent filed the suit herein but failed to serve the appellant with the Court documents and as a consequence thereof, Judgment was entered without the participation of the appellant. Mr. P. Magolo further submitted that the letter attached to the respondent's replying affidavit claiming that the appellant admitted owing the respondent Kshs. 7 Million was a forgery.

6. He relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the case of **James Wangalwa & another v Agnes Naliaka Cheseto** [2012] eKLR, where the Court noted that orders for stay of execution are granted at the discretion of the Court on sufficient cause being established by an applicant. On the issue of substantial loss, the appellant's Counsel submitted that the mode of execution sought was that of committing the director of the appellant to civil jail, thus if stay of execution was not granted, the said director would be arrested and put in civil jail and serve his term to conclusion before the appeal herein is heard and determined. The appellant's Counsel stated that there would be substantial loss in terms of the director's freedom of liberty.

7. On the issue of security, Mr. P. Magolo submitted that the applicant was ready to offer security and abide by any terms which this Court

would issue.

8. On whether the present application had been made without undue delay, he stated that the ruling the subject of this appeal was delivered by Hon. C.N Ndegwa, Senior Principal Magistrate on 7th April, 2021, whereas the instant application together with the appeal were filed on 9th April, 2021, being two days after the delivery of the ruling by the Trial Court. He submitted that it can be concluded that there was no undue delay on the part of the appellant.

9. As to whether the appeal herein is merited, the appellant's Counsel relied on the provisions of Order 22 Rule 6 of the Civil Procedure Rules and submitted the appellant had annexed to its replying affidavit a letter purportedly sent to it by post through P.O Box 95711-80112, Mombasa, informing it of the Judgment. He also stated that the appellant had attached a copy of its CR 12 which shows the company's registration details and postal addresses.

10. Mr. Kiragu, learned Counsel for the respondent relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and submitted that the three conditions therein cannot be severed but must be met simultaneously. On the issue of substantial loss, he submitted that the burden of proof lies with the appellant and in a matter for a money decree like is the case herein, the appellant had to prove the respondent's inability to refund the decretal sum should the appeal succeed. In citing the case of **Hassan Guyo Wakalo v Straman East Africa Ltd** [2013] eKLR, Mr. Kiragu argued that the appellant herein had not placed real and cogent evidence before this Court to show that the respondent would not able to refund the decretal sum should the appeal succeed as it is not enough for the appellant to allege that he stands the risk of being committed to civil jail for failing to pay the decretal sum.

11. On the issue of deposit of security, he submitted that the purpose of security is to guarantee the due performance of such decree or order as may ultimately be binding on the appellant herein. Mr. Kiragu contended that the appellant had not established that he was willing to deposit security. He cited the case of **John Mwangi Ndiritu v Joseph Ndiritu Wamatha** [2016] eKLR, where Judge Mativo when dealing with a similar application held that the offer for security must come from the applicant as a price for stay of execution.

12. On whether the Memorandum of Appeal raises triable issues, the respondent's Counsel contended that it does not disclose any arguable points. He submitted that each party was given an opportunity to present its evidence but the appellant never moved the Court by invoking the provisions of Order 5 Rule 6 of the Civil Procedure Rules to have the Officer who effected service cross-examined, if the issue of service was being contested, thus the Trial Court deemed the interlocutory Judgment issued on 6th July, 2020 to be a regular Judgment.

13. He further submitted that the letter from the appellant's Counsel was an admission of the facts as it acknowledged that the appellant was indebted to the respondent and that the said letter was corroborated by the letter from the office of the Director of Public Prosecutions dated 28th July, 2020. He stated that the learned Magistrate exercised his discretion judicially (sic) by striking out the defence on admission of facts.

14. On the issue of whether the respondent would be prejudiced in the event that the application herein was granted, Mr. Kiragu submitted that it would be prejudiced as litigation must come to an end and it must enjoy the fruits of its Judgment.

15. He contended that the appellant never proved two limbs of Order 42 Rule 6 of the Civil Procedure Rules, 2010 so as to establish other factors which show that execution would create a state of affairs that would irreparably affect or negate the very essential core of the appellant resulting to substantial loss.

**ANALYSIS AND DETERMINATION.**

16. This Court has considered the application filed herein and the affidavit filed in support of the said application. This Court has also considered the depositions in the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether the appellant herein has satisfied the conditions set out for an order for stay of execution pending appeal.

17. In the affidavit filed by the appellant, it deposed that the respondent filed the suit herein and obtained *exparte* Judgment without the appellant's participation. That thereafter, the appellant made an application to set aside the said Judgment but the application was dismissed by the Trial Court.

18. The appellant averred that being aggrieved by the Trial Court's ruling, it filed an appeal without delay. It further averred that there was real and imminent threat of execution of the ruling since there was a warrant of arrest that had been issued against the appellant's director and if the same proceeds, the appeal shall be rendered nugatory.

19. The appellant averred that the intended appeal raises several arguable and important issues of law and the same would be rendered nugatory if the respondent proceeds to execute the resultant decree before the filing, hearing and determination of the intended appeal, which has high chances of success. It further averred that it is willing to abide by any conditions as to security as the Court may deem fit to impose.

20. The respondent in its replying affidavit deposed that the appellant herein was served with summons to enter appearance and a plaint and thereafter an affidavit of service was filed in Court. It was averred that the Trial Magistrate was correct to hold that the draft defence does not raise any triable issues in the face of admission, as reflected in the appellant's Advocate's letter, thereby exercising his discretion judiciously by striking out the defence. The respondent further averred that a right of appeal must be balanced against an equally weighty right of the respondent to enjoy the fruits of the Judgment delivered in its favour and there must be a just cause for depriving the respondent of that right.

21. The respondent deposed that this Court has discretion to order for half of the decretal sum and costs to be given to the respondent and for the rest to be deposited in a joint interest account in the names of both Advocates on record.

22. The principles governing the granting of orders for stay of execution pending appeal are provided under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which states as follows-

> ***"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."***

23. In **Vishram Ravji Halai vs. Thornton & Turpin** [1990] KLR 365, the Court of Appeal held that whereas its power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. In determining an application for stay of execution, a Court is under duty to balance the interests of the parties, taking into account the fact that an appellant has an undoubted right of appeal whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason.

24. On the aspect of whether the appellant has an arguable appeal, this Court has perused the Memorandum of Appeal and appreciates that the same raises several issues that deserve attention and determination by the Court. These are that the Trial Magistrate in his ruling noted that no application was made to cross-examine the Process Server and that since service was not challenged through cross-examination, the Judgment on record is regular and that the Trial Magistrate failed to note that due to the prevailing conditions of the Covid-19 pandemic, he directed that the application in the lower Court was to be heard by way of written submissions. It was stated that the said directions ruled out the possibility of cross-examination of the Process Server. There is also the allegation that the letter purportedly written by the appellant's lawyers was a forgery.

25. It is trite that in determining whether an appeal is arguable, the appellant does not need to establish a multiplicity of grounds as it is sufficient if a single *bona fide* arguable ground of appeal is raised as an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, that is, one which is not frivolous. From the material before me, I am satisfied that the appellant has an arguable appeal. See **Joseph Gitahi Gachau & another v. Pioneer Holdings (A) Ltd. & 2 others** [2009] eKLR.

26. In dismissing the appellant's application, the Trial Magistrate stated that the draft defence on record did not raise any triable issues and that in light of the admission contained in the letter by the appellant's Advocate, it would be pointless to set aside a regular Judgment. With the dismissal of the application for setting aside the *exparte* Judgment, the appellant was liable to pay the decretal sum thus the warrants of arrest that had been stayed pending the hearing and determination of the application before the Trial Court automatically became enforceable.

27. The decree in issue is a money decree. The appellant submitted that it stands to suffer substantial loss in the event that stay of execution is not granted since the nature of execution sought by the respondent is to commit the appellant's director to civil jail. It was also submitted that if the orders sought are not granted, the appellant's director shall be arrested, committed to civil jail and he will serve the full prison term before the appeal herein is heard and determined, thereby losing his liberty.

28. The respondent on the other hand contended that that for a money decree like is the case herein, it was up to the appellant to prove the respondent's inability to refund the decretal sum should the appeal succeed but the appellant herein did not prove, let alone plead and/or allude to the respondent's inability to refund the decretal sum in the event the appeal herein is successful.

29. The Court in **Kenya Shell Limited vs. Kibiru** [1986] KLR 410, considered the meaning of substantial loss and stated thus-

> ***"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 corner stone of both jurisdictions for granting a 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).

30. It is noteworthy that in the present application, the appellant did not allude to the respondent's inability to refund the decretal sum in the event the appeal was successful and inasmuch as the appellant stated that it stands to suffer substantial loss, it did not put forth its current financial position and demonstrate how the same would be affected in the event that stay of execution was not granted. The respondent on the other hand neither demonstrated its financial capacity to this Court nor did file an affidavit of means to demonstrate its ability to refund the appellant the money in the event that it emerges successful in the pending appeal.

31. In light of the foregoing, and bearing in mind that the preferred mode of execution by the respondent in pursuit of the money decree before the Trial Court is committal to civil jail, I am in agreement with Mr. P. Magolo that the appellant's director shall suffer substantial loss in the event that the warrants of arrest against him are executed as it will lead to his arrest and committal to civil jail, whereby his freedom of liberty shall be curtailed.

32. It is not in dispute that the present application has been brought without any unreasonable delay since the Trial Court's ruling was delivered on 7th April, 2021 while the application herein was filed on 9th April, 2021.

33. The appellant submitted that it is ready to offer security and abide by any terms this Court will issue. In the case of **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another** [2018] eKLR, the Court stated as follows on the issue of deposit of security-

> ***"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security."***

34. This Court is satisfied that the appellant is deserving of the orders sought. In reaching the decision herein, this Court has borne in mind that the orders that it should make should safeguard not only the interest of the appellant in the pending appeal but also the interest of the respondent, in the event that the appellant does not succeed in its the appeal.

35. The upshot is that the application dated 9th April, 2021 is merited and the same is allowed in the following terms-

> **(i) That there shall be a stay of execution of the Judgment and resultant decree passed on the 20th May, 2020 by the learned Senior Principal Magistrate and all resultant orders pending the hearing and determination of the appeal herein;**
>
> **(ii) That the appellant shall deposit Kshs. 6,871,000/= in a joint interest earning bank account in the names of the Advocates for the parties within 45 days from the date of this ruling and in default thereof, the application shall be deemed to have been dismissed and the respondent shall be at liberty to execute; and**
>
> **(iii) That the costs of this application will abide the outcome of the appeal.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF MARCH, 2022.**

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued

by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. P. Magolo for the appeallant/applicant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.