



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E343 OF 2021

JOSFIRM ENGINEERING CO. LIMITED.....APPLICANT

-VERSUS-

LEONARD MUNYUA & GRACE SIMALOI

T/A MUNLEO HARDWARE & METAL FABRICATORS.....RESPONDENTS

RULING

1. The motion dated 23rd June, 2021 by **Josfirm Engineering Co. Limited** (hereafter the Applicant) seeks an order to stay proceedings in **Nairobi Milimani CMCC No. 51 of 2016** between the Applicant and **Leonard Munyua & Grace Simaloi t/a Munleo Hardware & Metal Fabricators** (hereafter the Respondent), pending the hearing and determination of the appeal lodged by the Applicant. The motion is expressed to be brought under Article 50(1) of the Constitution of Kenya, 2010 and Order 42 Rules 6 of the Civil Procedure Rules, *inter alia*. The grounds on the face of the motion are amplified in the supporting affidavit sworn by **Joseph Kariuki Muchemi**, who describes himself as the managing director of the Applicant.

2. To the effect that being aggrieved with the ruling of the court delivered on 24th May, 2021 the Applicant has preferred an appeal which raises serious triable issues; that there is a high likelihood that execution may commence at any time in the absence of the stay orders. Which event would render the Applicant's appeal nugatory as the Applicant is apprehensive about the Respondents' ability to reimburse the decretal sum should the appeal succeed. The deponent asserts that no prejudice shall be visited upon the Respondent if the orders sought herein are granted. In conclusion the Applicant expresses willingness to comply with any conditions that the court may impose in granting stay.

3. The motion is opposed through the replying affidavit and supplementary affidavit sworn by **Rosemary Wangari Chege**, counsel having conduct of the matter on behalf of the Respondents. She contends that the appeal has no merit whereas the Respondents have a decree in their favour and may be subjected to prejudice out of the fact that the Applicant continues to enjoy unconditional stay orders; that the Applicant is a frivolous and vexatious litigant who abuses the court process; and that the motion has not met conditions to warrant stay of execution of the decree. Counsel asserts that if the court is inclined to grant the order sought the Applicant ought to be ordered to deposit the entire decretal sum as security.

4. The motion was canvassed by way of written submissions. As regards the applicable principles, counsel for the Applicants anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Section 1A & 1B of the Civil Procedure Act, the dicta in **Butt v Rent Restriction Tribunal [1982] KLR 417** and **Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR**. Submitting on the question of substantial loss counsel relied on the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** to submit that if execution proceeds, the Applicants will lose their tools of trade and clientele and that they are equally apprehensive as to the Respondents' ability to refund the decretal sum should the appeal be successful, thus rendering the appeal nugatory.

5. Counsel further reiterated the Applicant's willingness to comply with any conditions on stay imposed by the court. Citing **Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji & Anor [2015] eKLR** and **Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another [2018] eKLR** the Applicant argued that their defence in the lower court raised triable issues that can only be determined through a full hearing and thus they ought not to be condemned unheard. In conclusion counsel contended that the motion was filed timeously as such the motion ought to be allowed as prayed.

6. For her part, counsel for the Respondents went into depth to argue the merits of the Applicant's appeal and thus surmised that the appeal before the court does not *prima facie* raise triable issues and or have any probability of success. It was further submitted that in the unlikely event the appeal succeeds, the Respondents are well able to refund the decretal sum, and that the Respondents are entitled to the fruits of their

judgment. Counsel concluded by contending that Applicants may be unable to settle the decretal sum and their motion ought to be dismissed with costs.

7. The Court has considered the material canvassed in respect of the motion. The ruling appealed from related to an application made by the Applicant in the lower Court to review its earlier order by which it struck out the Applicant's defence and reinstated the default judgment therein for failure by the Applicant to comply with the condition to pay thrown away costs to the Respondents. The condition had been imposed after the Applicant had successfully moved the court to set aside the default judgment against him.

8. The power of the court to stay proceedings, which constitutes the live prayer in the instant motion is donated by Order 42 Rule 6 (1) of the Civil Procedure Rules. The Court may also make orders to stay proceedings where the ends of justice so require, under section 3A of the Civil Procedure Act, also invoked by the Applicants. The former provision is in the following terms:

“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.”

9. In **Re Global Tours & Travel Ltd Nairobi HCCC No. 43 of 2000 (UR) Ringera, J** (as he then was) spelt out the applicable considerations in determining an application for stay of proceedings as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

See also **Christopher Ndolo Mutuku and Anor. V CFC Stanbic Bank Limited (2015) eKLR**; and **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi (2014) e KLR**.

10. The need to avoid unnecessary proliferation of proceedings which needlessly dissipate the Court's limited time resource is a key consideration in an application of this nature, as is the consideration whether the appeal will be rendered nugatory if the subject proceedings are not stayed. As observed by **Onyango Otieno, J** (as he then was) **Niazsons (Kenya) Ltd. v China Road & Bridge Corporation (Kenya) Ltd. Nairobi HCCC No. 126 of 1999**:

“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 (stay of proceedings) should be granted.”

11. The Court of Appeal in **Wachira Waruru & Anor. v Francis Oyatsi [2002] 2 EA 664** held that:

“In an application for stay of proceedings pending appeal where the judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

12. There is no dispute that the Applicants moved the court expeditiously, by filing the appeal and instant motion soon after delivery of the lower court's ruling on 24th May, 2021. The ruling appealed from was in respect of an application by the Applicant seeking extension of time to pay thrown away costs and to set aside of the lower court order made on 13th March, 2019 striking out the defence and reinstating the default judgment after the Applicant failed to comply with court's earlier orders issued on 17th August, 2018 to defend the claim subject to payment of the sum of Shs.15,000/- being thrown away costs awarded to the Respondents. (See **Annexure JKM-2** to the supporting affidavit).

13. It is also undisputed that on the strength of the reinstated default judgment, the Respondents thereafter extracted a decree dated 8th September 2017 (**Annexure JKM-1** to the supporting affidavit) in **Nairobi Milimani CMCC No. 51 of 2016** and have taken out warrants of attachment (**Annexure JKM-6 & JKM-7** to the supporting affidavit) against the Applicant. The judgment and decree in favour of the Respondent against the Applicants is in respect of a liquidated sum of Kshs. 2,715,000/- plus interest and cost of the suit.

14. The live prayer in the Applicant's motion seeks an order to stay proceedings in the lower court suit pending appeal. What proceedings? The default judgment having been reinstated, a decree was issued on 18th September, 2017 (**Annexure JKM-1**). All this was on account of the Applicant's failure to comply with the lower court orders issued on 17th August, 2018 to pay thrown away costs as condition for defending the suit against him. The suit against the Applicant comprised a liquidated claim, hence pursuant to Order 10 Rule 4 of the Civil Procedure Rules, the default judgment entered was final and no further proceedings by way of formal proof were necessary.

15. If the Applicant desired, as emerges from his material, to apply for an order to stay execution of the judgment and decree in the lower

court suit, an express prayer to that effect ought to have been made, rather than the prayer for stay of proceedings between the parties. Effectively, the Applicant sought a certain prayer (stay of proceedings) in the motion but canvassed a different one (stay of execution) by his grounds, affidavit material and arguments. The two prayers and principles governing them are not identical. In my considered opinion, the dissonance in the motion renders it incompetent. The same is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF APRIL 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms Mwangi h/b for Mr. Ngala

For the Respondent: Miss Chege

C/A: Carol