



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 236 OF 2020**

**TOFINA ROM BUILDERS LIMITED.....APPLICANT**

**VERSUS**

**BASCO PRODUCTS (K) LIMITED.....RESPONDENT**

**RULING**

The application dated 1<sup>st</sup> September 2020 seeks an order of stay of execution against the judgment delivered by the Chief Magistrate’s Court on 29<sup>th</sup> May, 2019 in **Milimani CMCC 6187 of 2017; Basco Products (K) Limited –V- Tofina Rom Builders Limited**. The application is supported by the affidavit of Edwin Muriungi sworn on 1<sup>st</sup> September, 2020. The respondent filed a replying affidavit sworn by Philip Ongondi on 10<sup>th</sup> November, 2020.

Mr. Muriungi, Counsel for the appellant contend that the applicant’s movable assets were proclaimed and the applicant is apprehensive that it will suffer substantial loss as the respondent may not be able to repay or compensate the applicant. The applicant is likely to suffer substantial loss in the event that the appeal is successful if for now the respondent is allowed to proceed with the execution. Counsel referred to the case of **BONIFACE KARIUKI WAHOME –V- PETER NZUKI NYAMAI & ANOTHER (2019) EKLR** where the court held;-

**“if the order being sought herein is not granted and the Respondents proceed to execute the decree, it’s goods will be attached and sold by way of public auction to raise the decretal amount. Therefore, if the Appeal succeeds, the Appellant will not be able to recover the said goods whence I find that the Appellant would likely to suffer substantial loss. This is further exacerbated by the fact that the Respondents will not be able to reimburse the Appellant as alleged by the Appellant since the same is not controverted by credible prove to the standard required by the law.”**

It is further submitted that the application has been filed within reasonable time. The proclamation was done on 27<sup>th</sup> August 2020 while the application was filed on 1<sup>st</sup> September 2020. The applicant is willing to comply with any conditions imposed by the court. Counsel relies on the case of **FOCIN MOTORCYCLE CO. LTD –V- ANN WAMBUI WANGUI & ANOTHER (2018) eKLR** where it was stated:-

**“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. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”**

Mr. Ong’ondi appeared for the respondent. It is submitted that the appellant was properly served with a hearing notice but failed to attend court and the matter proceeded ex-parte. Service is not disputed. On 3<sup>rd</sup> September, 2014 the appellant admitted owing Kshs.67,964 and on 31<sup>st</sup> May, 2018 a sum of kshs.164,277/34 was admitted in writing. The applicant has failed to settle the admitted sum. Counsel maintain that the applicant has not demonstrated what substantial loss will be suffered if the orders are not granted. Counsel referred to the case of **JAMES WANGALWA & ANOTHER –V- AGNES NALIKA CHESETO (2012) eKLR** where it was held:-

**“Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:-**

- a) Substantial loss may result to the applicant unless the order is made,
- b) The application has been made without unreasonable delay, and
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant. These conditions are the essence of Order 42 Rule 6 Civil Procedure Rules which I need not recite in verbatim. The conditions share an inextricable bond such that the absence of one will

**affect the exercise of the discretion of the court in granting stay of execution.”**

It is further contended that the applicant has not filed any appeal against the judgment delivered on 28<sup>th</sup> May 2019 by the trial court. There has been unreasonable delay in filing the application which delay has not been explained. Counsel contend that the dispute involves a money decree and the appeal will not be rendered nugatory just because payment is made to the respondent.

Order 42 Rule (6) of the Civil Procedure Act provides the parameters to be considered in an application for stay of execution. Order 42 Rule (6) states as follows

**“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.”**

In the case of **OCEANIC VIEW HOTEL LTD –V- KENYA COMMERCIAL BANK [2002] eKLR 338**, Khaminwa, Commissioner of Assize (As she then was) held:-

**1. An applicant must satisfy two conditions before he is granted a stay of execution pending appeal, namely, that the intended appeal is not frivolous and that the intended appeal if successful would be rendered nugatory if stay of the order is not granted.**

**2. If an applicant has a right to appeal on the amount of money involved in a dispute, this constitutes special circumstances meriting a stay of execution.**

The judgment was delivered on 29<sup>th</sup> May 2019. The appellant filed an application to set aside the ex-parte judgment and the same was dismissed vide a ruling delivered on 28<sup>th</sup> June, 2020. The current application was filed on 1<sup>st</sup> September, 2020 shortly after the delivery of the ruling. I am satisfied that the current application has not been brought after a long period of time from the date of delivery of the ruling. The application was filed after a period of about four (4) months. Considering the circumstances under which the courts were operating since the announcement of the presence of the corona virus in March 2020, I do find that the delay is not inordinate.

The appellant has annexed the warrant of execution which contains a claim for Kshs.525,829/-. It is submitted that the applicant will suffer substantial loss if the amount claimed is paid and this will render the appeal nugatory. It is submitted by the respondent that the applicant has not demonstrated what substantial loss will be suffered if execution is not stayed. It is evident that if execution is not stayed, the appellant will have to pay the decretal sum in full failing which its property will be auctioned. Substantial loss does not mean a huge amount of money running into millions. It all depends on the circumstances of each case. I am satisfied that the applicant is likely to suffer substantial loss if execution is not stayed.

There is the requirement for security to be provided as a pre-condition to the granting of orders of stay of execution. This requirement serves the interest of justice in that the respondent will be denied the fruits of its judgment but will be in a position to know that should the appeal be unsuccessful, there will be no need to pursue execution afresh. The applicant should not have a blanket order staying execution without providing security unless it can be established that the applicant is an institution or person who is financially sound and capable of settling the decretal sum whenever called upon to do so.

From the rival pleadings and submissions, I do find that justice demand that the applicant be in a position to pursue its appeal. The judgment of the trial court is *ex-parte*. On the other hand, the contention by the respondent that the applicant even admitted part of the claim cannot be ignored. The application of 1<sup>st</sup> September, 2020 is hereby granted on the following conditions: -

- i. The applicant to deposit a sum of Kshs. Five Hundred Thousand (Kshs.500,000) in a joint interest earning account of both counsels or in court within sixty (60) days hereof.
- ii. Cost of the application shall follow the outcome of the appeal.

**DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2021**

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**S. CHITEMBWE**

**JUDGE**