



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**HCCC NO. 35 OF 2017**

**MABATI ROLLING MILLS LIMITED.....PLAINTIFF**

**VERSUS**

**ROYAL MABATI FACTORY LIMITED.....DEFENDANT**

**RULING**

**Introduction**

1. The Plaintiff/Respondent herein instituted this suit against the Defendant/Applicant seeking, *inter alia*, orders for permanent injunction, expungement or variation of entries made in the Register of Trademarks, damages, delivery up of accounts of profits and delivery up of colour-coated iron sheets. On 29<sup>th</sup> April 2020, this court delivered judgment in favour of the plaintiff thus triggering the filing of the application that is the subject of this ruling.

**Application**

2. This ruling is in respect to the Defendant's application dated 15<sup>th</sup> June, 2020 which application is supported by the affidavit of **Moses Ikinya Kang'arua**, sworn on 15<sup>th</sup> June, 2020. The Defendant/ Applicant seeks the following substantive Orders

*(a) Spent*

*(b) Spent*

*(c) That pending the hearing and determination of the intended appeal by the Applicant herein, this Honourable Court be pleased to grant an order of stay of execution of the judgment issued by the Justice W. A. Okwany on the 29th April, 2020 in this matter;*

*(d) That this Honourable court be pleased to restrain the Plaintiff/Respondent whether by itself or servants from executing the judgment rendered by Hon. W. A. Okwany on the 29<sup>th</sup> April, 2020 until further orders of this honourable Court;*

*(e) That this Honourable court be pleased to restrain the Plaintiff/Respondent whether by itself or servants from executing the judgment rendered by Hon. W. A. Okwany on the 29<sup>th</sup> April, 2020 pending the lodging, hearing and determination of the Defendant's intended appeal; and*

*(f) That in the alternative and without prejudice to the above prayers (c), (d) and (e) that this court to review the judgment particularly orders (d) and (e) which state as follows;*

*a) AN ORDER that the Defendant do deliver up an account of its profits and payment by the Defendant to the Plaintiff 011 taking such account together with interest thereon as aforesaid; the Defendant is to file the said accounts in this court within ninety (90) days of the date of this judgment;*

*b) AN ORDER that the Defendant do deliver up to the Plaintiff all colour-coated iron sheets and roofing tiles manufactured and branded by the Defendant bearing the infringing mark for destruction. The delivery up shall be within 14 days of this order, I shall be asking the parties to address me as to the place for delivery up and*

*destruction.*

3. The Application is premised on the following grounds: -

*a. That the Defendant believes it has an arguable appeal with very high chances of success;*

*b. That the Defendant's right of appeal will be rendered nugatory if the Plaintiff executes the judgment during the pendency of the intended appeal;*

*c. The orders sought to be reviewed are incapable of execution and it is apparent there is a possible mistake and or error on the face of the record; and (d) It is in the interests of justice for the orders sought to be granted.*

4. The Plaintiff opposed the Application through Grounds of Opposition dated 6<sup>th</sup> July, 2020, wherein it sets out the following grounds: -

*(1) In respect of prayer (c);*

*(a) The Applicant has not demonstrated that it is likely to suffer substantial loss unless the orders of stay are granted as required by Order 42 rule 6 (2)(a) of the Civil Procedure Rules and is therefore undeserving of the orders sought;*

*(b) The Applicant cannot in any event suffer substantial loss and damage if the Applicant proceeds to settle the decree herein as, by its own reckoning and admission at paragraph (c) of the grounds in support of its Application, it has a large portfolio of customers and deals in wide range of roofing products;*

*(c) The Applicant has not demonstrated that it has given such security as is adequate for the due satisfaction/ performance of the decree herein as required by Order 42 rule 6 (2)(b) of the Civil Procedure Rules and is therefore undeserving of*

*(d) The intended appeal is in any event, not arguable and lacks any probability of success and as such the orders sought, if granted, would be in vain.*

*(2) In respect of prayers (d) and (e);*

*(a) There can be no legal basis for injuncting the enforcement of a lawful judgment of court; and*

*(b) In any event, the prerequisites for grant of an injunction have not been met.*

*(3) In respect of prayer (f), the same is untenable the Defendant/ Applicant having chosen to appeal against the judgment. Grant of such an order would interfere with and confuse the appellate process and outcome.*

5. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

#### **Review**

6. Besides the main prayer for stay of execution pending appeal, the applicant also sought an order for review of the court's decree. The remedy of review is captured under **Section 80 of the Civil Procedure Act** which provides as follows: -

*“Any person who considers himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

7. The above provision is echoed in **Order 45 Rule 1 and 2 of the Civil Procedure Rules** as follows:

*“(1) Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.***

8. A simple reading of the above provisions shows that a party cannot pursue both an appeal and review of a decision at the same time. Indeed, courts have taken the position that the options of a review and an appeal are not simultaneously available to an aggrieved party. This is the position that was taken in *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR where J.M Mutungi J, held as follows:

***“Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party.***

.....

***The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence.”***

9. When considering a similar scenario in *Martha Wambui v Irene Wanjiru Mwangi & another* [2015] eKLR Aburili J. held that: -

***“From the above provisions of Section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same judgment/decreed or order. One must elect either to file an appeal or to apply for a review.”***

10. In *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR the Court of Appeal expressed itself as follows;

***“In disallowing that prayer, the trial court found the appellant could not pursue both review and appeal simultaneously; that having opted for review, she had effectively abandoned the option of appeal.....***

***We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders. The appeal could only lie on the outcome of the application for review.”***

11. In the present case, the applicant has clearly indicated that it intends to appeal against the decision of this court and has sought orders for stay of execution pending appeal. My finding is that in the circumstances of this case and going by the dictum in the above cited cases, it is not open for the applicant to straddle between the options of an appeal and review at the same time. I am therefore not persuaded that the applicant is entitled to the order for review.

**Injunction**

12. The applicant also sought orders to restrain the Plaintiff/Respondent from executing the judgment rendered on 29<sup>th</sup> April, 2020 pending the lodging, hearing and determination of its intended appeal. I find that the issue of restraining the respondent from executing the decree does not arise in this case as it is the court that executes the judgment as opposed to the decree holder who merely applies for such execution. I am guided by the decision in *Michael Bartenge v Stephen Bartenge* (2007) eKLR where it was held that: -

***“In effect, it is the court which executes decrees. The party who holds a decree which is in his favour, only applies to the court to execute the decree.***

***Therefore, if the order to stop the execution was issued in the nature of an injunction, it would effectively be addressed against the court. And, as it is the duty of the court to execute its decrees, an injunction to restrain it from so doing would be purporting to stop the court from performing one of its roles. That, in my considered view, would not be proper, even if the orders were clothed in such language as suggested that the orders were directed against the defendant.***

***The only manner in which courts are stopped from taking steps to execute decrees is through orders for stay of execution. ”***

**Stay of Execution Pending Appeal**

13. The relief of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules which stipulates, in part, as follows:

***“(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.*

(3) ...

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

(5) ...

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

14. An applicant for stay of execution of a decree or order pending appeal is obligated to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

15. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal outlined the matters to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

16. What amounts to substantial loss was discussed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, as follows: -

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

17. In the present case, while the applicant argued that its application meets the threshold of the conditions set out in Order 42 Rule 6 of the CPR, the respondent maintained that the application falls short of the said conditions. The respondent observed that since the decree is partly a money decree, the applicant needed to demonstrate that the Respondent would not be in a position to reimburse the money paid to it in satisfaction of the decree should the appeal be successful. The Respondent further argued that it is a company of means and that should the appeal be successful it would be able to repay any monetary aspects of the executed judgment.

18. My finding is that the applicant did not demonstrate that it will suffer substantial loss that cannot be reimbursed should it be successful in the intended appeal.

19. On security for costs, the applicant proposed that it would furnish in the sum of Kshs. 3,000,000/= in the form of immovable property. The Respondent, on the other hand submitted that the applicant’s proposal is vague and way too low considering that the court also awarded the respondent costs, damages and account for profits. My finding is that the issue of the amount or nature of security to be provided is a matter to be determined by the court.

20. On the aspect of whether the instant application was filed without unreasonable delay, I note that the impugned judgment was delivered on 29<sup>th</sup> April 2020 and the present application filed on 15<sup>th</sup> June 2020, one and a half months after delivery of the Judgment. My finding is that the delay is, in the circumstances of this case, not inordinate or inexcusable.

21. My above findings on the prayer for stay of execution notwithstanding, I am also alive to the fact that the court has the discretion in determining whether or not to grant stay and that the purpose of such an order is to preserve the subject matter of the appeal. However, in considering an application for stay, the court must balance the interests of the applicant to the right to exhaust the appeal process and the respondent, to the fruits of the judgment. In *RWW v EKW* [2019] eKLR, the Court addressed the purpose of a stay of execution order

pending appeal, as follows: -

***“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.***

***Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”***

22. Guided by the above decision, I will allow the prayer for stay of execution pending appeal but on conditions that will secure the interests of the respondent in as far as securing the decretal sum is concerned. Consequently, I grant the following final orders: -

***a) That the prayer for stay of execution pending the hearing and determination of the intended appeal by the Applicant herein is hereby allowed on the following conditions:***

***i) That the applicant shall within 30 days from the date of this ruling deposit, as security, the sum of Kshs. 1 Million in an interest earning account in a bank of repute to be held in the joint names of the advocates for both parties pending the hearing and determination of the appeal.***

***ii) That the applicant shall file and serve the Memorandum of Appeal and Record of Appeal on the respondent within 45 days from the date of this ruling.***

***iii) In the event of failure to comply with the conditions in a) i) and ii) hereinabove, the stay of execution orders shall be automatically lapse and/or be vacated in which case the respondent will be at liberty to proceed with the execution of the decree.***

***b) I award the costs of this application to the respondent.***

Dated, signed and delivered via Microsoft Teams at Nairobi this 29<sup>th</sup> day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

W. A. OKWANY

JUDGE

**In the presence of:**

Mr. Thiga for plaintiff/respondent

Mr. Ikinya – Defendants/Director

Court Assistant: Sylvia.