Cartridge and Print Services (K) Limited v Techno Service Limited (Civil Appeal E037 of 2021) [2021] KEHC 295 (KLR) (Commercial and Tax) (18 November 2021) (Ruling)

Neutral citation: [2021] KEHC 295 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E037 OF 2021

WA OKWANY, J

NOVEMBER 18, 2021

BETWEEN

CARTRIDGE AND PRINT SERVICES (K) LIMITED ..... APPELLANT

AND

TECHNO SERVICE LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect to the application dated 17th May 2021 wherein the applicant/appellant seeks the following orders: -

   a) Spent.

   b) Spent.

   c) THAT pending the hearing and determination of the Appeal herein the Honourable Court be pleased to order a stay of execution of the judgment delivered on 23 April 2021 in Nairobi CMCC No. 83 of 2020 Techno Service Limited vs Cartridqe and Print (K) Limited.

   d) THAT the costs of this application be in the cause.

2. The application is supported by the affidavit of the applicant's Director, Mr. Rajesh Gaurishankar Pandya and is premised on the grounds that: -

   i. On 23 April 2021, the Honourable D.O. Mbeia, Principal Magistrate delivered judgment in Nairobi CMCC No. 83 of 2020 compelling the Appellant herein to pay the Respondent general damages of USD 30,000 and exemplary damages of USD 10,000 for infringement of franchise rights together with interest at court rates from the date of filing suit. The Respondent was also awarded the costs of the suit.

ii. At the time of delivery of judgment, the trial Court also ordered a stay of execution against the said judgment which stay will lapse on 21 May 2021.

iii. Pursuant thereto, the Appellant appealed against the aforesaid judgment vide a Memorandum of Appeal dated 17th May 2021.

iv. The Appeal has a high chance of success and the Appellant ought to be given an opportunity to pursue the same failing which it shall forever be driven from the seat of justice.

v. If the said judgment is executed against the Appellant before the Appeal is heard and determined, then the Appeal will be rendered nugatory and the Appellant will be irreparably and substantially harmed since the Respondent has not demonstrated that it will be able to pay back the decretal sum should this Appeal be successful.

vi. The Appellant is apprehensive that should the Respondent proceed to execute the decree the Appellant will be unable to recover the USD 40,000 that will be paid to the Respondent in the event the Appeal is eventually successful.

vii. The Appellant is ready and willing to comply with any order issued by the Honourable Court for the due performance of such decree or order as may be deemed to be ultimately binding on it.

3. The Respondent opposed the application through the replying affidavit sworn by its counsel on record Ms. Valentine Ataka who states that the application is defective and ought to be struck out on the basis that it is drawn by an advocate who is not properly on record and that it does not meet the threshold for granting of the orders sought.

4. The respondent's counsel states that the Application and the Appeal herein offend the res judicata doctrine as they raise issues that are similar to the issues raised in HCCA E014 of 2021 wherein Ngenye J. on 14th April 2021 dismissed a similar application for stay of execution. She faults the applicant for failing to attach a copy pf the order, Decree or Judgement appealed from so as to enable the Court to assess the extent and scope of the judgement that is the subject of the application for stay.

5. Ms. Ataka avers that the applicant's principal, Rajesh Kaurishankar Pandya, is not resident in Kenya and that there is therefore real danger that the Respondent could run into difficulties in recovering the fruits of its judgement in the event that the Appeal is dismissed. It is the respondent's case that the applicant has not demonstrated that it has an arguable appeal so as to warrant the granting of the orders for stay of execution

6. The application was canvassed 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 an order for stay of execution pending appeal. Preliminary points were however raised on the following issues: -

a) Whether the doctrine of res judicata is applicable to the application.

b) Whether the replying affidavit sworn by an advocate is admissible, and;

c. Whether the applicant's advocate is properly on record.

7. I will therefore consider the preliminary issues first before delving into the substance of the application.

Res Judicata.

8. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 as follows: -

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

9. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms: -

> ''Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
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> Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.''

10. In essence, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of *Henderson vs Henderson (1843-60) ALL E.R.378,* observed thus: -

> " ...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

11. It therefore follows that a Court will invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.

12. Applying the foregoing principles to the present case, I note that the main prayer sought in the application is an order of stay of execution pending appeal. The respondent contended that there are similar proceedings before this court being HCCA E014 of 2021 wherein Ngenye J. on 14th April 2021 dismissed a similar application for stay of execution. The applicant conceded that there is indeed a similar appeal between the same parties over the same subject matter the only difference being that the instant appeal is against the judgment of the lower court while the earlier appeal is against a ruling from an interlocutory application.

I have perused the proceedings in HCCA E014 of 2021 and I note that the parties in the said appeal are the same as the parties in this case but that the application that was considered and dismissed by Lady Justice Ngenye was an application for stay of proceedings before the Lower court pending an appeal.

13. The existence of two appeal proceedings between the same parties over the same subject matter can lead to the conclusion that the instant application is res judicata, even though it is for stay of execution pending appeal. This court is at a loss as to how the applicant can have two different appeals over the same subject matter.

Applicant's Legal Representation and the alleged Missing Endorsement on the Supporting Affidavit

14. The Respondent's case was that the law firm of Madhani Advocates LLP is not properly on record having taken over the conduct of the case from the applicant's previous advocates, after the entry of judgment, without complying with the provisions of Order 9 of the Civil Procedure Rules.

15. The applicant, on the other hand, submitted that it filed and served a consent allowing the said law firm of Madhani Advocates LLP to take over the conduct of the lower court suit but that the Notice of Change of Advocates was inadvertently left out during service of the Application and the Memorandum of Appeal.

16. My finding is that the applicant's legal representation has been satisfactorily explained by the applicant who not only exhibited a consent executed by the applicant's former counsel on record allowing the new law firm to come on record but has also shown that the Notice of Change of Advocates was duly filed.

17. Regarding the Respondent's claim that the Supporting Affidavit was filed by an unqualified person as the "Drawn and Filed by" endorsement page is missing, the applicant submitted that the same was an inadvertent error which occurred during printing and scanning. The Respondent argued that the omission is a mere technicality which does not void the Supporting Affidavit. For this argument, the applicant cited the decision in *National Bank of Kenya Ltd vs Puntland Agencies Limited & 2 others [2007] eKLR* wherein the court held as follows regarding a similar omission: -

> "In my view there is nothing in Section 35 of *Advocates Act* which empowers the court to strike out an affidavit simply because it was not endorsed by the Advocate who drew and filed it. The failure to endorse an affidavit is not fatal to require the court to strike it out, I will however deem that to be a minor transgression, which does not go to the root of the mischief to be cured under Section 35 of the *Advocates Act*. More so no prejudice is caused to the applicant by the said default. It is my position that the failure to endorse the name of the drawer Advocate on the verifying affidavit is not fatal and does not render the affidavit void. That is a mere irregularity which can be readily excused by the court. The omission of the plaintiff's Advocate to endorse their names on the affidavit is not a violation of Section 35(1) of the *Advocates Act*. In any case Section 35(1) says that every person who draws or prepares any document or instrument referred to Section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address: It means Section 35(1) is subject to the provisions contained under Section 34(1) of the *Advocates Act*. Perhaps it is essential to note that Section 34(1) does not specifically mention an affidavit as a document or instrument which requires an endorsement of the drawer." [Emphasis added]

18. Guided by the decision in the above cited case, I find that the explanation offered by the applicant regarding the missing endorsement at the "Drawn & Filed By" endorsement section of the Supporting Affidavit is plausible.

Replying Affidavit Sworn by an Advocate

19. The applicant submitted that the contents of Paragraphs 20, 21, 22 and 23 of the Replying Affidavit should be expunged/struck out as they contravene the provisions of Order 19 Rule 3 of the Civil Procedure Rules which states that:

> "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

20. According to the applicant, the Respondent's counsel deposed to contested matters of fact without advancing any grounds and/or reason for his beliefs.

21. The applicant also contended that the Replying Affidavit is sworn by the Respondent's Advocate in contravention of settled law that Affidavits containing contentious averments of facts should as a general rule be signed by the litigant to avoid a situation where the Advocate is called upon to be cross-examined on the contentious facts. Reliance was placed on the decision in *East African Foundry Works (K) Ltd vs Kenya Commercial Bank Ltd [2002] eKLR* where the Court, while striking out paragraphs of an Affidavit that contained contentious issues of fact stated:

> "I have considered the rival arguments. I accept the submissions of Mr. Akiwumi that in reality paragraphs 3,4 and 8(c) of the affidavit of Mr. Ngatia contain not statements of facts of which he had personal knowledge but statements based on information the source whereof he has not disclosed. Accordingly, those paragraphs offend Order 18 rule 3(1) of the Civil Procedure Rules. I also accept the further submission of Mr. Akiwumi that indeed they consist of contentious averments of fact which an advocate should not be allowed to depose to in a case where he is appearing as such. I have always deprecated depositions by advocates on contentious matters of fact in suits or applications which they canvass before the courts and I have never had any hesitation in striking out such depositions as a matter of good practice in our courts. The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice."

22. In a rejoinder, the Respondent submitted that the replying affidavit is properly on record as it was sworn by an advocate who had dealt with the matter from its inception. The respondent maintained that its counsel on record was therefore well versed with all the matters pertaining to the instant proceedings and competent to swear the affidavit. It was submitted that the averments made in the Replying Affidavit relate to issues that are apparent and ascertainable from the court record or otherwise informed by procedural matters known to the advocates for both parties.

23. The Respondent's case was that the facts stated in paragraphs 20, 21, 22 and 23 of the replying affidavit are facts that are within the knowledge of the advocate who has been handling the matter and the sources and grounds thereof can well be ascertained from the court's records thus falling within the purview of Order 19 Rule 3(1) of the Civil Procedure Rules which stipulates that: - "Affidavits shall be confined to such facts as the deponent is able of this own knowledge to prove". Reference was made to the decision in *Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR*, where the court cited the case of *Jane Jaoko Owino vs Blue Shield Insurance Co. Ltd HCC 359/2000* and held that: "An affidavit sworn by an advocate on matters which are not in dispute and supported by the court record is not defective....."

24. I note that the respondent's advocate averred as follows at paragraphs 20, 21, 22 and 23 of the replying affidavit: -

> "20. THAT given the circumstances of this case, I also believe that the Appellant has been guilty of laches and indolence. As such, they are not deserving of the Court's equitable orders. By the time the Appellant filed the Appeal herein, it had not even sought typed proceedings and/or a copy of the Judgement from the lower Court. The Judgement was delivered on 23 April 2021, nearly a month ago. I therefore truly believe that that the Appeal and the Application herein are an afterthought.
>
> 21. THAT since the Appellant has not extracted the Decree or even a copy of the Judgement from the lower Court, it is not logical for them to impugn the Judgement. On 23 April 2021 the Judgement was not read in full. Only the final awards were read. The Appellants cannot therefore purport to be privy to and thereby discredit the content of the Judgement unless the Appeal has been filed merely as a matter of course intended to delay the realisation of the Judgement as opposed to being an appeal out of genuine grievance.
>
> 22. THAT the Appeal is therefore premature and unfounded. It raises and is founded on grounds and grievances only imagined by the drafters of the Memorandum of Appeal. It is apparent that the Memorandum of Appeal was drafted without sight of and/or reference to the Judgement it purports to appeal from.
>
> 23. THAT the Appellant has otherwise not shown that it has an arguable appeal. First, because it has not presented the Court with a copy of the impugned decision so as to enable the Court make that determination by considering the reasoning of the lower Court. Secondly I have seen the purported grounds of appeal as set out in the Memorandum of Appeal and I note that they are a mere regurgitation of the issues argued by the Appellant before the trial Court. At the lower Court the Appellant was out rightly wrong and misdirected on the stances it took on the issues. The same misdirection is apparent in the purported grounds of Appeal as set out in the Memorandum of Appeal."

25. My finding is that the aforesaid paragraphs of the replying affidavit contain factual and legal matters that were within the advocates knowledge or which could be obtained from the court records. It was not contested that the advocate in question had the conduct of the case from its inception and was therefore competent to swear an affidavit over the issues in question. Courts have held that no law prohibits an advocate from swearing an affidavit on behalf of its client in a matter where an advocate has a personal knowledge of the proceedings arising therefrom. This is the position that was taken in Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR, where the court took into account the case of Kamlesh M.A. Pattni vs Nasir Ibrahim Ali & 2 Others CA 354/2004, and held: -

> " ... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information..."

26. Guided by the above decision, I find that it was well within the advocates mandate to swear the replying affidavit concerning issues that were within her knowledge. I therefore find that the objection to the above stated paragraphs of the replying affidavit is misconceived and unmerited.

Stay of Execution pending Appeal

27. Order 42 rule 6(1) and (6) of the *Civil Procedure Rules (2010)* which provides as follows: -

> " 6.(1) 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.
>
> (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."

28. In *Tabro Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR* it was held: --

> " [31] The granting of stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is granted at the discretion of the Court when sufficient cause has been established by the applicant, on whom the incidence of the legal burden of proof lies...
>
> [32] "Sufficient cause is established when the Applicant proves the following conditions on a balance of probabilities that:
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> a) Substantial loss may result to the applicant unless the order is made,
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> 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.
>
> [33] These conditions are the essence of Order 42 Rule 6 CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in Mukuma V Abuoga (1988) KLR 645 reinforced this position. Each of the condition is examined below to see whether the circumstances of this case neatly fit the scales. (Emphasis mine)"

Delay

29. On whether the instant application was filed without unreasonable delay, I note that the judgment appealed against was rendered on 23 April 2021 Nairobi and the instant application filed less than one month later on 17th May 2021. My finding is that in the circumstances of this case, the application was filed without unreasonable delay.

Substantial Loss

30. The applicant submitted that it stands to suffer substantial loss unless the orders sought herein are granted should it be compelled to pay the decretal sum to the Respondent as recovery of the same from the Respondent would be extremely improbable. The applicant maintained that it does not know the respondent's financial means and is therefore apprehensive that the respondent will be unable to refund the decretal sum should it be paid. It was submitted that the respondent has no known assets

which can be liquidated in the event the Appeal is successful and that it has not provided any account statements showing its financial position. In a nutshell, the applicant argued that that the Respondent had not demonstrated its ability to refund the decretal sum, in the event it is required to do so.

31. In a rejoinder, the respondent submitted that the applicant has not shown risk of substantial loss as it had not demonstrated that the Decree Holder would not be in apposition to refund the decretal sum in the event that Appeal eventually succeeds. For this argument the respondent referred to the decision in *Kenya Shell Limited vs Kibiru [1986] KLR 410*, where it was held that: -

> " ...The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 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 be unable to repay the decretal sum plus costs in two courts. 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".

32. In the same case the court further held as follows at: -

> " It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement." (See also the holding by Odunga J. in Socfinac Company Limited V Nelphat Kimotho Muturi, supra.)

33. It was the respondent's case that the allegation that it is not able to refund the decretal sum is unsubstantiated. From the submissions presented before this court it is clear that parties held divergent positions regarding the party who should shoulder the evidential burden of proving a decree holder's financial capability to refund the decretal sum should the appeal be successful. Courts have taken the position that the respondent has the evidential burden. I am guided by the decision in *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR* where it was held: -

> " It is noted that though the Respondent alleges that he is willing to deposit a bank guarantee for the decretal sum, he has not attached any evidence by way of bank statements or other documents as proof that he indeed has the money. It is not enough for him to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge.

34. Similarly, in *National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another Nairobi Civil Application No. 238 of 2005 (UR)* the Court of Appeal stated: -

> "This court has said before and it would bear repeating that while the legal duty is on an applicant 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 an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses 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."

35. In the present case, I find that the respondent did not discharge the evidential burden.

Security Deposit

36. Regarding the requirement that an applicant for stay of execution should deposit security for the due performance of the decree, the applicant stated that it was willing to make such deposit/guarantee without specifying the nature of security it was willing to provide. I however find that the court has the discretion to make an order as to the nature of security to be deposited for the due performance of the decree as a condition for stay.

37. Be that as it may and my above findings notwithstanding, courts have taken the position that in an application for stay of execution pending an appeal, the right of the appellant to appeal should be balanced with the decree holder's right to the fruits of its decree. In executing this balance, I find that it will be in the interest of justice to allow the application for stay pending appeal but on conditions that will secure the respondent's interests and rights to the fruits of the decree.

38. For the above reasons, I allow the instant application in the following terms: -

    i) That there shall be stay of stay of execution of the judgment delivered on 23rd April 2021 in Nairobi CMCC No. 83 of 2020 Techno Service Limited vs Cartridqe and Print (K) Limited pending the hearing and determination of the appeal on condition that: -

        a) The applicant shall, within 30 days from the date of this ruling, deposit the full decretal sum in an interest earning account in a bank of repute to be held in the joint names of advocates appearing for the parties herein.

        b) That in the event of failure to comply with condition i) a) hereinabove, the stay orders shall automatically lapse and the respondent shall be at liberty to execute the decree.

    ii) The costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered via Microsoft Teams at Nairobi this 18th day of November 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 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Shah for the Appellant/Applicant

Mr. Kimutai for the Respondent.

Court Assistant: Margaret