



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO.E026 OF 2021**

**SBI INTERNATIONAL HOLDINGS AG KENYA.....APPLICANT**

**V E R S U S**

**KIPSIGIS TRADERS LIMITED.....RESPONDENT**

**R U L I N G**

1. By Notice of Motion dated 23/8/2021 the Applicant is seeking stay of Execution of the Judgment entered on 28/7/2021 and all consequential decrees, orders, proclamations, attachments and Execution process pending the hearing and determination of this application and also pending the hearing and determination of this appeal.

2. The Application is based on the grounds on the face of it and supported by the Affidavit of HOSBON ONSEMBE in which it is deposed as follows:-

*(i) THAT the Respondent herein commenced a fictitious suit by way of Plaintiff dated 4/7/2014 filed in Court on 16/12/2014 and amended on 11/9/2017 and further amended on 17/6/2019 seeking the sum of Kshs.1,653,498.50 and a further Kshs.1,040,419.68 in respect of withholding VAT allegedly owed to the Respondent.*

*(ii) THAT the Plaintiff is an International Road Construction Company who was awarded a tender for the Construction of the Mau-Summit Kericho Road by the Government of Kenya and funded through the Tax Payer a Project that has since been completed and handed over to the Government of Kenya through KenHA (Kenya National Highways Authority).*

*(iii) THAT the Appellant purchased goods order from the Respondent and duly paid all the invoices for goods and the Appellant provided the Respondent with Tax Exemption certificates based on their pro-forma invoices for the goods supplied.*

*(iv) THAT during the Trial, the Respondent did not present any evidence in the form of Invoices, delivery notes or Tax returns for the amount claimed and thereby failed to discharge the elementary burden required to succeed in such a claim.*

*(v) THAT the Trial Court awarded the said amount despite making a finding that the Respondent had failed to discharge their evidently burden of proof.*

*(vi) THAT the Appellant will suffer substantial loss unless the stay of Execution is granted and further the appeal will be rendered nugatory.*

3. The Respondent opposed the application and filed a Replying Affidavit dated 15/10/2021 in which it is deposed as follows:-

*(i) THAT on diverse dates between November, 2011 and January, 2013 the Respondents supplied hard ware materials to the Appellant worth Kshs.16,960,154/= and the Appellant made payment for goods supplied leaving and balance of Kshs.1,653,498.50 together with Kshs.1,040,419.68 being withholding VAT not paid.*

*(ii) THAT the Appellant has not demonstrated sufficiently or otherwise that it will stand to suffer substantial loss if the decretal sum together with costs and interest is paid to the Respondent company.*

*(iii) THAT the Appellant has not offered any security for the due performance of the decree.*

4. The parties filed written submissions as follows: -

The applicant submitted that it has sufficient cause to warrant stay of execution pending appeal as it has an arguable appeal that will be rendered nugatory if the stay sought is not granted;

5. The applicant also submitted that it will suffer irreparable harm if the stay of execution is not granted as the applicant will be unable to deliver on its projects within the stipulated time frame and will therefore run the risk of being in breach of contract with the government of Kenya. The applicant also submitted that it is willing and ready to deposit security as directed by the court and as such, the stay of execution should be granted.

6. The respondent on the other hand submitted that the applicant has not sufficiently demonstrated that it stands to suffer substantial loss if the orders of stay for execution are not granted and also that the appeal shall not be rendered nugatory if the decretal sum is paid to the respondent, as the respondent is financially stable and will be able to refund the money within 7 days of such order.

7. The respondent also submitted that the applicant has not provided security as provided for under order 42 rule 6(2) (b) of the Civil Procedure rules and as such the respondent is not entitled to be granted stay of execution.

8. The issues for determination is as follows: -

**(i) Whether the Appellant has met the conditions for grant of stay of Execution pending appeal.**

**(ii) Whether the Appellant will suffer substantial loss if the stay is not granted.**

**(iii) Who pays the costs of the Applications?**

9. On the issue as to whether the Appellant has met the condition for grant of stay of Execution pending appeal, the governing section in Order 42 rule 6 which states 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 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 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.**

10. In the current case this court has a duty to balance the Appellants’ right of appeal against the Respondent’s right to enjoy the fruits of its judgment.

11. The court of appeal in **National Industrial Credit Bank Ltd versus Aquinas Francis Wasike, (UR) Nairobi civil application no. 238 of 2005** stated as follows:- **“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.”**

12. There is no evidence tabled before this court that the Respondent would be in a position to refund the decretal sum if the appeal succeeds.

13. I grant stay of Execution pending appeal in the following conditions:-

**(i) THAT the Appellant deposits the decretal sum in an interest earning account held by Counsels for both parties within 60 days of this date.**

**(ii) THAT costs of this Application to abide the appeal.**

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 17TH DAY OF DECEMBER 2021.**

**A. N. ONGERI**

**JUDGE**