



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 256 OF 2003

PROLINE SUPAQUICK LIMITED.....PLAINTIFF

VERSUS

KENOL KOBIL PLC formerly known as

KENYA OIL LIMITED.....DEFENDANT

RULING

1. Judgment was entered in favour of the plaintiff by this court's judgment of 29th November 2019. The defendant filed a Notice of Motion application dated 11th December 2019 seeking an order of stay of execution of that judgment pending appeal.

2. By that application the defendant deponed through the affidavit of Clara Jepkorir, the defendant's Retail supervisor that having exercised its right of appeal it was apprehensive that if the judgment amount is paid to the plaintiff the plaintiff would be unable to refund the amount in the event the appeal was successful.

3. In response the plaintiff, through the affidavit of Azim Raiwani its director, deponed that the parties previous business engagement was on the basis that the plaintiff had capacity to settle its claims.

ANALYSIS

4. The defendant has exercised its right of appeal and filed an appeal against this court's judgment. The decree thereof is a money decree. The right to appeal was referred to in the case **TABRO TRANSPORTERS LTD V ABBASALOMDOVA LUMBASI (2012) eKLR** thus:

“See the opinion of the court in the case of **BGM HC MISC APPL NO 42 OF 2001 JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO** that;

The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.”

5. The fact the defendant has filed an appeal, that appeal cannot operate as a stay: see **Order 42 Rule 6(1) of the Civil Procedure Rules** (the Rules).

6. Stay of execution is provided under Order 42 Rule 6(2) (of the Rules) which provides:

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.

7. I am satisfied that the defendant filed its application for stay pending appeal timeously as required under Order 42 Rule 6(2).

8. On whether the defendant will suffer substantial loss if stay is not granted, the defendant deponed that the plaintiff might fail to refund it the judgment amount in the event the appeal does succeed. The principle of law as captured under Section 107 of the Evidence Act is that he who alleges must prove what he alleges. **Section 107(1) of the Evidence Act** provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

9. However that burden of proof, under Section 107 (1) of the Evidence Act can shift in certain circumstances such as here where the defendant cannot be expected to know the financial capability of the plaintiff to confirm it can refund the judgment amount in the event the appeal does succeed. This is what the courts have often held. For example in the case **Morning Foods Limited & Another v Burhani Decorators & Contractors Ltd (2017) eKLR** the court stated:

“It is now trite law that once the applicant calls into question the respondent’s financial ability, the burden of proving such ability immediately shifts to the respondent. This position was adopted in the case of Kenya Orient Insurance Co. Limited Vs. Paul Mathenge Gichuki & Another. (2014) eKLR where the court cited with approval the case of ABN Amro Bank N.V. Vs. Le Monde Foods Ltd. Civil Application No. Nai 15/2002 where the court expressed itself as follows;

“They of course, cannot be expected to go into the bank accounts, if any, operated by the respondents to see if there is any money there..... In those circumstances, the legal burden still remains on the applicant, but the evidential burden would have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. The evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has.....such as land, cash in the bank and so on.....(Emphasis added).”

10. The plaintiff did not shift the evidential burden of proof to prove its financial standing. Accordingly, the defendant has proven it will suffer substantial loss if stay is not granted.

11. I do however find that the interest of justice, in this case, require that such stay be conditional to ensure the plaintiff is afforded certainty that if the intended appeal does fail it will be paid its judgment. It is for that reason that I will order that the defendant does provide a bank guarantee guaranteeing to pay the plaintiff the decretal sum hereof if the appeal does fail.

12. On costs the same shall abide with the outcome of the appeal.

CONCLUSION

13. In the end the orders of the court are:

a. A stay of execution pending the hearing and the determination of appeal is hereby granted on condition that the defendant does within 30 days file and serve the plaintiff a bank guarantee guaranteeing the payment to the plaintiff of the decree sum in the event the defendant’s appeal does fail.

b. Failure to provide the bank guarantee as stated above execution shall proceed.

c. The costs of the application dated 11th December 2019 shall abide with the outcome of the pending appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 25th day of JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary kasango

C/A Sophie

For plaintiff:

For defendant:

ORDER

This decision is hereby virtually delivered this 25th day of June, 2020.

MARY KASANGO

JUDGE