



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 587 OF 2019

SGS KENYA LIMITED.....APPELLANT

VERSUS

FONTANA ENTERPRISES LIMITED.....RESPONDENT

RULING

1. In its Notice of Motion application dated 16th October 2019 and filed on 17th October 2019, the Appellant sought an order for stay of execution of the judgment and decree that was delivered on 16th September 2019 pending the hearing and determination of the appeal herein. It's said application was supported by the Affidavit of Hellen Achieng, its Pre-Export Verification of Conformity (PVOC) Contracts Manager that was sworn on 16th October 2019.
2. It contended that it was aggrieved by the entire judgment that was entered in **CMCC No 6159 of 2016** where the Learned Magistrate, Hon G. A. Mmasi, entered judgment against it for Kshs 200,000/= general damages, Kshs 4,879,467/= special damages, interest on special damages at court rates from the date of filing suit until payment in full and costs of the suit.
3. It averred that it was in the interests of justice that it be granted an order for stay of execution pending appeal so as not to suffer substantial loss and/or suffer prejudice for the reason that the Respondent would not be able to refund it the monies in the event it was successful in its Appeal herein. It was its further assertion that it was capable of complying with any directions and/or orders regarding security for due performance of the decree. It therefore urged this court to allow its application as prayed.
4. In opposition to the said application, on 6th November 2019, John Chomba, the Respondent's Managing Director, swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 7th November 2019.
5. The Respondent termed the present application frivolous and a ploy to frustrate and delay it from enjoying the fruits of its judgment. It pointed out that the Appellant had come to court with dirty hands as it had not yet settled the decretal sum. It added that it was capable of refunding the Appellant the said sum in the event it was successful in its Appeal.
6. It was emphatic that the Appellant had not demonstrated that it could not refund the said monies in such an eventuality and/or the kind of substantial loss that it would suffer in the event the present application was not allowed.
7. It asserted that the judgment that was arrived at was fair, just and lawful and in the circumstances, it urged this court to dismiss the present application with costs. In support of its application, it relied on the cases of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR** and **Focin Motorcycle Co Limited vs Ann Wambui Wangui & Another [2018] eKLR**.
8. Despite the court having directed the Respondent to file its Written Submissions by 13th February 2020, it had not done so by the time it reserved and/or wrote its decision. The court also noted that the parties herein had been exploring possibilities of an amicable settlement but that as at the time of reserving the Ruling herein on 27th April 2020, no consent had been placed before it. It therefore proceeded to write the Ruling herein.
9. Notably, before an applicant can be granted an order for stay of execution pending appeal, he has to demonstrate that he has met the following conditions that have been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

a. That substantial loss may result unless the order is made.

b. That the application has been made without unreasonable delay.

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

10. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

11. In the case of **G.N. Muema P/A (sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another** (Supra), this very court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

12. The court noted that the Respondent had not filed an Affidavit of Means to demonstrate that it was financially able to refund the Appellant the decretal sum if the same was paid to it before the intended appeal herein could be heard and determined and the Appellant was successful in its Appeal herein.

13. In the absence of proof by the Respondent to demonstrate its ability to refund the Appellant the decretal sum, this court was satisfied that the Appellant would suffer substantial loss. It had thus satisfied the first condition of being granted an order for stay of execution pending appeal.

14. The judgment the Appellant wished to appeal against was delivered on 16th September 2019. It filed its present application on 17th October 2019. It therefore filed the said application without undue delay. Consequently, it had satisfied the second condition for the granting of an order for stay of execution pending appeal.

15. The Appellant was ready to comply with any order and/or direction as regards security for the due performance of the decree. It had thus demonstrated it had complied with the third condition of being granted an order for stay of execution pending appeal.

DISPOSITION

16. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 16th October 2019 and filed on 17th October 2019 was merited and the same is hereby allowed in terms of Prayers No (3) therein in the following terms:-

1. THAT there shall be a stay of execution of the decree in CMCC No 6159 of 2016 Fontana Enterprises Limited vs SGS Kenya Limited pending the hearing and determination of the Appeal on condition the Appellant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the Respondent, the sum of Kshs 5,079,467/= within thirty (30) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 16 (1) hereinabove, the conditional stay of execution shall automatically lapse.

3. Either party is at liberty to apply.

4. Costs of the application will be in the cause.

17. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of July 2020

J. KAMAU

JUDGE