REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. 123 OF 2011

BROOKSIDE DAIRY LTD.....PLAINTIFF/RESPONDENT

VERSUS

ADONCAN NJAGI, FEDEL NYAGA & DEDAN RIUNGU

(sued as Registered Officials of

MATHIRU DAIRY SELF HELP GROUP.....DEFENDANT/APPLICANT

RULING

[1] The significant order sought in the Motion dated 9th December 2019 is stay of execution pending appeal under order 42 rule 6 of the Civil Procedure Rules. The Motion is premised upon grounds set out in the Motion, the Supporting Affidavit and Further Affidavit sworn by JASPER NYAGA M'MUGA, the chairman of the Applicant. JAMES NGÁNGÁ filed a Replying Affidavit in opposition to the application.

[2] Parties also filed written submissions to augment their respective standpoints on the application. The applicant urged that it filed this application after the Plaintiff levied execution, yet it had filed an appeal. According to the applicant, it could not have filed this application before execution was attempted or levied. It has also been argued that the attached goods are tools of trade whose attachment would put them out of business and expose them to their competitors. They submitted further that they cannot raise the colossal decretal sums for they deal with farmers'money. According to them, they could not have given any security for no such order had been made. They however, stated that they are ready to abide by any reasonable conditions the court may impose. On the basis of these reasons, the applicant sought a stay of execution pending appeal.

[3] The Respondent argued that the applicant has not demonstrated any justifiable reason for an order of stay of execution pending appeal. According to the respondent, the applicant has not established that the respondent cannot make refund of the decretal sum should the appeal succeed. In any event, the respondent stated that it has sufficient financial capability to pay back the decretal sum if the appeal succeeds. It stated that it is a leading milk producer in the country with a plant in Ruiru and vast assets throughout the country. In the circumstances, the respondent is of a strong view that the applicant will not suffer any irreparable damage as alleged.

[4] The Respondent also averred that, going by the Bank Statements annexed to the supporting affidavits, the applicant has financial ability to pay the decretal sum only that it has refused to prioritise this debt.

[5] The respondent continued to submit that the applicant has not proposed to give any suitable security as required in law. Moreover, they argued that the applicant is guilty of inordinate delay in filing the application a year after the judgement was rendered. According to them, the applicant went to slumber only to be awakened by execution herein. In the premises, the respondent stated that the applicant does not deserve a stay of execution order.

ANALYSIS AND DETERMINATION

Two little points

[6] One of the arguments put forth by the applicant is that it is not able to pay such colossal decretal sum. Such argument may profit an application for payment by instalment or postponement of payment. It may not be indomitable or potent in this application.

[7] Similarly, merely that the applicant has filed an appeal is not enough to warrant stay of execution pending appeal.

[8] See the Court of Appeal in **Joseph Kahugu Wakari –vs- Barclays Bank of Kenya Limited & Another: Civil Application No. Nai 237 of 1998 (UR)** on these two little points, that: -

> ***".....there must be substantial reasons for grant of stay of execution. It is not enough to say that the applicant will be burdened financially. That is the natural consequence of a judgment entered against him. It is also not enough to say that the fact of filing of the proposed appeal entitles an applicant to a stay of execution of decree. We do not see how the appeal, if successful, will be rendered nugatory. The respondent is a sound bank."***

[9] What, therefore, is the legal threshold for stay of execution pending appeal? Stay of execution pending appeal will only be ordered where the applicant has established sufficient reason. The court normally seeks to be satisfied that substantial loss would occur if stay is not ordered. The court will also consider whether the application was filed without any unreasonable delay. And, where appropriate, it may call for security for due performance of the decree that may become payable.

Filing of application

[10] From the record, judgment herein was delivered on 13th December, 2018. The applicant filed their application on 10th December, 2019. This was almost one year. This is quite a delay. The explanation given for this delay is that the applicant could not have moved the court earlier because execution had not been attempted or levied. Quite arrogant submission. Nonetheless, I agree with the respondent that the applicant went into slumber after judgment only to be awakened by execution. Of great significance is that, the explanation provided by the applicant for the delay is not plausible whatsoever. Accordingly, the application for stay herein was not filed without unreasonable delay. Be that as it may, let me consider the other factors for such applications.

Substantial loss occurring

[11] Substantial loss has been aptly described in the case of ***Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005*** (High Court of Uganda at Kampala) as follows: -

> **"…substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal".**

[12] In money decrees, substantial loss consists in the respondent's inability to make a refund should the appeal succeed. Such eventuality renders the appeal nugatory; leaves the appellant with a barren success; and makes his judicial journey mere pious exploration. The law will never leave a party to such piety.

[13] What does the facts herein portend?

[14] The applicant merely stated that attachment would render irreparable loss upon it for it is not able to pay such colossal decretal sum. It was not established that the respondent cannot make a refund of the decretal sum should the appeal succeed. Quite to the contrary; the respondent is a leading milk producer and processor in the country and nothing shows any financial limitations that would make it unable to refund the decretal sum should the appeal succeed. The decision in ***ALIBHAI SHARIFF & SONS LTD vs. TECHNICAL TRADING COMPANY LIMITED, HCCC NO. 1950 OF 2000*** by Azangalala J. (as he then was) is on point when he stated as follows; -

> **"The last test is that of security. The Applicant has offered to pay the decretal sum together with interest and costs in an interest earning account in the joint names of the Advocates of both parties till the appeal is heard. This offer is attractive. But the respondent has a judgment in its favour. Its financial position is sound and has means of repaying the money in the event that it ultimately loses in the intended appeal. In the premises, I see no reason why the respondent should be deprived of the fruits of the judgement passed in its favour.**
>
> **I would adopt the following observations of the Court of Appeal in Joseph Kahugu Wakari –vs- Barclays Bank of Kenya Limited & Another: Civil Application No. Nai 237 of 1998 (UR)**
>
> ***".....there must be substantial reasons for grant of stay of execution. It is not enough to say that the applicant will be burdened financially. That is the natural consequence of a judgment entered against him. It is also not enough to say that the fact of filing of the proposed appeal entitles an applicant to a stay of execution of decree. We do not see how the appeal, if successful, will be rendered nugatory. The respondent is a sound bank."***
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> **The applicant in the case at hand in my view is in the same position as the applicant in the above Court of Appeal application. I have already found that the applicant's intended appeal if successful will not be rendered nugatory.**
>
> **The upshot of all the above is that this application dated and filed on 13th March 2006 is without merit and is dismissed with costs."**

[15] Like the foregoing case, there is nothing which suggests that the respondent cannot refund the decretal sum if called upon to do so. Accordingly, I find that the applicant has not shown that it will suffer any substantial loss.

[16] Despite the foregoing, is there any other sufficient reason to order stay or call for security?

Provision of security

[17] In spite of my finds; (1) that the application was not filed without unreasonable delay; and (2) that the applicant has not established that

substantial loss would occur unless stay is granted; I am alive to the fact that: there are two competing rights here; the applicant's right of appeal which includes legitimate expectation that the appeal will not be rendered nugatory; and the respondent's right to the fruits of judgment which again should not be interfered with or postponed without sufficient reason. None of these rights is the lesser; a set of affair that forces the court to perform a delicate judicial balancing of these competing interests. In doing so, the court does not discriminate one party or elevate the other; it simply administers justice in the case. See the case of **ABSALOM DOVA vs. TARBO TRANSPORTERS [2013] eKLR where the court stated that:**

> ***''The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination''***

[18] I do not intend to look abrupt in my winding up. Paying deference to the right of appeal is also relevant consideration. Accordingly, I will exercise my discretion in a manner that does not stifle right of appeal. See the rationale of this policy in the case of ***Sewankambo Dickson (supra)*** that: -

> **"…insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts".**

[19] In the upshot, I order the applicant to pay half of the decretal sum to the respondent within 60 days of today. The balance will await the outcome of the appeal. The applicant will also pay costs of the application.

Dated, signed and delivered at Narok through Teams Application this 23rd day of November, 2020

F. GIKONYO

JUDGE