



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 25 OF 2018

HYDRATECH BUILDING CONTRACTORS &

SUPPLIES CO. LTD.....APPELLANT

-VERSUS-

FELISTER MWENDE MUSYIMI.....1ST RESPONDENT

ANNA NDUNGE MUASYA.....2ND RESPONDENT

RULING

1. The matter before court is a Notice of Motion seeking stay of execution of trial court judgment in PMCC No. 73 of 2015 Kilungu pending hearing and determination of the appeal lodged herein *inter alia*.
2. The Application is premised on the provisions of Order 42 Rule 6(b) CPR *inter alia*.
3. The same is opposed by way of a replying affidavit of Phyllis Mbula sworn on 01/10/2018.
4. It's based on grounds namely the trial court judgment of 09/03/2018, was inordinately high therefore aggrieved by it thus lodging appeal to impugn same judgment.
5. There is apprehension that execution will be undertaken any time if stay is not granted.
6. Further it is also averred that in the event of the execution applicant will suffer substantial loss as the decretal amount may never be recovered in event the appeal succeeds as Respondent has no means of refunding the same.
7. The lodged appeal is said to be having high chances of success and may be rendered nugatory should execution take place.
8. Further the Applicant seek to deposit security for the performance of the payment of judgment amount in event the appeal fails.
9. The application is supported by Affidavit of Barckleigh Kilei Mutindo sworn on 10/07/2018 and a Supplementary Affidavit sworn by same deponent on 15/08/2018 both reiterating the content of the grounds on the Notice of Motion.
10. The Application is opposed via an Affidavit of Respondent sworn on 16/07/2018 and annexures thereto.
11. The Respondent avers that the Applicants never offered any evidence in defense to rebut Respondent case thus no demonstration appeal has chances in succeeding.
12. Further it is averred that there is no demonstration that Applicant will suffer any substantial loss.
13. The Respondent proposes the entire decretal amount be deposited in court as security.
14. The parties agreed to canvass appeal via submission which they filed and exchanged.
15. In submissions the Applicant raises the issue that the filed appeal is time barred as judgment was delivered on 16/01/2017 and appeal was lodged on 29/03/2018.

16. Obviously this is misleading as the record shows that Hon. Mayamba SRM delivered same on 09/03/2018.

17. On the Application the court finds that the only issue to be determined is whether the Application has met the conditions of grant vide Order 42(b) CPR.

18. The Applicant has demonstrated that the Application was filed on 11/07/2018 about 3 months or so from date of filing appeal. The delay is said to have been occasioned by the typing of the proceedings. However stay was sought before execution could commence.

21. Further the appeal was lodged in time. The Respondent does not demonstrate prejudice in the period taken in filing the application on possibility of suffering substantial loss.

22. The Applicant argues that the Respondent will not be able to refund the decretal amount in event the appeal succeeds.

23. The Respondent has not rebutted that averment. The Respondent main concern is the expenses incurred in pursuing the instant matter for compensation thus proposal for deposit of decretal amount in court.

24. The Applicant however offers to deposit security in form of logbook or a bank guarantee.

25. Having weighed the material in the above and parties submissions, I find the application has merit and make the following orders:-

1) The stay of execution is granted on conditions that:-

i. The Applicant shall pay Kshs.500, 000/= to the Respondent within 45 days.

ii. The balance amount shall be secured by a bank guarantee to be deposited in court within 45 days from date herein.

iii. In default of any of the above conditions, execution to issue.

DATED, DELIVERED, SIGNED THIS 30TH DAY OF JANUARY 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE