REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL CASE NO. 3 OF 2018

PASACON GENERAL CONTRACTORS &

ELECTRICAL SERVICES LTD.....APPELLANT

VERSUS

TOTAL (K) LTD.....RESPONDENT

RULING.

1. The Applicant/Appellant, PASACON GENERAL CONSTRUCTIONS & ELECTRICAL SERVICES LIMITED has by Notice of Motion dated 18th September, 2018 extremely brought under Sections 79G, 1A, 3A of the Civil Procedure Act and Orders 42 Rule 6 and 51 Rule (1) of the Civil Procedure Rules sought for orders that;

(a) Spent

(b) spent

(c) there be a stay of execution pending the hearing and determination of the Appeal on judgment delivered on the 25th august, 2018,

(d) costs of the suit.

2. The application is predicated on the grounds on the face of it and the supporting affidavit of Rosemary Wakaba, the legal office of the Applicant sworn on the 10th October, 2018, that;

(a) there are glaring discrepancies in the facts and law vis-à-vis the case and the applicant's appeal's the whole judgment.

(b) the appeal has high chances of success.

(c) the appeal to the Court of Appeal would be rendered nugatory if the orders sought are not granted.

(d) the decretal amount may not be recoverable if the same is released to the respondent.

(e) the applicant is willing to deposit the full decretal sum in an interest earning account of both advocates as security.

(f) no prejudice will be occasioned to the Appellant should the Application be allowed.

Annexed to the affidavit is the copy of the filed Notice of Appeal and copies of proceedings and judgment vide letter dated 28th August, 2018.

3. The Application is opposed vide a Replying Affidavit sworn by PAUL ODHIAMBO, the Respondent's Managing Director, sworn on 12th October, 2018, who avers that;

(a) the Application is just a mere excuse to further deny the Respondent fruits of its judgment.

(b) the Respondent is a reputable company with means to refund the decretal sum should the Applicant's appeal succeed.

(c) the decretal sum be deposited in a joint interest earning account in the names of the advocates on record for the parties.

(d) the Applicant is guilty of inordinate delay for filing the application one month after the judgment.

4. When the matter came up for hearing on 3rd October, 2018, counsel for the Respondent was directed to file a Replying Affidavit and the Applicant to respond. And on 29th October, 2018, the Applicant's counsel confirmed that they had filed their written submissions. The Respondent indicated that they had not been served with the said submissions and prayed for leave of 14 days to file theirs. They were granted their prayer as prayed.

5. On 4th December, 2018, counsel for both parties confirmed that they had filed their submissions in respect of the application dated 18th September, 2018 and opted to rely on them.

6. In considering the said application, I have read through it and the affidavits sworn by both parties in support of and in opposition to the application. I have also given due consideration to the written submissions of counsel by both parties and the authorities they have cited.

7. In my view, the issue that falls for determination in this application is whether the Applicant has satisfied the condition for grant of stay of execution set under Order 42 Rule 6 of the Civil Procedure Rules.

8. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 stipulates that an applicant for stay of execution of decree must demonstrate:

(a) that the application for stay has been made without unreasonable delay;

(b) that substantial loss may result to the applicant unless the order is made;

(c) that such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. With regard to the first requirement of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, I have looked at the judgment and orders sought to be stayed were delivered on 28th August, 2018. The application herein was filed on 18th September, 2018. Ordinarily, stay of execution of decree is sought immediately after delivery of the decree or order. The application was filed about 21 days after delivery of judgment and or order. And although there is no explanation for this, I do not find the delay inordinate on the part of the Applicant as a decree is yet to be extracted.

10. For the second requirement, I am guided by the holding in :

(a) The case of DAVID MBUBA & ANOTHER –VERSUS- VICTORIA KIMWALU & ANOTHER (2017) eKLR, where , citing the case of WINFRED NYAWIRA MAINA –VERSUS- PETERSON ONYIEGO GICHANA (2015) eKLR, it was held,

"The substantial loss under Order 42 Rule 6 of the Civil Procedure Rules especially where money decree is involved in lie the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving its inability lies with the Applicant and it does not shift."

(b) The case of KENYA HOTEL PROPERTIES VERSUS WILLES DEN PROPERTIES LTD (21) where the Court of Appeal had this to say:

"The decree is a money decree and normally the courts have felt that the success of the appeal would be rendered nugatory if the decree is a money decree so long as the court ascertain that the respondent is not in a "man of straw" but is a person who on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to the legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court, however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all (Emphasis added)

11. With these decisions in mind, I have read through the applicant's application and supporting affidavit and find that the applicant have failed to demonstrate or substantiate how they should suffer any substantial loss if the stay they are seeking is denied. They have also not demonstrated whether or not the Respondent would be incapable of refunding the decretal sum if the same is paid to them. The Respondents, have at paragraph 7 of their replying affidavit averred that the Applicant are a reputable company with means to refund the decretal sum should the same be released to the Applicant. This has not been rebutted by the Applicant.

12. For the requirement of security for the due performance of the decree of the High Court, the Aplicant has offered to deposit the same in a joint interest earning account in the names of the advocates on record for the parties. The Respondent on the other hand, has at paragraph 8 of the replying affidavit urged the court to order the applicant to deposit the decretal sum in a joint interest-earning account in the names of the advocates for the parties herein. It is clear that the parties are in consonance that I believe they ought to have entered into a consent to save on judicial time, but they did not.

13. On the basis of these findings, I allow the application dated 18th September, 2018 on condition that the Applicant deposits the decretal sum of Kshs 671,378/= in a joint interest earning account within 30 days from today.

Ruling DELIVERED, DATED & SIGNED this 29th day of January, 2019.

D. CHEPKWONY

JUDGE.