



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CIVIL APPLICATION NO. 90 OF 2018

BOLPAK TRADING CO. LTD.....APPLICANT

VERSUS

GEORGE OTIENO NYAMWAYA.....RESPONDENT

RULING

1. The two significant order sought in the Notice of Motion dated 14th May 2018 are:-

i. Stay of execution of the Ruling delivered on 9th May 2017 in Meru Cmcc No. 147 of 2016 George Otieno Nyamwaya vs. Bolpak Trading Co. Ltd pending the hearing of the Applicant's intended appeal; and

ii. Extension of time to file the Appeal.

[2] The application is Supported by the Affidavit of **Raymond Waweru Gitau** who deposed inter alia:-

i. That the applicant instructed the firm of M/s Khaminwa & Khaminwa Advocates who entered appearance on 23/1/17 and filed an application dated 25/1/17 seeking to set aside the interlocutory Judgement entered.

ii. That the Ruling was reserved for 20/4/17 but was not delivered on that date neither was it deferred to another date.

iii. That it is only after being served with execution proceedings that it became aware of the Ruling which was delivered on 9/5/17 in its absence and without notice.

iv. That the Respondents claim is based on falsehoods i.e. that the Respondent bought tractor No. KTCB 904N from the Applicant at Kshs 3,359,000/= vide a Sale Agreement dated 11/3/16 and not at Kshs.4, 800,000/= nor did it sell to the Respondent tractor No. KTCB 905N.

v. That if the Orders Sought are not granted the Applicant will suffer irreparable harm.

[3] The Respondent, **George Otienoh Nyamwaya** opposed the application through his replying affidavit sworn on 13th July, 2017. He averred that interlocutory judgment in default of defence was entered into against the Applicant. That the application dated 25/1/2017 seeking to set aside the interlocutory judgement was to be canvassed by way of written submissions. That the court was not sitting on 20/4/17 when the said application was scheduled for Ruling and was deferred to 9/5/17. Mr. Kariuki, Advocate held brief for the Respondent's advocate and Nyenyire held brief for counsel of the Applicant. It took the applicant one (1) month to file this Application- a delay that is inordinate and that would amount to injustice. The Respondent stated that the applicant has also not sought to deposit any amount in Court despite being financially capable of doing so.

Submissions

[4] The applicant filed its written submission on 12/06/2018 and urged that the prayers sought by the Plaintiff in the trial court was a declaration and not a liquidated amount hence formal proof was necessary That failure to be informed of the delivery of the Ruling is the reason the Applicant failed to file the intended Appeal within the prescribed period.

[5] The respondent argued that the Applicant ought to have annexed their intended appeal or intended defence. In the absence thereof, this Court cannot discern the grounds of appeal. An affidavit cannot suffice. That the applicant ought to also have offered to pay the decretal

amount or pay throw away costs which it has failed to propose.

ANALYSIS AND DETERMINATION

[6] Under Order 42 Rule 6(2) of the Civil Procedure Rules no order of stay shall be issued unless:-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made; and

(b) 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.

Unreasonable Delay

[7] This requirement is normally the easy one to tackle. The impugned Ruling was delivered on 9th May 2017. This application was made on 14th May 2018- this is a period of over One (1) year. The applicant sought to justify this delay by stating that they were not aware of the Ruling of the trial Court until they were served with a proclamation Order on 7th May 2018. The record bears the answer.

[8] The trial Court proceedings show that on 9/5/2017 the applicant herein was represented by a Mr. Nyenyire. The applicant has since denied that it gave Mr. Nyenyire instruction to hold their brief and/or that they were aware of him. At the footing of the Ruling the same shows that the Applicant herein was absent. The proceedings do not also show what transpired on 20/4/2017. There is also no evidence that the applicant was ever served with notice for delivery of the Ruling. I am therefore inclined to believe, albeit with a pinch of salt, that the applicant herein was not aware of the Ruling until 10/5/18. I excuse the delay for plausible explanation thereto has been given.

Substantial Loss

[9] The second hurdle is whether the Applicant will suffer substantial loss unless stay of execution is granted. In light of my finding on the first point, this is case of *ex debito justitiae* and execution in these circumstances will be substantial loss to the Applicant. In addition, the Applicant attached a proclamation Order that shows that most of its goods may be charted away in execution thereto. The goods include a tractor and office furniture. The Respondent has not given any evidence to show that he will be able to pay back the amount if the Appeal was successful. This again portends substantial loss occurring to the Applicant. See **G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR** where the Court Held;

“.....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.

17. As can be seen hereinabove, there was no affidavit evidence by the Respondents on the court record. This therefore left the court in a quagmire especially as regards the ability of the Respondents to pay back the decretal sum in the event the Appellant was successful in his Appeal herein. In the absence of proof of their ability to pay back the said sum, this court was satisfied that the Appellant would suffer substantial loss. He had thus satisfied the first condition of being granted a stay of execution pending appeal.....”[Emphasis Mine] Of Security

[10] The Applicant herein has offered no Security. Nonetheless, whether to give or not to give security or the sufficiency of Security is a matter of the discretion of the Court. I am however aware 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”. (SEWANKAMBO DICKSON VS. ZIWA ABBY HCT-00-CC MA 0178 OF 2005, THE HIGH COURT OF UGANDA AT KAMPALA)

[11] The upshot of the foregoing analysis is that I allow the application and order that there be stay of execution pending the hearing and determination of the appeal. The appellant will provide security by depositing within 30 days, one half of the decretal sum in an interest earning account in the joint names of the counsels on record for appellant and the respondent.

Extension of time to file Appeal.

[12] The delay in filing appeal in time must be explained to the satisfaction of the court. The Applicant herein has only pleaded in its affidavit that the trial Magistrate erred in holding that the prayer sought by the Plaintiff was a liquidated amount other than a declaration. He has however not led any evidence that shows that he has made steps to prefer an appeal. He has not attached a draft memorandum of Appeal nor has he attached documentary evidence to show that they have made efforts to prefer the appeal, say paid for the certified copies of the proceedings.

[13] As I stated, I will however give the Applicant the benefit of doubt and allow them to exercise their right of appeal. Accordingly, I grant leave to the Applicant to file appeal in 30 days of today which failing these orders shall automatically lapse. Costs shall be in the cause. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th February, 2019

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F.M GIKONYO

JUDGE

In presence

Muriera for defendant/applicant

Kimathi for plaintiff/respondent – absent

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F.M GIKONYO

JUDGE