



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 177 OF 2015

MAGIC CHEMICALS INC.....PLAINTIFF

VERSUS

PRADIP ENTERPRISES (E.A) LTD.....DEFENDANT

R U L I N G

(1) Before this Court is the Notice of Motion dated 22nd February 2019, in which PRADIP ENTERPRISES LTD (the Defendant/Applicant) seeks the following orders:-

“1. SPENT

2. Pending the hearing and determination of this application, a stay of execution of the judgment and decree in Milimani HCCC No.177 of 2015 Magic Chemicals Inc -Vs- Pradip Enterprises Limited (E.A) do issue.

3. The Ruling dated 15th February 2019 be reviewed and the Notice of Motion dated 11th July 2018 be allowed as prayed.”

4. Costs be in the cause.”

The application was premised upon Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 45 Rule 1,2,3, Order 51 Rule 3 of the Civil Procedure Rules and all other enabling provisions of the law. The same was supported by the affidavit of MANOJ SHAH a Director of the Defendant Company. Sworn on 22nd February 2019.

(2) The Plaintiff/Respondent MAGIC CHEMICALS INC filed a Replying Affidavit on 1st March 2019 sworn by GURVINDER S. BAWA, the Director of the Plaintiff.

(3) Pursuant to directions given by the court the application was disposed by way of written submissions. The Defendant/ Applicant filed their written submissions on 18th March 2019 whilst the Plaintiff/Respondent filed their submissions on 5th March 2019.

(4) This application arises from the Ruling delivered by this Court on 15th February 2019, in which the Court declined to grant a stay of execution of the judgment and decree in the present case pending the hearing and determination an appeal filed in HCCC NO.565 OF 2016 (being Civil Appeal No.206 of 2018).

ANALYSIS AND DETERMINATION

(5) The Grounds advanced in favour of this application for review and stay of execution are as follows:-

(i) That there exists an error apparent on the face of the record; and

(ii) That the orders made by this court vide its ruling dated 15th February 2019, would be extremely prejudicial to the Applicant in the event that the Civil Appeal No.206 of 2018, succeeds.

(6) The grounds upon which an application seeking review of a decision of the court can be made and entertained are set out by Order 45 Rule (1) of the Civil Procedure Rules 2010, which provides:-

“Any person considering himself aggrieved.

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred or:-

(b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, on an account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

(7) I have carefully perused the Defendant/Applicants present application as well as the affidavit in support and I find that all the issues raised in the present application are the very same issues which were raised and canvassed in the previous Notice of Motion dated **11th July 2018** on which the Court has already ruled. Accordingly I do not find that there arise any new or important matters that would cause this court to review its earlier decision. It is pertinent and I wish to emphasize as I did in my ruling delivered on **15th February 2019** that the matter which is pending before the Court of Appeal being **Civil Appeal No.206 of 2018** does **NOT** emanate from the judgment in this matter but rather emanates from the decision in totally separate and distinct suit being **HCCC NO.565 OF 2014 Pradip Enterprises Limited –Vs- Magic Chemicals**.

(8) In **STEPHEN GITHUA KIMANI –VS- NANCY WANJIRA WARUINGI T/A RROVIDENCE AUCTIONEERS [2016] eKLR** the Court of Appeal held as follows:

“.....The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution pending appeal are handled....”

(9) The Applicant is seeking stay of a money decree. It has been severally held that stay of execution for a money decree ought not be granted as there is little risk that an appeal may be rendered nugatory.

(10) Although the Applicant submitted that there existed an error apparent on the face of the record which necessitated a review of the court’s ruling, I find that there has been no clear demonstration of any such error. Indeed in their written submissions the Applicant appears to have abandoned this ground. Instead the Applicant submitted that contrary to the decision of the court in its ruling of **15th February 2019**, the burden lay on the Respondent to prove that it is capable of refunding the decretal sum. This does not amount to an error. The Applicant is in effect submitting that the court erred in its finding on this point. That is a matter for appeal **not** for review.

(11) In **NYAMOGO & NYAMOGO –VS- MOSES KIPKOLUM KOGO [2001] E.A 170** it was held that:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of in definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares on in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on point where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.” [emphasis supplied].

(12) I find that no persuasive grounds have been advanced to warrant a stay or review of this court’s Ruling of **15th February 2019**. If the Applicant feels that the court has misapprehended the law then the proper course of action would be to file an appeal against that ruling.

(13) Finally I find no merit in this present application. The same is hereby dismissed in its entirety with costs to the Respondent. The status quo orders made on **27th March 2019** are accordingly vacated with immediate effect.

Dated in Nairobi this 20th day of June 2019.

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Justice Maureen A. Odero