REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL SUIT NO. 24 OF 2015

NGINA GITIBA.....PLAINTIFF/RESPONDENT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD....DEFENDANT/APPLICANT

RULING

1. The Applicant herein, **South Nyanza Sugar Company Limited,** filed a Notice of Motion on 11/03/2019 which application is evenly dated and sought for the following orders: -

a. spent

b. spent

c. The court be pleased to grant an order of stay of execution of the judgment and of the consequential decree of this court in this matter dated 14th February 2019 pending hearing and eventual determination of an Intended Appeal to be lodged in the Court of Appeal.

d. Costs of this application be provided for.

2. The body of the application also contain the grounds upon which the application is premised. The application is supported by the affidavit of **Maurice Omondi Ng'ayo,** an Advocate of the High Court of Kenya and the Applicant's Legal Services Manager, sworn on 11/03/2019. The Affidavit details the background of the application.

3. The Respondent herein opposed the application by filing a Replying Affidavit which she swore on 01/04/2019.

4. Directions were taken and the application was heard by way of written submissions where both parties complied. The brief background of the application is that the Respondent filed this suit against the Applicant seeking the enforcement of three contracts she entered into with the Applicant towards growing sugar on the Respondent's farm sometimes in 2011. The suit was heard and judgment rendered on 14/02/2019. Dissatisfied with the decision, the Applicant filed a Notice of Appeal and later filed the application subject of this ruling.

5. Relying on the application, the Applicant contend that the Applicant has satisfied the requirements of **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and submits that the application was filed without any unreasonable delay and the delay, if any, is sufficiently explained. It also submits that the sums payable under the judgment of this Court is in excess of Kshs. 62 Million and it is apprehensive of recovery in the high likelihood of the success of the appeal before the Court of Appeal. It further contends that despite expressing its apprehension the Respondent did not sufficiently demonstrate her means and financial ability to the effect that the Applicant shall not be prejudiced in the event of recovery of the judgment sums. On security the Applicant submits that it is the Court to look at the circumstances of the case and order an appropriate security thereof as a party ought not to fetter the discretion of the Court by proposing the security it is willing to avail. The Applicant variously relied on several judicial decisions in support of its position including **Ujagar Singh vs. Runda Coffee Estates Limited (1966) EA 263, Siegfried Busch v MCSK [2013] eKLR, Halai & another v Thornton & Turpin (1963) Ltd [1990]eKLR, Samvir Trustee Limited v Guardian Bank Ltd, Nairobi (Milimani) HCC No. 795 of 1997, IL Nwesi Company Limited & 2 Others v Wendy Martin [2011]eKLR, Dr Alfred N. Mutua v Ethics & Anti-Corruption Commission & Others, Civil Application No. Nai. 31 of 2016,Universal Petroleum Services Limited v B P Tanzania Limted [2006] 1 EA 486, Mangungu v National Bank of Commerce Ltd [2007] 2 EA 285 & Butt v Rent Restriction Tribunal [1982] KLR 417**

6. Opposing the application, the Respondent submits that the delay was not sufficiently explained as no good reasons were given and hence inexcusable. She further submits that the Applicant has failed to demonstrate any substantial loss and that she is able to repay the decretal sum in the event the appeal succeeds since the value of her land is well beyond the judgment sum further to the fact that the appeal is a sham.

On the issue of security, the Respondent contend that the Applicant ought to have offered the security which in money decrees is usually that one-half of the sums is paid directly to the Respondent and the other half is held in a joint account. The Respondent relied on various decisions in urging this Court to dismiss the application. The decisions include **Mukuma vs. Abuoga (1988) KLR 645, Butt vs. Restriction Tribunal (1982) KLR 417, James Wangalwa & Another vs. Agnes Naliaka Cheseto Miscellaneous Application 42 of 2011, Equity Bank Ltd vs. Taiga Adams Company Ltd Civil Appeal 772 of 2005, Masisi Mwita vs. Damaris Wanjiku Njeri (2016) eKLR, Meteine Ole Kilelu & 10 Others vs. Moses K. Nailile, Civil Appeal No. 340 of 2008, Kenya Shell Ltd vs. Kibiru &Another, Civil Appeal No. 97 of 1986 Nairobi, Richard Muthusi vs. Patrick Gituma Ngomo & Danro (Kenya) Limited HC MISC APP NO. 138 of 2017, & Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others - Civil Appeal No. 291 of 1997.**

7. I have carefully considered the application and the submissions as well as the judicial decisions before me. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree.

8. On the aspect of **substantial loss**, the Applicant relied on two grounds. The first one being that the Applicant is a public entity and is currently not in a position to service the judgment sum which is so high and risks grounding the entire operations of the Applicant. The second ground being that the Respondent's means and material possessions are unknown to the Applicant and as such the Applicant is apprehensive that in the event the appeal succeeds then it will not be able to recover the sums from the Respondent.

9. The Respondent rightly so submits that the fact that the Applicant is unable to satisfy the judgment cannot be a good reason to demonstrate any loss or at all and should infact raise the Court's antennae on the liquidity of the Applicant and the possibility of having a paper judgment.

10. Arising from the contention by the Applicant that it is apprehensive that any money paid to the Respondent may not be recovered in the event the appeal before the Court of Appeal succeeds given that the Respondent's means and material possessions are unknown, the Respondent deponed that she is a person of means and that her land is worth over the judgment sum.

11. It is well settled in law that whoever alleges must prove. Therefore, an Applicant who alleges that it may not be able to recover the sums from a Respondent in the event the appeal is successful must likewise prove such. The Applicant must adduce evidence on the preponderance of probability in support of the assertion. An assertion that the Applicant is not aware of the financial position of the Respondent will largely suffice. In the event the Applicant adduces such evidence or the record contains such evidence then the evidential burden of proof shifts to the Respondent. In such a case the Respondent will be required to respond to the Applicant's position to the contrary. One of the ways a Respondent may put forth such a response is by filing an Affidavit of Means. (See Court of Appeal in **ICDC vs. Daber Enterprises Ltd Civil Application No. Nai 223 of 1999** as referred to in **Tabro Transporters Limited vs. Absalom Dova Lumbasi (2012) eKLR**, **Ocean View Beach Hotel Ltd vs. Salim Sultan Moloo & 5 Others (2012) eKLR** among others).

12. Adding its voice to the issue of the shifting of the evidentiary burden of proof the Court of Appeal in **Nai Civil Application No. 238 of 2005 National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Another** (unreported) expressed itself thus: -

> **…This Court has said before and it would bear repeating that while the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge…...**

13. The Applicant deponed that it was not aware of any of the Respondent's means and material possessions although there is no dispute that the parcel of land subject of the contracts under appeal belong to the Respondent and her husband. The decretal sum runs past Kshs. 62 Million and the Respondent contend that the land is sufficient proof of her ability to repay. I agree with the Applicant that the figure of Kshs. 100 Million put forth by the Respondent as the value of her land runs short of any sound basis since no valuation report was filed. The Respondent also testified that as a result of the breach of the contracts by the Applicant she defaulted on several loans she had secured and invested on the land and which loans are yet to be repaid. Further, the Respondent's husband is not a party in this suit and he has not expressed his willingness to the sale of the land in case need arises. With such a state of affairs the Respondent's apprehension solidifies. The sum of Kshs. 62 Million is colossal by any standard and not many people or even corporates are able to settle such amount of money with ease.

14. In this case the Applicant having deponed that it was not aware of the liquidity of the Respondent and in view of the sums involved coupled with the difficulty financial position the Respondent testified to be in then the evidential burden shifted to the Respondent. This is a perfect case where the Respondent was to further demonstrate her ability to repay the sums in view of her difficult financial position including unpaid loans. I therefore find and hold that the Respondent did not discharge the evidential burden of proof on her part. Conversely, the Applicant demonstrated the likelihood of substantial loss unless the order sought is granted.

15. On the issue of **delay**, I note that the judgment was rendered in February 2019 and the application filed in March 2019. The intervening period of around 30 days cannot be alleged to have been inordinate.

16. As to **security**, the Applicant contend that it is ready to furnish any security as ordered by the Court as a condition precedent to the grant of the orders sought. On her part the Respondent contend that the Applicant ought to have given the security which in money decrees is usually that one-half of the sums is paid directly to the Respondent and the other half is held in a joint account. Of the two schools of thought put forth by the parties I am in support of the position that the determination of the security is on the part of the Court. However, when an Applicant offers a certain security that goes a long way in aiding the Court to exercise its discretion with ease. Offering security gives a general direction on the Applicant's ability to comply with conditional stay and may curtail further applications for review of conditions attached to a stay of execution order, but as said the buck stops with the Court in determining a suitable form of security.

17. As I come to the end of this ruling I must state that this Court in dealing with the current application for stay of execution is guided by the provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and the contention that the intended appeal is has no chances of success is not one of the grounds for consideration before the High Court.

18. From the foregone analysis and by striking a balance between the parties without losing focus of the unique circumstances of this matter and with a view to hasten the parties to take steps towards early determination of the intended appeal I must allow the Notice of Motion dated 11/03/2019, but in the following manner: -

> **a. That there be a stay of execution of the decree herein pending the determination of the intended appeal before the Court of Appeal on condition that the sum of Kshs. 5,000,000/= be deposited in an interest earning joint account in the names of the parties' Advocates within 45 days of this order and in default execution do issue.**

19. Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 08th day of August 2019.**

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Marvin Odero, Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Applicant.

Mr. Mugoye, Counsel instructed by the firm of Messrs. Mugoye & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant