

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 354 OF 2019

TULSI CONSTRUCTION COMPANY LIMITED.....APPELLANT/APPLICANT

VERSUS

KENYA AIRPORTS PARKING SERVICES LIMITED.....RESPONDENT

R U L I N G

The lower court delivered a judgment in favour of the respondent against the appellant on 28th May, 2019. The appellant asked for a stay of execution for 30 days which was allowed. That period was to expire on 25th June, 2019. A day thereafter, that is on 26th June, 2019, the appellant filed an application in this court by way of Notice of Motion, for an order of stay of execution of the said judgment, pending the hearing and final determination of the appeal.

On the same day, i.e. 26th June, 2019, the appellant filed memorandum of appeal. Both the application and memorandum of appeal are dated 24th June, 2019. The application is brought under Section 79G of the Civil Procedure Act, Order 42 Rule 6(1) and 6 of the Civil Procedure Rules alongside Sections 1A, 1B and 3A of the Civil Procedure Rules.

The reasons for seeking the order of stay have been set out on the face of the application alongside an affidavit sworn by the Director of the appellant. The application is opposed and there is a replying affidavit sworn by the Deputy Director of the Respondent. Both parties have filed submissions and cited some authorities which I have noted.

A party approaching the court under Order 42 Rule 6 of the Civil Procedure Rules is supposed to demonstrate that substantial loss may be incurred if the orders sought are not granted and that the application is filed timeously. The other consideration is that the appeal is not frivolous and if the order is not granted, the appeal may be rendered nugatory.

The present application was filed only one day after the period given for stay by the lower court had expired. That was within the time allowed under the Civil Procedure Rules to file any appeal.

The Appellant, therefore, complied with that condition. The appellant has stated that if the stay of execution is not granted, the appeal shall be rendered nugatory and there shall be irreparable damage suffered. Further that, the respondent shall not suffer any prejudice which is incapable of a remedy by way of damages.

It is now trite law that any party alleging substantial loss is required to identify and state the said loss and should never leave that to speculation. The appellant has not demonstrated what loss, if any, shall be suffered if the order sought is not granted.

The Appellant has the right of appeal but the respondent equally has a judgment in its favour, and the court is therefore called upon to consider the interests of both parties. The possibility of suffering substantial loss has been considered as the cornerstone of the jurisdiction of the court in granting the orders such as those sought by the appellant herein. See **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR**

The appellant has not doubted the financial capacity of the respondent to refund the decretal sum in the event the appeal succeeds. In effect, therefore, the appellant has not demonstrated that the appeal shall be rendered nugatory if the order sought is not granted. A practice has been established that in applications of this nature the party applying should offer security, in most cases a deposit of the decretal sum or a substantial part thereof, in an interest earning account in the names of the parties or their advocates. Such an offer is non-existent in this application. In any case, the appellant has not disputed the averment by the respondent that it is financially sound, and is capable of meeting any decree that may be issued against it.

I am not satisfied that the orders sought by the appellant are deserving and therefore, this application is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 27th day of November, 2019.

A MBOGHOLI MSAGHA

JUDGE