

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 169 OF 2017

POWERGEN TECHNOLOGIES LIMITED.....APPELLANT

VERSUS

ZACHARY BONGOKO OGETO.....1ST RESPONDENT

BETTER LINE COMPANY LIMITED2ND RESPONDENT

MBIRI JOSEPH3RD DEFENDANT

THOMAS KINOBE4TH DEFENDANT

RULING

The appeal herein arises from objection proceedings at the instance of the appellant which however was dismissed by the lower court. There is now before me an application dated 20th April, 2017, by way of Notice of Motion under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, for an order that there be a stay of execution pending the hearing of the appeal.

The appellant was not a party in the lower court proceedings. However, when execution was initiated its goods were proclaimed to satisfy the decree in favour of the 1st respondent. The appellant then initiated objection proceedings before the lower court, which application was however dismissed leading to the filing of the Memorandum of Appeal herein.

The stay of execution application is supported by an affidavit sworn by a director of the appellant alongside grounds set out on the face of the application. The appellant is supposed to demonstrate that the application was filed timeously, that substantial loss may result if stay is not granted and that sufficient security is availed for any decree that may issue if the appeal is dismissed.

The ruling of the lower court dismissing the appellant's objection proceedings was delivered on 18th April, 2017 and the Memorandum of Appeal was filed on 19th April, 2017 alongside the present application. The application was therefore filed timeously. The appellant has annexed receipts showing that it purchased the said proclaimed properties and if stay is not granted, and the proclaimed goods are sold, substantial loss will be incurred.

The appellant has offered to deposit security for the performance of any decree that may be binding on it. In essence the applicant has complied with the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules.

The order sought is discretionary and I have considered the material presented by both parties including their submissions. The objection proceedings in the lower court were dismissed on the basis that there was collusion between the appellant and the 1st defendant.

I have seen no evidence of such collusion and in any case, the appellant had no reason to do so because of tangible evidence of ownership of the proclaimed properties. The appeal is therefore arguable and may be rendered nugatory if stay of execution is not allowed.

Accordingly, the application dated 20th April, 2017 is allowed. There shall be stay of execution until the appeal is heard and finalised. The appellant shall deposit with the court a sum of Kshs. 10,000/= as security for costs.

Dated, signed and delivered at Nairobi this 22nd Day of February, 2018.

A. MBOGHOLI MSAGHA

JUDGE