



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 162 OF 2014**

**PANKAJ TRANSPORT PVT LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SDV TRANSAMI KENYA LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. The subject Notice of Motion Application is dated 27<sup>th</sup> May 2017, brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, under Order 42 Rule 6(1) and (2), Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It is supported by the grounds thereon and an Affidavit sworn by Onsando Jacqueline, dated 26<sup>th</sup> May 2017.

2. The Applicant is seeking for prayers;-

a. Spent;

b. That the Honourable Court be pleased to issue an order for stay of the Judgment and/or decision of the Honourable Court rendered or delivered on 17<sup>th</sup> February 2017 pending the hearing and determination of the intended Appeal;

c. That the Court does make such or further orders in the interest of justice;

d. That costs be in the cause.

3. The Applicant avers that the Plaintiff (herein the "Respondent") filed this suit vide a Complaint dated 24<sup>th</sup> April 2014, claiming a sum of USD 3,037,444\$ and USD 1,520,483, from the Defendant (herein "the Applicant") and upon service of the Complaint and summons the Applicant filed a statement of defence dated 11<sup>th</sup> June 2014, wherein the Respondent's claim was denied. Subsequently the case was heard and judgment delivered on 17<sup>th</sup> February 2017, as prayed, in favour of the Plaintiff/Respondent as against the Defendant/Applicant.

4. However, the Applicant is dissatisfied with the decision of the Honourable Court and has filed a Notice of Appeal against the decision and/or judgment and has, vide a letter dated 27<sup>th</sup> February 2017, applied for typed proceedings for the purpose of preparing the record of Appeal.

5. The Applicant avers that an attempt to negotiate the matter with a view to stay the judgment pending the determination of the intended Appeal, by the Applicant providing an Insurance Guarantee from Jubilee Company Limited, as a security for performance of the decretal sum in lieu of the formal application for stay of execution was not successful as the Respondent declined and/or refused the proposal.

6. That in the given circumstances, it is likely to suffer substantial loss if the judgment is not stayed, as the sums involved herein are quite substantial and the decree holder is incorporated in the Republic of India, outside the jurisdiction of the Court.

7. It is also argued that the intended Appeal is arguable with high chances of success and if the order for stay is not granted, it will be rendered nugatory. Therefore it is in interest of justice that, the Application be allowed as prayed.

8. However, the Application was opposed vide an Affidavit in reply, dated 9<sup>th</sup> July 2017, sworn by Vishal Mehta, the Chief Executive Officer of the Plaintiff's Company. He deposed that, after the Judgment was entered in favour of the Plaintiff on 17<sup>th</sup> February 2017, the Applicant's former lawyers on record Messrs Iseme Kamau & Maema Advocates, wrote a letter to the Plaintiff's Advocates, Hamilton Harrison & Mathews Advocates, making a proposal to furnish a guarantee from Jubilee Insurance Company Limited, in lieu of stay of

execution pending Appeal. The letter dated 23<sup>rd</sup> March 2017, was received and responded to on the 23<sup>rd</sup> March 2017, to the effect that they were taking instruction from their client on the proposal. On 6<sup>th</sup> July 2017, the Plaintiff's lawyers reverted back declining the proposal and demanded the entire decretal sum be deposited in a joint interest earning account in the names of the Advocates representing the Parties. Allegedly there was no response to this letter and a reminder was sent on 12<sup>th</sup> April 2017.

9. The Respondent argued that the Applicant has not demonstrated that it will suffer substantial loss if the stay of execution is not granted and neither has the Application been brought without undue delay. That the proposal to furnish a guarantee from Jubilee Insurance Company Limited, is not acceptable as the Plaintiff will have to pursue a Third Party in the event the Appeal fails but if the sum is deposited in the joint interest earning account, it will be easier to access it.

10. In response to the Affidavit in reply, the Applicant filed a supplementary affidavit dated 19<sup>th</sup> June 2017, and argued that the Applicants are not disputing the deposit of the decretal sum as security for grant of stay of execution, the only dispute is the mode of deposit of the security. That the Applicant is willing to provide a Bank Guarantee from a foreign Bank specifically from France where the Headquarters for the Applicant is situated, as an alternative security for the performance of the decretal sum.

11. Finally, the Respondent argued that the Application has been brought without delay, and within a reasonable time bearing in mind the Parties were exploring an out of court negotiation on the security to be deposited.

12. After filing the respective responses, the Parties agreed to dispose of the Application by filing submissions and highlighting the same. The Applicant filed its submissions on 28<sup>th</sup> June 2017, and submitted that the working of order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 requires the Applicant seeking for orders as herein to satisfy the conditions that;

- a. Substantial loss may result to the Applicant unless the order is made;
- b. The Application has been made without undue delay;
- c. Such security as to costs has been given by the Applicant

13. On the issue of substantial loss, it was argued that execution of the orders herein will create a state of affairs that will irretrievably affect and/or negate the very essential core of the Applicant's Appeal.

14. That, the Applicant's core business is in the transport sector and execution of the judgment in the sum of Kshs 201,739,729 will cripple the day to day operations of the Company. Further, the Applicant is apprehensive if the sum is paid, it may prove difficult and more expensive to retrieve or obtain the amounts back from the Respondent which is a foreign Company incorporated and carries on business in India with no registered office or known assets in Kenya.

15. The Applicant relied on the case of; ***Equity Bank Ltd vs Taiga Adams Company Limited (2006) eKLR*** where the Court held that;

“...the only way of showing or establishing substantial loss is by showing that if the decretal sum is to be paid to the Respondent- that is execution carried out- in the event the appeal succeeds the Respondent would not be in a position to pay- reimburse as she/he is a person of no means.”

16. Further reliance was placed on the case of; ***ABN Amro Bank .N.V vs Le Monde Foods Limited- Civil Application No. Nai 15 of 2002***, where the Court stated:

“...all an applicant in the position of the bank can reasonably be expected to do is to swear, upon reasonable grounds, that, the Respondent will not be in a position to refund the decretal sum if it were paid over to him and if the pending appeal was to succeed...the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has such as land, cash in the bank so on.”

17. On the issue of undue delay, the Applicant reiterated that the delay between 17<sup>th</sup> February 2017, to 30<sup>th</sup> May 2017, was occasioned by the negotiations between the Parties, and that while the negotiations were going on, there arose some differences between the Applicant and his previous Advocates occasioning further delay. The Application was only filed by the new Advocates on record after the notice of change filed on 12<sup>th</sup> March 2017. Therefore the mistake and slight delay should not be visited upon the Applicant.

18. Reliance was placed on the cases of; ***Philip Chemowolo & Another vs Augustin Kubede (1982-88) KAR 103 at 1040*** and ***Belinda Murai & 9 Others vs Amos Wainaina CA No. 9 of 1978***, where the Court held that:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior Counsel. Though in the case of junior counsel the Court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule...”

19. Further reference was placed on the case of; ***Savings & Loans (K) Limited vs Onyancha Bwomote (2014) eKLR***, where the Court stated

as follows:-

“blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

20. In Belinda’s case (supra) the court observed that;

“a mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior Counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule...”

21. The Applicant further submitted that, it is willing to abide by the conditions ordered by the Court with regard to security pending the hearing and determination of the Appeal, and reiterated that, it is ready to provide the insurance guarantee as stated herein.

22. Finally the case of; **Butt vs Rent Restriction Tribunal Civil Application No. 6 of 1979** was cited where the Court stated;-

“the litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be rendered nugatory. A stay which would otherwise be granted ought to be refused because the Judge considers that another, which in his opinion will be a better remedy, will become available to the Applicant at the conclusion of the proceedings.....it has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the Appeal, if successful from being rendered nugatory.”

23. However in response to the Applicant’s submissions, the Respondent submitted that in determining an Application as herein the Court will be guided by the principles as set down in the case of; **Halai & Another vs Thornton & Turpin (1963) Ltd**, as follows;

- a. The court must be satisfied that substantial loss would ensue from a refusal to grant the stay of execution;
- b. The application must be made without unreasonable delay;
- c. The applicant must furnish security
- d. The applicant must establish sufficient cause

24. The Respondent further argued that, the fact that the judgment sum is substantial is not an indication that the Applicant will suffer irreparable loss. Reliance was placed on the case of; **Radio Africa Ltd vs lingam Enterprises & 4 Others (2011) eKLR**, where the Court held that the amount of the decree are not a sufficient cause for stay of execution.

25. The case of; **Antoine Ndiaye vs African Virtual University (2015) eKLR**, was also cited to support the proposition that it is not enough for the Applicant to merely state that it is likely to suffer substantial loss if the stay of execution is not granted. The Applicant is bound to place before the Court such material and information that should lead the Court to conclude that the Applicant stands a risk of suffering substantial loss moneywise and therefore the stay ought to be granted.

26. That it is not enough for a Party to just allege that since the Respondent resides outside Kenya, its means are unknown and it might not refund the sums and that there is no material before the Court to show the kind of loss the Applicant will suffer if it pays out the judgment sum. The collapse of its business is not a test for grant of the orders sought.

27. The Respondent further submitted that there is indeed no allegation that, it will not be in a position to refund the money. That for evidential burden to shift to the Respondent, the Applicant must first swear upon reasonable grounds that, the Respondent will not be in a position to refund the decretal sum if the Appeal succeeds. As the Applicant has not shown to the Respondent financial limitation, the Respondent has not tendered any evidence to show that it is in a position to refund the judgment sum. Reliance was placed on Antoine Ndiaye (supra).

28. The Respondent argued that the delay of filing the Application of over 3 months is inordinate and unreasonable, and has not been adequately explained and the negotiation process advanced as an explanation for delay is not a sufficient reason.

29. That the allegations of the differences between of the Applicant and its former Advocate is being brought up in the first instance, in the submissions and was not deposed to in the supporting affidavit. Even then, the new Advocates took 18 days to file the Application, which is too long a period. That it is not a question of a mistake of an Advocate, but a case of a Party not keen on pursuing the Appeal. Reliance was placed on the case of; **Edney Adaka Ismail vs Equity Bank Limited (2014) eKLR** to submit that, the Applicant ought to have been vigilant in following up to the progress of the Appeal, especially after the Court granted it 30 days stay of execution after delivery of judgment.

30. Finally, it was submitted that, the security offered by the Applicant is unacceptable as the Respondent will have to go into inquiry as to where the foreign bank is incorporated, the Bank’s history of honouring its liabilities and so on. Even then, the alleged Bank is not named;

hence an indication that, the Applicant is not keen on the said guarantee. That the Court is duty bound to balance the interest of both parties and in that regard reliance was placed on the case of; Radio Africa Ltd vs lingam Enterprises & 4 Others (2011) eKLR.

31. At the conclusion of the arguments by the Parties and having considered their respective submissions, I find that this Application is premised on the procedural provisions of Order 42 Rule 6 of the Civil Procedure Rules which lay down the conditions upon which a stay of execution order will be granted.

32. In the said provisions the Applicant must show that:

- i. He/she or it will suffer substantial loss unless the order of stay of execution is granted;
- ii. The Application has been made without unreasonable delay; and
- iii. Security for the due performance of such decree or order has been given by the Applicant.

33. Generally the power of the Court to grant an order of stay of execution is discretionary. However, the discretion should be exercised judicially, and not capriciously, whimsically and must be based on sufficient cause that will necessitate the grant of the stay and the Applicant should not be denied an opportunity to be heard on the intended Appeal.

34. Thus in exercise of this discretion, the Court will take into account inter alia the special circumstances of the case, its unique requirements, and the defined principles of law as stated in the cases here below:-;

- i. Butt vs. Rent Restriction Tribunal (1982) KLR
- ii. Winfred Nyawira Maina vs. Peterson Onyiego Gichana (2015) eKLR
- iii. Shah vs. Mbogo (1967) EA 470

35. I shall first deal with the issue as to whether the Applicant filed this Application without undue delay. I find that, the decision giving rise to this Application was rendered on 17<sup>th</sup> February 2017, and the Application filed 30<sup>th</sup> May 2017, hence a delay of about three (3) on months.

36. The Applicants have explained that, they were involved in negotiations in relation to the kind of security to offer in lieu of stay of execution. The Respondents have admitted that, they indeed received a letter to that effect, which they replied to, rejecting the security offered. I am therefore satisfied that the Applicant did not just sit back as time eroded and waited to file the Application late. I rule that in the given circumstances, the delay is explained and is not therefore inordinate.

37. As regards the issue of whether the Applicant will suffer substantial loss unless the orders sought are granted I note that the Applicant averred that, if the sum sought is paid, it will not be recoverable and its day to day business will cripple. It was also averred that the Plaintiff foreign Company has no assets, and therefore it will be difficult to recover the money if paid and that in the given circumstances, it is safe to have the money kept at a place where it will be easily accessible if the Appeal succeeds.

38. However, I note that no evidence was led to the effect that the Respondent's Company is not in a position to refund the money if it is paid and the Appeal succeeds as required as the Applicant did not swear to that effect.

39. The Respondent argued that in the absence of this evidence, the Applicant has not discharged its evidential burden and as long as that burden is not discharged the Respondent cannot be called upon to prove otherwise.

40. That may be so, however, there is no prejudice that will be suffered if the Respondent adduced evidence that it is in a position to refund the money if it is paid and the Appeal succeeds.

41. However the question remains, has the Applicant proved it will suffer substantial loss? That takes me to the issue of the security offered. I have considered the rival submissions by both Parties; I find that, indeed, the Applicants have submitted that they are willing to be bound by the fair conditions the Court will impose in relation to the same. They have offered two types of securities: An Insurance guarantee from Jubilee Insurance Company or in the alternative a Bank Guarantee from a reputable foreign Bank. Both of these securities are not acceptable to the Respondents, who prefer a deposit of the total decretal sum in a joint interest earning account.

42. It is therefore clear that, the issue is not the provisions, but the type of security that will serve the interest of both Parties, and in doing the best that I can, in the given circumstances, I find that, it will be in the interest of justice to order that half of the decretal sum be deposited in a joint interest earning account as aforesaid and the Applicants provide a Bank Guarantee for the other 50% of the decretal sum.

43. The said sums and/or Guarantee to be deposited and/or provided within Thirty (30) days of the date of this order.

44. In default of compliance with the order of deposit and/or provision of the Bank Guarantee and within the stipulated period, the Respondent will be at liberty to levy and/or proceed with execution for the decretal sum forthwith and without further reference to the Court.

45. In that case, there will be a stay of execution on the above stated terms. The costs of this Application will be borne by the Applicant.

46. It is so ordered.

**Dated, delivered and signed in open Court this 21<sup>st</sup> day of March, 2018.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

Ms. Kiriba for Ochieng for the Plaintiff/Respondent

Ms. Kahiti for the Defendant/Applicant

Lang'at.....Court Assistant