



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 178 OF 2013

SEYANI BROTHERS & COMPANY (K) LIMITED.....PLAINTIFF

VERSUS

AFFILIATED BUSINESS

CONTRACTORS LIMITED.....DEFENDANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 30th August, 2017 brought under the Provisions of Sections 1A, 1B, 3A and 65 (1) (b) of the Civil Procedure Act and under Order 42 Rule 6 of the Civil Procedure Rules.

2. The Applicant is seeking for orders:-

(i) That there be a stay of execution of the Judgment of the Honourable Court delivered on 15th August 2017 pending the lodging, hearing and determination of the Applicant's intended Appeal against the said judgment;

(ii) That the Respondent be restrained from executing the Judgment and decree in HCCC No. 178 of 2018;

(iii) That the costs of this Application be costs in the cause.

3. The Application is premised on the grounds on the face of it and on the Supporting Affidavit dated 30th August 2017 sworn by Zephania Gitau Mbugua, a Director of the Applicant Company herein

4. He deposed that, the Court in the said judgment, dismissed the Applicant's counter-claim and ordered the Parties to, within fourteen (14) days thereof, deal with the issue of the final statement of account and thereafter take a mention date for purposes of determining the outstanding issues and closure of the matter.

5. That the Court also found that the final Certificate of payment No. 13 was properly drawn, was due for and payable within fourteen (14) days of the date of presentment together with one half of the retention sums.

6. Being aggrieved by the said judgment the Applicant filed a Notice of Appeal before this Honourable Court on 28th August 2017 and believes that he has an arguable appeal as per the grounds set out in the draft Memorandum of Appeal.

7. Further on the 24th August 2017, the firm of M/S Kale Maina & Bundotich Advocates, on record for the Respondent herein, wrote to the Applicant's Advocates indicating that they were awaiting their urgent response with regard to the Applicant's implementation of the orders of this Honourable Court. In that case the Applicant is quite apprehensive that if execution is to proceed, the same will render its intended appeal nugatory and occasion a grave miscarriage of justice, on the Applicant should the Appeal be successful, as the Applicant will not be able to recover its property and/or the substantial amount that would be paid out to satisfy the award of the Court.

8. It was argued that moreover, the Applicant has no knowledge of the assets of the Respondent herein and therefore any funds paid will be beyond the reach of the Applicant for recovery should its intended appeal be successful. The Applicant submitted that it is ready to tender such security as the Honourable Court may direct to, pending the hearing and determination of its intended Appeal.

9. On that basis therefore this is a proper case for the granting of the orders for stay of execution pending appeal and it would be in the interest of justice that the execution is stayed to allow the Applicant to ventilate its grievances on appeal.

10. The Application was opposed vide a Replying Affidavit dated 5th October 2017, sworn by Karsan Khimji Seyani, a Director of the Plaintiff's/Respondent's Company. He stated that the Defendant/Applicant has not filed any application of stay of execution at the Court of Appeal and within which they can seek an order of this Honourable Court to grant a stay of execution pending hearing and determination of any such Application and Applicant's Advocates have not served upon the Respondent any Notice of Appeal as alleged.

11. He further stated that for the Court to grant a temporary stay of execution, the Defendant/Applicant must tender evidence to demonstrate that it :-

- (i) Suffer substantial loss unless the order is made
- (ii) The Application has been made without unreasonable delay; and,
- (iii) It has offered suitable security for the due performance of the decree

12. The Respondent averred that the Applicant has not even honoured any of the orders of the Court in respect of the aspects which they have clearly indicated they do not intend to appeal against and that they are undeserving of any protection from the Honourable Court. Neither has the Applicant offered any security in lieu of the payment of the decretal sum.

13. That Respondent stated that it is a respectable Company in the construction and is currently undertaking many projects worth billions of Kenya Shillings, including the extension works at Village market and constructions at Sanlam House therefore it has the means to easily refund the Applicant the decretal sum in the unlikely event that the intended Appeal (if any) succeeds.

14. The argued that it Respondent completed the construction of the Applicant's premises in the year 2011 which the Applicant has been enjoying its use and possession but has refused to pay the certified payment yet it is evidence from the Certificate of Search of the title of the premises that the Applicant has borrowed a sum of Kshs 123,000,000 from Housing Finance Company of Kenya Limited on the strength of the complete premises. Therefore the Applicant is deliberately frustrating the Respondent by refusing to settle the amount claimed.

15. However in a rejoinder the Applicant filed a further Affidavit sworn by Zephania Gitau Mbugua dated 23rd October 2017, who deposed that an Application for stay of execution before the Court of Appeal is not a requirement that this Court ought to take into account before granting a stay of execution pending Appeal as alleged.

16. That the assertion that no security is offered is not entirely true as the security is given by order of the Court and that the Application, explicitly stated that it is ready to tender such security as the Honourable Court may direct pending the hearing and determination of the Appeal.

17. That the Respondent's threatened execution, despite the Court order, as well as its extraction of the decree demonstrate the imminent risk of substantial loss on the part of the Applicant, which action would greatly prejudice the outcome of the Appeal.

18. The Applicant refuted the allegations that it has not honoured the orders of the Court and argued it has been demonstrated that there is currently an order in force staying the execution of the judgment of the Honourable Court pending the hearing and determination of the instant application. Therefore the Applicant is not in breach of the orders of the Court as alleged or at all.

19. However, the Applicant argued that on a without prejudice to the foregoing, even with the stay orders in place, it has in utmost good faith had its project Architect contact the Respondent and is awaiting its response to enable it conclude the issue of Certificate No. 2, a fact which the Respondent has materially sought to conceal.

20. That the loss caused by the sale of the property, in the event the Appeal is successful would be irreparable as the property, which currently stands on prime land in Upper Hill, is valued at a sum far greater than the sums in the partial decree and once the vantage location is lost, it shall not be recoverable.

21. The Applicant averred that it is willing to provide security in the form of a bank guarantee or such other terms as the Honourable Court deems fit pending the hearing and determination of the Appeal. The Applicant refuted the assertion that the charge on the property was obtained on the strength of the completed building as alleged. That the Applicant had charged the said property Land Reference Number 209/9346 severally before the suit herein arose and even used the sums of the charged property to finance the construction of the building.

22. It was further argued that the Applicant has continued to incur the costs and huge losses arising from the debt taken to finance the construction after the Respondent failed to undertake defects repair leading to loss of tenants at the premises.

23. At the conclusion of the arguments above the Parties agreed to dispose of the Application by filing submissions. The Applicant identified the issues for the Honourable Court's determination as follows:-

- (i) *Whether the Defendant/Applicant has established grounds for the grant of orders of stay of execution;*
- (ii) *Whether the Defendant/Applicant is entitled to the prayers sought*

24. It was submitted that the statutory provision underpinning the granting of orders of stay pending appeal to the High Court is found under Order 42 Rule 6(2) of the Civil Procedure Rules which states that:-

“No order for stay of execution shall be made under sub rule (1) unless:-

(a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay;

(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on his has been given by the Applicant.

25. The case of; **Peter Ondande t/a Spreawett Chemis vs Josephine Wangari Karanja (2006) eKLR** was cited as having set out the legal threshold for the granting of stay pending appeal and held that:-

“For this Court to grant stay of execution, it must be satisfied that substantial loss may result to the Applicant if stay is not granted. Further, the applicant must have filed the Application for stay of execution without unreasonable delay. Finally, the Applicant must provide such security as may ultimately be binding upon him.”

26. The Applicant further submitted that it shall suffer substantial loss in the event that the Honourable Court does not grant the orders sought and relied on the case of; **Antoine Ndiaye vs African Virtual University (2015) EKLR**, where the Court held that:

“...substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

27. The Court in the same case further held that:-

“The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the Appeal. This is what substantial loss would entail...”

28. That the Respondent has already as aforesaid intimated its intention to attach and sell the Applicant's property L.R. No. 209/9346, despite the stay orders served upon it as on 19th September 2017, on or about 20th September 2017, in total disregard of the orders, the Applicant proceeded to write to the Defendant's bankers seeking to attach the said property.

29. The Applicant urged the Honourable Court to take cognizance of the fact that this is the same property L.R. No. 209/9346 whose payment certificates constitute the subject of the intended Appeal and therefore in the event the stay orders are not granted, the execution of the decree will be effected thereby creating a state of affairs that will irreparably affect and negate the essential core of the Applicant as the successful party in the Appeal. Reliance was placed on the case of; **Antoine Ndiaye case (supra)**, and that the Applicant is apprehensive that it will not be able to recover the money should the Appeal succeed.

30. The case of; **International Laboratory for Research on Animal Diseases vs Kinyua (1990) KLR 403** was cited where the Court in an Application for stay pending appeal held that:-

“...the allegation that there was a reasonable and justifiable apprehension of the applicant being unlikely to recover the money from the Respondent called for rebuttal evidence which was not given...”

31. Therefore the Respondent's financial ability is called into question, and the burden of proving such ability immediately shifts to the Respondent and as held in the case of; **ABN Amro Bank N.V. vs Le Monde Foods Ltd Civil Application No. NAI 15 of 2002** which was approved the holding in the case of; **Kenya Orient Insurance Company Limited vs Paul Mathenge Gichuki & Another (2014) eKLR**, the Court held that:-

“The bank in this case is required to pay over to the Respondent over Kshs 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any operated by the Respondent to see if there is any money there. So 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 able in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but 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 and so on.”

32. That the Respondent alleges that it is undertaking many projects worth billions of shillings but without an iota of evidence to prove that it is actually undertaking these works or any works at all. The Applicant argued that this Honourable Court to find that the Application was filed timeously.

33. The Applicant is ready and willing to comply with any conditions set by this Court and it is willing to comply with the orders that this Court may issue with respect to performance of the decree in granting of the orders sought in accordance with Order 42 Rule 6(2) (b) of the

Civil Procedure Rules.

34. The Applicant has demonstrated at paragraph 14 of its Further Affidavit that it is ready and willing to issue a bank guarantee and/or comply with any conditions that may be imposed by the Court as security for due performance of the decree.

35. The case of; ***Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR***, was cited where the the Court of Appeal stated as follows:-

“The inherent powers of this Court, like discretionary powers, are exercised as a means of enabling the court to take any such action and make such orders as to maintain its character as a court of justice; to prevent its process from being misused; to preserve the subject matter of the dispute in an Appeal and to protect a party from suffering injustice.”

36. However the Respondent reiterated that, it is instructive to note that the Applicant has not filed an Appeal within sixty (60) days from the date of filing of Notice of as required under the relevant law which should have been filed an Appeal on or before 28th October 2017. That it is not in dispute that the Court gave a partial judgment and a partial decree issued and the Court is yet to make an order with respect to interest on Certificate No. 2, retention sum and on costs. As per the provisions of Section 94 of the Civil Procedure Act which states as follows:-

“where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

37. The Respondent also submitted that the Respondent has not commenced any execution proceedings and neither has the Applicant been granted leave to execute before an award of the remaining limb of orders and costs is made.

38. That indeed the Respondent being alive to the provisions of Section 94 aforesaid, has filed an Application dated 28th September 2017, seeking for orders on the issue of interest and costs and which Application is yet to be heard and determined. Therefore the upshot of the above is that the Applicant's Application should be dismissed with costs as it is premature for the reasons that:-

(i) No Appeal has been filed;

(ii) The decree is partial and the Court is yet to make an award on interest and costs;

(iii) The Court has not granted leave to the Plaintiff to execute the partial decree'

39. At the conclusion of the arguments by the parties and after considering the submissions on the subject Application I find that the provisions that guide stay of execution of a judgment pending Appeal are provided for under Order 42 Rule 6(2) which provide that:-

“No order for stay of execution shall be made under subrule (1) unless—;

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

40. From the authorities cited, above the key factor the Applicant has to establish is that it will suffer substantial loss if the orders sought are not granted. In this regard the Applicant as aforesaid and at the risk of the Court repeating itself, averred that, it intends to Appeal against the judgment delivered herein, and that the Respondent has already commenced execution as evidenced by the Respondent letter written to the Applicant's Bankers seeking to attach the Applicant's property L.R. No. 209/9346, the same property whose certificates constitute the subject of the intended Appeal despite the stay orders being given and served.

41. That the Applicant is apprehensive that it shall not recover the money if the Appeal succeeds, as the Respondent has not discharged the burden of proof of its ability to refund the money if the Appeal succeeds and its assets are also unknown. That the Applicant is ready to furnish security in the form of a Bank guarantee or comply with any of the conditions the Court may impose as security.

42. The Respondent did not respond to these averments on substantial loss and provision of security directly and merely submitted that, no Appeal has been filed, the decree is partial and the Court is yet to make an award of interest and costs as leave has not been granted to execute the partial decree.

43. In an application of this nature as herein, the Court has the discretion to grant or fail to grant the order for stay of execution and of course being live to the fact that the exercise of this jurisdiction should be done judicially and not capriciously (See *Butt vs Rent Restriction Tribunal (1982) KLR*).

44. In the exercise of that discretion the Court will grant the order stating execution where it appears to be equitable to do so with a view of temporary preserving the status quo to allow the Applicant prosecute the intended Appeal. But again the Respondent's right to immediate

realization of the judgment must be considered. The Applicant has offered to provide a bank guarantee to protect the interest of the Respondent.

45. Based on the above facts and law and in the interest of justice, I allow the Application herein and order that there shall be a stay of execution of the decree on conditions that;-

(i) The Applicant deposits the total principal sum of Kshs 22,387,568.70 plus interest from the date of judgment to the date of this order in an interest earning account in the joint names of the parties within Thirty (30) days of this order;

(ii) The Applicant pays costs of this Application to the Respondent;

(iii) In default of compliance with the above orders under (i) and (ii) above execution to proceed forthwith

46. It is so ordered.

Dated, delivered and signed in an open Court this 21st day of March, 2018.

G.L. NZIOKA

JUDGE

In the presence of:-

Mr. Buntotich.....for the Plaintiff/Respondent

Mr. Jelle for Mr. Ng'enofor the Defendant/Applicant

Mr. Lang'at..... Court Assistant