



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**PETITION NO.9 OF 2017**

**IN THE MATTER OF LONGONOT GATE DEVELOPMENT LIMITED**

**BETWEEN**

**LONGONOT GATE DEVELOPMENT LIMITED.....APPLICANT**

**-VS-**

**RAINBOW PROJECTS LIMITED.....1<sup>ST</sup> RESPONDENT**

**SALEEM HAJI.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Applicant filed Notice of motion dated 25<sup>th</sup> April 2017 seeking the following orders:-

1. Spent
2. Spent
3. Spent
4. Stay of further proceedings pending lodging, hearing and determination of intended appeal.
5. In the alternative stay of execution of this court's ruling dated 15<sup>th</sup> November 2017 appeal and that the respondent be restrained from acting upon purported demand dated 26<sup>th</sup> September 2016 and statutory notice dated 31<sup>st</sup> March 2017 pending hearing and determination of the intended.
6. That the respondent be restrained from advertising or getting or in any other way giving notice to the public or any interested party of the filing the statutory demand filed on 31<sup>st</sup> March 2017 and issued on 3<sup>rd</sup> April 2017 or giving notice to the public or an interested party in relation to creditors petition.

Grounds on the face of the application are that the applicant is dissatisfied with this honorable court's ruling and intends to preserve the subject matter of the intended appeal.

Grounds stated for the appeal are that this court declined to find that the statutory demand issued on 31<sup>st</sup> March 2017 was premature, unprocedural and against the express provisions of **Insolvency Act 2015** and that statutory demand dated 26<sup>th</sup> September 2016 was not served upon the applicant as stipulated by the law; did not conform with requirements of the law and should have been set aside.

The applicant cited the case of ***Madhupaper International Ltd V Kerr (1985)KLR840 And Erinford Properties Vs Chesire County Homes (1974)2ALL ER 448*** where the court held:-

***“that on a motion for stay pending trial, the question is whether the applicant has made out a sufficient case to have the respondent restrained pending trial and on trial the question is whether the plaintiff has sufficiently proved his case; and on the other hand where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of the appeal; that one of the factors to be***

*considered is possibility that the judgment may be reversed or varied ...that a judge may be clear in his conclusion yet on appeal be held wrong; that no human being is infallible...that the comparative effects of refusing or granting an appeal are such that it would be right to preserve status quo pending the appeal.”*

The applicant submitted that, in appealing against the ruling delivered on 15<sup>th</sup> November 2017, the applicant is exercising its right of accessing the court of appeal under article 48 of the constitution and cited **Bungoma High Court Misc. Application Number 42 Of 2001: James Wangawa & Another Vs Agnes Naliaka Cheseto** where the court held:-

*“that the right of appeal is a constitutional right that actualizes the right to access to justice, protection, and benefit of the law, whose essential substance encapsulate that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the right of appeal.”*

The applicant submitted that it seeks to protect the subject matter of the intended appeal which constitute real estate development in its advance stages at Longonot Gate, Naivasha and which subject matter could be compromised or subjected to a major setback if the respondent proceeds with insolvency petition.

In response the respondents filed a replying affidavit dated 6<sup>th</sup> December 2017 by Saleem Haji who is the 2<sup>nd</sup> respondent and the managing director of the 1<sup>st</sup> respondent. He averred that failure by the applicant to secure or compound the debt even after service of statutory demand on 26<sup>th</sup> September 2016 is an act of insolvency and demonstrate that the applicant is unable to pay its debts.

He added that the statutory demand was properly drafted and issued under **Section 384 of Insolvency Act 2015** and not regulation **15 of Insolvency regulation 2016**; that whether it is referred to as statutory demand or demand for payment as suggested by the applicant remains a matter of semantics that does not go to the root of whether the applicant is indebted to the 1<sup>st</sup> respondent and has been notified of the same.

He averred that before filing the petition it has to be reviewed by the official receiver that the petition is in order and that while filing this petition, the official receiver advised that a fresh demand needed to be served. He added that the petition was filed and served on condition that it would not be set down for hearing or directions until a period of 21 days within which the applicant is entitled to apply for it to be set aside has lapsed and that is the reason the court issued a hearing date of 23<sup>rd</sup> May 2017.

He averred that all the processes leading to filing of insolvency petition were carried out in accordance with the law and directions from the official receivers office and therefore beyond reproach.

He averred that the ruling that this court issued was sound; that it held as follows:-

*“Statutory demand dated 26<sup>th</sup> September 2016 was titled “Statutory Demand under Section 384 of The Insolvency Act 2015 and gave the debtor company 3 weeks to pay the debt failure which it will be deemed unable to pay its debts in the meaning of Section 384 of The Insolvency Act.”*

He averred under **Order 42 Rule 6 of the Civil Procedure Rules, 2010** the applicant ought to demonstrate that substantial loss may result if unless order for stay is issued and that applicant will offer security for performance of the decree.

He averred that the applicant has adamantly refused to pay the debt amount to the 1st respondent for 2 years. That no plausible reason has been advanced by the applicant for failure to pay the outstanding debt and the applicant has conveniently failed to submit on the furnishing of security.

He averred that the applicant is seeking assistance of this court in stopping the gazettement/publication of this petition with a view of concealing to its bankers, creditors, intending customers/clients and general public of the fact of its inability to pay its debt. That this court should not condone this habit as a person should not benefit from its wrong; that insolvency petitions should be advertised to protect the innocent. He added that the respondent stand to suffer as it applied for facilities from the banking institutions in order to undertake the project and risks sale of securities.

He urged court to balance the interest of the parties by ordering the respondent to deposit **Kenya Shilling Sixty Four Million, One Hundred and Ninety Six Thousand, Four Hundred and Thirty and Fifty Eight Cents (Kshs. 64,196,430.58)** which was outstanding as at 26<sup>th</sup> September 2016.

In conclusion, he submitted that this application is a sham intended to delay the course of justice.

I have considered grounds for the application herein. I have also perused and considered rival submissions by the parties herein plus annexures to the affidavits filed.

The applicant has indicated dissatisfaction with the ruling of this court. It argues that if stay is not granted the intended appeal will be rendered nugatory. The applicant's wishes to challenge the finding on validity and service of notice required to be served before filing petition. I made a finding on the above and would not want to go into the merits of the intended appeal. I agree with the decision in **Madhupaper International Ltd V Kerr (1985) KLR840 and Erinford Properties Vs Chesire County Homes (1974)2ALL ER 448** that however much I am convinced that my decision is sound, it would be in the interest of justice to give an opportunity to a dissatisfied party to challenge it in the court of appeal. While the appeal is being process it would be in the interest of justice to stay my ruling. The stay will serve to protect the applicant's image in the eyes of the public in the unlikely event that the superior court finds that I erred in my finding.

I however note that the applicant is challenging the procedure of format filing and service of the notice in this petition. The respondent has indicated that the indebtedness of the respondent to the applicant was **Kenya Shilling Sixty Four Million, One Hundred and Ninety Six Thousand, Four Hundred and Thirty and Fifty Eight Cents (Kshs. 64,196,430.58)** as at 26<sup>th</sup> September 2016 which has not been disputed.

On the other hand, the applicant has argued that the fatal error on the procedure cannot be explained by allegation to the effect that the indebtedness has not been disputed.

My view is that the scales of justice need to be balanced. The applicant's interest is to protect its reputation and the respondents interest us to be paid its dues. It would be in the interest of justice to stay the ruling delivered on 15<sup>th</sup> November 2017 pending hearing and determination of the intended appeal. I proceed to stay the said ruling on condition that half of **Kenya Shilling Sixty Four Million, One Hundred and Ninety Six Thousand, Four Hundred and Thirty and Fifty Eight Cents (Kshs. 64,196,430.58)** is deposited in court within 60 said days from the date of delivery of this ruling.

Costs in the cause.

**Dated and Delivered at Nairobi this 18<sup>th</sup> day of April, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

.....**COURT ASSISTANT**

.....**COUNSEL FOR APPLICANT**

.....**COUNSEL FOR RESPONDENTS**