



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 241 OF 2011

CABRO EAST AFRICA LIMITEDPLAINTIFF/RESPONDENT

-VERSUS-

ROSOGA INVESTMENTS LTD.....DEFENDANT/APPLICANT

RULING

1. Judgment was delivered in this matter on the 4th May 2017 in favour of the Respondent herein. A Notice of Appeal was filed on the 16th October 2017 by the Defendant now applicant.

By his application dated 16th October 2017 the applicant seeks an order of stay of execution of the decree pending appeal.

2. An order of this nature is anchored under Order 42 Rule 6 of the Civil Procedure Rules which sets out the conditions a party must meet, for the said orders to be granted, thus

(6) (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and 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.

3. The applicant avers that the appeal has high chances of success and the applicant is likely to suffer substantial loss if the decree is executed and that is willing to provide adequate security. It is further averred that execution of the decree will render the appeal nugatory, as the amount may not be recoverable should the appeal be successful. The application is opposed by a replying affidavit sworn by one Fixan Ashraf, the Managing Director of the plaintiff/Respondent Cabro East Africa Ltd on the 4th December 2017.

4. In summary, the Respondent avers that the application was not filed timetiously, that being a money decree, there is no likelihood of the appeal being rendered nugatory as it is able and capable of paying back the decretal sum and has annexed bank statement to show its liquidity and ability to pay, and that no security has been offered save for a statement that it is willing to offer sufficient security.

5. I have considered parties written submissions.

As held in the case **Alhyder Trading Co. Ltd -vs- Lucy Jepnetich Mbei, Eldoret Civil Appeal No. 135 of 2014,**

“--- Whether or not to grant stay of execution pending hearing of an appeal is at the discretion of the court, and the conditions stated under Order 42 rule 2 of Civil Principal Rules are only meant to be guidelines to assist the court in the exercise of its discretion.”

6. This application was brought to court over five months after the judgment. I agree with the Respondent that a period of five months in the circumstances is unreasonable and no plausible explanation was offered. See also – **Jaber Mohsen Ali & Another ELC No. 200 of 2012 (2014) e KLR, Winfred Nyawira Maina -vs- Peterson Onyieko Gichana (2015 e KLR.**

7. The explanation by the applicant that unavailability of the proceedings and luck of typed proceedings in my view is not a sufficient reason as these may not be satisfactory for the purposes of this application. I am not satisfied of the explanation.

8. Substantial loss that may be suffered by an applicant if a stay order is denied is the cornerstone in this kind of application. It is not enough for an applicant to state that it will suffer loss. He must prove by specific and cogent details what type of loss may be suffered. This a money decree. See **Kenya Shell Ltd -vs- Benjamin Karuga Kibiru and Another, Court of Appeal Civil Application No. 97 of 1986 1**

KAR 1018. Other than stating that the applicant will suffer substantial loss as the money will be out of reach of both parties, and may not be recoverable if the appeal succeeds, no particulars or details of the said loss were provided.

9. A successful party ought not be shut out of its fruits of judgment on mere allegations of substantial loss and appeal being rendered nugatory without tangible proof of loss being shown to the court – **Machira t/a Machira & Co. Advocates -vs- East African Standard (No. 2) e KLR.**

10. On whether or not an appeal may be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if not reversible, whether damages will reasonably compensate the aggrieved party – **Reliance Bank Ltd -vs- Norlake Investments Ltd (2002) EA 227 Page 222.**

Being a money decree, I find no reason why compensation in terms of money would not suffice.

11. The Respondent has shown by its bank statements that it is liquid and would have no problems paying back the 4,793,064/= decretal sum should the appeal be successful - **Order 42 rule 6(2) (a) of Civil Procedure Rules.** See also **Court of Appeal decision in Reliance Bank Ltd** above.

12. The applicant has stated that it is ready to offer sufficient security for the due performance of the decree. I agree with the court's holding that such security ought not be offered upfront so long as a party states it is willing to abide with what security the court may order – **Selestica Ltd -vs- Gold Rock Development Limited (2015) e KLR.** The court in its discretion, and upon considering the circumstances of the case, is empowered to direct and order the type of security sufficient to cushion due performance of the decree.

13. Having found that the applicant has failed to satisfy the court on the two important limbs of stay, to establish the arguability of the appeal being rendered nugatory and the substantial loss that may be occasioned if the orders are denied as well as the unreasonable delay, I proceed to dismiss the application with costs to the Respondent.

Dated, signed and delivered this 24th Day of May 2018

J.N. MULWA

JUDGE