



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 540 OF 2017

NORMAN TRACTORS & FARM EQUIPMENT LTD.....APPELLANT

VERSUS

SIGMA SUPPLIES LIMITED RESPONDENT

RULING

1. This ruling seeks to determine a Notice of Motion dated 9th October, 2017 and filed under the provisions of section 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6 (1) of the Civil Procedure Rules seeking orders that;

(a) the applicant be granted leave to file and serve its record of appeal out of time and/or that time for filing and serving the said record of appeal be extended.

(b) an order of stay does issue staying the judgment entered on 16/03/2017 and subsequent execution proceedings pending the hearing and determination of the Appeal; and

(c) Costs of the application be granted to the Appellant.

2. The Application is premised on the grounds on the face of the application and the Supporting, further, and further supporting affidavits of IRAF EBRAHIM dated 9th October, 2017, 27th October, 2017 and 3rd April, 2018 respectively. It is deponed that after the judgment was entered, the defendant made an application in which he offered the log book of tractor KCTB 286J as security, pending appeal and a ruling was delivered on 5th October, 2017 dismissing the application. It is further deponed that the ruling was read in the absence of the Appellant. He averred that he was aware of the ruling date but he had written to the executive officer notifying him that he would not be available on that date as he had gone to attend a criminal matter in Mombasa. The Appellant deponed that the ensuing proceedings after the judgment was entered on 16/03/2017 is what has caused the delay and it is therefore in the interest of justice that time be extended and the judgment of the lower court be stayed pending the appeal. In the further Affidavit, the Applicant explains what was happening in the suit and the applications that have emanated therefrom.

3. The Application was opposed by the Respondent who filed a Replying Affidavit dated 13th October, 2017 sworn by Julius Orenge wherein he has deponed that the current application is an extreme abuse of the court process and should be dismissed. He deponed that the Applicant had filed a similar application and a conditional stay was granted but the Applicant failed to comply with the conditions given by the trial court.

4. This Application was canvassed orally in Court which submissions I have considered. The history of this matter is that a judgment was delivered by the lower court on 16th March, 2017 and the Applicant herein filed an application dated 24/7/2017 seeking orders of stay of execution and leave to file an appeal out of time. The application was heard and granted on 27/7/2017, on condition that the Applicant does deposit the full decretal amount of Kshs. 454,180/= in Court within 30 days and upon compliance, to file and serve its Memorandum of Appeal within 14 days. Aggrieved by the ruling, the Applicant filed another application dated 10/8/2017 seeking a review of the orders of 27/7/2017 to be allowed to provide alternative security in form of log book for tractor KTCB 286 J which application was heard and dismissed on 5/10/2017. The instant application therefore seeks to stay the ruling delivered on 5/10/2017 and to extend the time for filing the Appeal.

5. **Section 79G of the Civil Procedure Act** provides for the timelines for filing an appeal where it states that , “*Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*”

6. The instant application was filed on 9th October, 2017, 4 days after the ruling was delivered. By then, the Applicant was within the time

frame of filing the Appeal since 30 days had not lapsed.

7. Secondly, the Applicant seeks order for stay of the judgment entered by the lower court on 1^{6th} March, 2017 and has deponed that they have an arguable appeal with high chances of success. It has been argued by the Respondents that the application is res judicata having been heard and determined by the lower Court. This Court, however, has jurisdiction to hear and determine an application for stay of execution irrespective of whether the same had been heard and determined by the lower Court. This is provided for in Order 42 Rule 6 (1) which provides that, “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

8. Order 42 Rule 6(1) provides the condition for granting an order staying execution which are;

- (a) That the application has been made without unreasonable delay;
- (b) security for the decree or order has been given; and
- (c) That substantial loss may result to the Applicant unless the order for stay is made.

9. Substantial loss is the backbone of an application for stay of execution. The Applicant has to demonstrate what they stand to lose in case the stay is not granted and appeal happens to be successful. The Applicant has not at all demonstrated that the Respondent is not able to refund the decretal sum in case the appeal is no successful and execution has taken place.

10. Substantial loss was discussed in the case of **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR where the court held that,**

*“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIKA CHESETO** 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...”

11. The Applicant has offered to present the log book of tractor registration number KTCB 286J which security is opposed by the Respondent on the grounds that since the decree is a monetary one, the security offered is not adequate since the tractor is prone to depreciation and it is not predictable how long the Appeal would take. In the ruling sought to be appealed against, the trial magistrate considered this aspect of the security. This court has to strike a balance between the Respondent who has a judgment which they would like to execute and the Applicant who have an appeal. The Respondent needs to be assured that in the event that the Appeal is not successful, they will not face difficulties in executing and this is the reason why courts would normally require the Applicant to deposit the decretal amount.

12. To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent. See **M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997”**

13. Since the subject decree is a monetary one, it would be in the interest of justice to ensure that the Respondents would not encounter difficulties in executing in the event the Appeal does not succeed. Therefore, in the circumstances, this court will grant the Applicant a conditional stay on the terms that the Applicant will deposit the whole of the decretal sum in a joint interest earning account to be operated by the Applicant and Respondent or between their Advocates as the case may be. The decretal sum is to be deposited within 30 days from the date of this ruling failure to which the stay orders shall lapse. The appeal to be filed within 14 days from today. The costs of the Application shall abide the outcome of the Appeal.

Dated, Signed and Delivered at Nairobi this 21st Day of June 2018.

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L. NJUGUNA

JUDGE

In the Presence of

.....*For the Plaintiff*

.....*For the Defendant*