



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 96 OF 2018

ELECTRO WATTS LIMITED.....APPELLANT

VERSUS

ALIOS FINANCE KENYA LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated on 14th March 2018 and filed on 16th August 2018 was brought pursuant to the provisions of Order 42 Rule 6 (1) & (2), Order 51 Rule 1, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. Prayers Nos (1) and (2) therein were spent. It sought the following remaining prayers:-

a. Spent

b. Spent.

c. THAT pending the hearing and determination of this appeal, this Honourable Court be pleased to order a stay of execution of the Lower Court's order dated 24th January, 2018.

d. The costs of this application be provided for.

THE APPELLANT'S CASE

2. On 13th March 2018, the Appellant's Managing Director, Steve Elkington, swore the Affidavit in support of the application herein. The Appellant's Written Submissions were dated 14th May 2018 and filed on 15th May 2018.

3. The Appellant's case was that the lower court granted it an injunction on condition that it deposited fifty (50%) percent of the contested sum within forty five (45) days failing which the injunction would lapse. It was aggrieved by the said Ruling which it intended to appeal against.

4. It pointed out that it was willing to provide such security as this court would deem fit to grant. It added that it would suffer substantial loss if the Respondent proceeded with the attachment and sale of the subject matter of the suit herein, it was also its contention that it had filed its present application without any delay.

5. It urged this court to grant it a stay of the said order because not granting the said order would render its Appeal nugatory and the proceedings herein a mere academic exercise.

THE RESPONDENT'S CASE

6. In response to the said application, the Respondent's Legal Officer, Sylvia Njoroge, swore a Replying Affidavit on 2nd May 2018. It was filed on even date. The Respondent's Written Submissions were dated 4th June 2018 and filed on 5th June 2018.

7. Its case was that it had extended an Investment Loan Facility to the Appellant in the sum of Kshs 3,000,000/= to finance the purchase of two (2) units new 6.0 KVA Perkins Acoustic Generator Sets Couple to Leroy Somer Alternator (Generators) but it defaulted in repayment of

the said loan. It pointed out that it ought to be allowed to exercise its contractual rights as per the Loan Facility Letter.

8. It contended that the Appellant had been indolent and that he had misled this court that he had fully paid the said loan. It averred that this court should not grant the order for stay as this was tantamount to amending the terms of agreement between itself and the Appellant.

9. It therefore urged this court to dismiss the Appellant's application with costs to it.

LEGAL ANALYSIS

10. The Appellant submitted that the power of the court to grant a stay of execution was discretionary. It stated that all that an applicant seeking a stay of execution had to demonstrate were the three (3) conditions provided in Order 42 Rule 6(2) of the Civil Procedure Rules.

11. It referred this court to the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto** (citation not given) in support of his submission that substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.

12. It argued that the generators were the property of the Government of Kenya and consequently, the Respondent could not purport to repossess the same. It stated that repossessing the Generators would sour its relationship with the Government of Kenya and damage its reputation as the latter had fully paid for the same and was now the legal owner.

13. It submitted that it filed its application without any delay, in fact, before the expiry of the forty five (45) days before the court order lapsed. It added that it was ready to deposit the security this court would deem fit to grant.

14. On its part, the Respondent argued that the Appellant had failed to demonstrate that it would suffer substantial loss. It averred that it was a sound financial institution that could compensate the Appellant in the event the Appellant succeeded in its appeal.

15. In this regard, it referred this court to several cases which had no citations – See **Equity Bank Ltd vs Taiga Adams Company Ltd**, **Elena D Korir vs Kenyatta University** amongst other cases.

16. It also stated that the Appellant had not addressed itself to the issue of security and that granting a stay of execution would outstrip the value of the loan that continued to accrue interest and charges.

17. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant must demonstrate the following:-

a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

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

18. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

19. Having said so, this court noted that the order the lower trial court granted was not a positive order. It was a negative order. The Appellant had been granted an injunction on condition that he paid fifty (50%) per cent of the contested amount. In the event it failed to deposit the said sum, the injunction it had been granted would be discharged. That was not an order that was capable of execution.

20. This court dealt with the issue of negative orders in the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** where it held that an order for stay cannot be granted where a negative order had been issued. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed.

21. Bearing in mind the facts of this case and the provisions of Section 2 of the Civil Procedure Act, there was no order to be executed in the event the Appellant failed to deposit the monies. The exercise of statutory power of sale was not an order emanating from court that could have been executed. Rather, it was a right that would crystallise if the Appellant defaulted in repaying the loan it had been advanced by the Respondent to purchase the Generators.

22. Accordingly, having looked at the Affidavit evidence, the Written Submissions and the case law that the parties had relied upon, this court came to the firm conclusion that it could not stay the orders that had been issued by the lower court.

DISPOSITION

23. For the reasons foregoing, the upshot of this court's Ruling was that the Appellant's Notice of Motion application that was dated 14th March 2018 and filed on 16th August 2018 was not merited and the same is hereby dismissed with costs to the Respondent.

24. For the avoidance of doubt, the interim orders of stay of execution granted by Njuguna J on 16th March 2018 and subsequently extended pending the hearing and determination of the present application are hereby discharged, set aside and/or vacated.

25. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **27th** day of **September** 2018

J. KAMAU

JUDGE