



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. CASE NO. 633 OF 2016

CIVICON GROUP LIMITED.....APPLICANT

VERSUS

EXPRESS DDB KENYA LIMITED.....RESPONDENT

RULING

1.The application dated 15th December, 2016 seeks orders that:

“1.

2.

3.

4. That pending the hearing and determination of the Applicant’s appeal, a stay of execution of the ruling delivered on 11th November 2016 by the Honourable Mr. D.W. Mburu (Magistrate) in Nairobi CMCC No 4439 of 2015; Express DDB Kenya Limited vs Civicon Group Limited and all other consequential orders be and is hereby granted.

5. That pending the hearing and determination of the Applicant’s Appeal a stay of execution of the Interlocutory Judgement entered in Nairobi CMCC No 4439 of 2015; Express DDB Kenya Limited vs Civicon Group Limited on 9th October 2015 and all other consequential orders be and is hereby issued.

6. That pending the hearing and determination of the Applicant’s Appeal, a stay of execution of the Interlocutory Judgement entered in Nairobi CMCC No 4439 of 2015; Express DDB Kenya Limited vs Civicon Group Limited on 9th October 2015 and all other consequential orders be and is hereby granted.

7. That leave be and is hereby granted to the Applicant to appeal out of time against the whole Ruling delivered on 11th November, 2016 by the Honourable Mr. D. W Mburu (Magistrate) in Nairobi CMCC No 4439 of 2015; Express DDB Kenya Limited vs Civicon Group Limited.

8.That in the alternative, the time within which to file an Appeal against the Ruling delivered on 11th November 2016 by the Honourable Mr. D.W. Mburu (Magistrate) in Nairobi CMCC

No 4439 of 2015; Express DDB Kenya Limited vs Civicon Group Limited be and is hereby enlarged.

9. That the annexed memorandum of Appeal be deemed as duly filed upon payment of the requisite Court fees.

10. That this Honourable Court do make appropriate orders for the service of this Application upon the Respondent and further give directions for the hearing of this Application *inter partes*.

11. That the costs of this Application be provided for.”

2. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit sworn by Philip Nyachoti, the Applicant's counsel. It is stated that the Applicant's applications dated 3rd November, 2015 and 13th January, 2016 respectively seeking orders for the case to be referred to arbitration and for setting aside interlocutory judgment entered in favour of the Respondent were dismissed. According to the Applicant, the ruling was delivered without notice and it was not until the 13th December, 2016 when the Applicant sent a clerk to peruse the file and it was discovered that the ruling had been delivered.

3. It is stated that the Applicant is dissatisfied with the said ruling and intends to appeal against the same but the time within which to file an appeal has lapsed. It is contended that the appeal is arguable with high chances of success and that the Applicant is willing to deposit security for the due performance of the decree. That if stay is not granted the Respondent will proceed with execution and will render the appeal nugatory thereby subjecting the Applicant to substantial loss and damage.

4. The application is opposed. The grounds of opposition dated 19th January, 2017 state as follows:

“1. That the Application is bad in law because the right to appeal is not an inherent right but must be based on fact or law and the two previous Applications dated 3rd November 2015 and 13th January 2016 seeking to stay proceedings pending arbitration and set aside interlocutory judgment respectively entered in the suit herein on 9th October 2015 have been dismissed on merit by the trial court.

2. That the Applicant's Application is an empty appeal to sentiment devoid of any substance in law/fact.

3. That the application smacks of an abuse of court process as it regurgitates matters that have already been heard and meritoriously determined. Having lost in the trial court, the Applicant is now playing lottery with the application before this honourable court.

4. That this application should be dismissed to bring litigation to an end for the rights to an action do not endure forever.

5. That the Applicant's application is a sham, an abuse of the process of Court and intended to delay justice by precluding the Respondent from enjoying the fruits of its legally acquired judgment.

6. That the Applicant has misled this Honourable Court in stating that it has applied for typed proceedings in readiness to file an Appeal, which is not true. This amounts to a show of bad faith on the part of the Appellant/Applicant which renders it underserving of the equitable reliefs sought.

7. That in addition to paragraph 6 above, the Appellant/Applicant alleges at paragraph 8 of the Notice of Motion that the Respondent herein will proceed to execute the decree from the

trial court thus making its application urgent and prayer for stay necessary. Again, the Applicant is misleading this honourable court as the matter in the trial court is yet to be fixed for formal proof hearing. The applicant has therefore approached this honourable court with unclean hands.

8. That this Honourable Court ought to take into consideration the Applicant's conduct which has been wanting since commencement of the Plaintiff's suit; from its inordinate delay to institute the Application for stay pending arbitration dated 3rd November 2015 hence losing its right to rely on the arbitration clause to failing to prove that it has an arguable defence in order to set aside the interlocutory judgment entered in the suit herein on 9th October 2015. The Defendant never even bothered to file a draft Defence in the trial court to advance any argument of triable issues.

9. That further to paragraph 8 above, the Applicant has already extended its unbecoming conduct to this honourable court by its actions of material non-disclosure and deliberate misleading of the court enumerated at paragraphs 6 and 7 above.

10. That the application is bad in law, an afterthought and is only meant to further delay the Respondent from recovering the monies owed by the Applicant.

11. That court orders are not issued in vain and having demonstrated no substantial grounds for grant of orders for stay, this Honourable Court should not bow to the whims of the Applicant to stay the Ruling of the trial court of 11th November, 2016.

12. That the Applicant has not proven that it will suffer any or substantial loss if the Ruling and subsequent orders of the trial court are not stayed.

13. That the Applicant has not proven to the court that it is able to furnish to the court the security for due performance of such decree or order.

14. That from the foregoing, it would be fair, right and just that this honourable court dismisses the Appellant/Applicant's Application dated 15th December 2016.

15. That the costs of this application be in favour of the Respondent."

5. The parties opted to canvass the application by way of written submissions. I have considered the said submissions.

6. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

"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; 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."

7. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

"22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate

jurisdiction in respect of the decree or the execution thereof,

for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

8. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR**, **Wachira Karani v Bildad Wachira [2016] eKLR**).

9. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

10. The Applicant has explained the delay in filing the appeal and the application within time. The explanation that the impugned ruling was set to be delivered on 29th July, 2016 but was delivered on 11th November 2016 without notice to the parties is not controverted by any evidence from the Respondent. Indeed the copy of the ruling exhibited herein shows that it was delivered in the absence of the parties. I find the explanation for the delay satisfactory. The delay is not inordinate. The instant application was filed on 16th December, 2016. Thus the time within which to appeal lapsed on 10th December, 2016. It's a delay of six days. The Respondent has not demonstrated what prejudice it will suffer from the delay which cannot be compensated by an award of costs.

11. The Applicant wishes to exercise it's undoubted right of appeal. Thus the appeal would be rendered nugatory if the application is not allowed. This could result in substantial loss. As stated by the Court of Appeal in the case of **Kenya Shell limited vs Kibiru (1986) KLR**:

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”

12. The Applicant has offered security for the due performance of that decree. To balance the interests of both parties herein, I allow the application on condition that the Applicant deposits the decretal sum in a joint interest earning account of the counsels for both parties herein or in court within 30 days from the date hereof.

13. On the issue raised by the Respondent's counsel in respect of the affidavit in support which is sworn by the Applicant's counsel, I find the affidavit relates to none contentious matters concerning the contents of the lower court file. I do not find the affidavit incompetent.

14. On whether the appeal raises any triable issues, under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the subordinate court to the High Court. The Applicant is not required to prove that it has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

15. With the foregoing, I allow the application on the above stated terms with costs in cause.

Date, signed and delivered at Nairobi this 23rd day of March, 2017

B. THURANIRA JADEN

JUDGE