



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NUMBER 664 OF 2016

POWERBASE LIMITED.....APPELLANT

VERSUS

JHPIEGO KENYA.....RESPONDENT

RULING

The Appellant/Applicant, Powerbase Ltd filed an application dated 20th February, 2017 brought under Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 63E of the Civil Procedure Act seeking orders as follows: -

- a. That this Honourable court be pleased to certify this application urgent and the same be heard ex-parte in the first instance.*
- b. That this Honourable court be pleased to grant an order of stay of execution of the judgment of the Chief Magistrate's court in Milimani CMCC No. 1272 of 2016 (Jhpiego Kenya Vs Powerbase Limited) pending the hearing and determination of this application inter-partes.*
- c. That this Honourable court be pleased to grant an order of stay of execution of the judgment of the Chief Magistrate's court in Milimani CMCC No. 1272 of 2016 (Jhpiego Kenya Vs Powerbase Limited) pending the hearing and determination of this Appeal.*
- d. That the cost of this application be in the cause.*

The Application was premised on the grounds that: -

- i. That judgment was entered for the Respondent against the Appellant on 6th May, 2016 in Milimani CMCC No. 1272 of 2016 and the same may be executed any time.*
- ii. On 13th February, 2017 Messes Little Vineyards Auctioneers proclaimed the Appellant's movable goods and the Appellant is in fear that 7 days will lapse today and the same will be attached hence attachment shall proceed unless this Honourable court grants a stay.*
- iii. That the appeal has high chances of success as per the grounds of appeal file herein.*

The application was brought under certificate of urgency was placed before me on 20th February, 2017 and the court ordered that: -

1. That the application is certified as urgent.

2. That stay of execution of the Judgment in Milimani CMCC 1272 of 2016 pending the hearing of this application inter-partes.

3. That hearing inter-partes be on 14th day of March, 2017.

On the date set for inter-parte hearing, Mr. Muturi who appeared for the Respondent raised a Preliminary Objection to the application on the grounds that the Appellant had sought and obtained a similar order in the Magistrate's court and he had not complied with the same and that this second application in this court is blatant abuse of the court process. He annexed an order dated 24th November, 2016 by J. W. Mburu, Principal Magistrate at Milimani Commercial Court to demonstrate the abuse of the process.

Mr. Ondabu for the Applicant submitted that at the time they made the applications there were no existing stay orders, he admitted that an application had been made and orders granted and that they had prepared bankers cheques for Ksh. 1.2 Million in favour of the Chief magistrate, Milimani in compliance with the order. He, however, submitted that this court being appellate court has powers to determine whether there should issue orders of stay or not and that they are prepared to deposit the amount in court as security.

It is clear that an application for stay was made by the Appellant/Applicant in the Chief Magistrate's Court in which the Principal Magistrate issued the following order: -

"UPON READING the application presented to this court on the 10th day of November, 2016 by the advocate for the Defendant/Applicant and supported by the affidavit of Samuel Ndinguri herein sworn on the same day.

AND WHEREAS the application is coming up for inter-partes hearing on the 24th day of November, 2016 before Hon. D. W. Mburu (Mr.) Principal Magistrate in the presence of the counsel for the Defendant/Applicant and in the presence of the counsel for the Plaintiff/Respondent.

AND UPON HEARING the said counsel, and by a subsequent ruling delivered on the same day;

IT IS HEREBY ORDERED

1. That let there be a stay of execution of the ruling delivered on 7th October, 2016 pending the hearing and determination of the Defendant's appeal in the High Court on condition that the entire decretal sum and costs be deposited in court within 30 days from today's date.

2. That in default, the stay to lapse and execution to issue.

Given under my hand and the seal of this court on 24th day of November, 2016.

Hon. D W MBURU (MR)

PRINCIPAL MAGISTRATE"

The existence of the order was not disclosed to this court when the applicant brought this application under a certificate of urgency on 20th February, 2017. Had this fact been disclosed, the court would not have entertained the Applicant except in the form of an appeal. This non-disclosure and the filing of a similar application in this court when the same had been filed and granted in the Magistrate's Court is an abuse of the court process.

I, therefore, find that this application is incompetent and clearly an abuse of the court process and same is struck out.

Dated, signed and delivered at Nairobi this 21st day of March, 2017.

.....

S N RIECHI

JUDGE