



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO 54 OF 2016

(Coram: F. Gikonyo J.)

DISLEY HOLDINGS (K) LIMITED.....APPELLANT

Versus

MERU CENTRAL DAIRY CO-OP UNION LTD.....RESPONDENT

RULING

Stay of execution pending appeal

[1] The significant order sought in the application dated 1st March 2017 is stay of execution of the decree in MERU CMCC NO 281 OF 2013 pending the determination of this appeal. The application is expressed to be brought under article 159 of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules and all enabling provisions of the law. It is supported by the Affidavit of DOUGLAS M. KEERU and other grounds argued herein.

Preliminary objection

[2] A preliminary point was raised to the effect that this application is an abuse of process of court, for the Applicant was granted a conditional stay of execution whose terms are yet to be fulfilled. This objection is fairly straight-forward and I will deal with it forthwith. Order 42 rule 6 provides that:-

6.(1) 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.

Accordingly, whether the application for stay shall have been granted or refused by the court appealed from, the appellate court shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just. Therefore, this court has jurisdiction to consider the application before me. Nonetheless, to avoid the seeming dilemma on this provision, it is desirable that the Appellant should consider applying to the appellate court to set aside the stay order and supplant it with its own. Such mix will avoid unnecessary arguments on and give rule 6 a pragmatic grip.

[3] I turn to the main application. It was argued that the Appellant will suffer substantial loss if stay of

execution of the decree herein is not granted. They saw substantial loss occurring in two senses. One, the Appellant's business will be crippled if it is called upon to settle the decretal sum at this stage. They viewed the conditional stay herein to be punitive as it required payment of ½ of the money to the Respondent and the other half into a joint interest earning account. The second is that the Respondent has not discharged its evidential burden that it will make a refund of the sum which was ordered to be paid to it. They, nevertheless, stated that they are ready to provide such security as the court may order.

Respondent: we can refund

[4] The Respondents fastened a quarrel with the application and filed a replying affidavit and submissions. They argued that the Appellant did not fulfil the conditions given by the lower court for stay of execution. And, that they waited until the lapse of the earlier stay in order to rush to this court for other orders. To them these acts amount to abuse of court process. They signified their financial power and ability to make a refund of the sum of Kshs. 3,500,000 if required to do so. First, they stated that this is a money decree and the sum of Kshs. 5,600,000 claimed in the decree was money paid by the Respondent to the Appellant. Therefore, the Appellant will not suffer any loss if he is asked to pay half of the decretal sum. In any event, the Respondent argued that it is capable of making refund of any money paid to it. To support this proposition, they stated that the two instalments of Kshs. 2,800,000 each paid by them to the Appellant were paid with a lot of ease. Again, the Respondent was able to deposit a sum of Kshs. 3,260,068.80 as had been ordered by the court as condition for setting aside the ex parte interlocutory judgment herein. In addition, the trial court visited the Respondent's Dairy plant during the hearing and saw it is a huge enterprise. Therefore, they are able and willing to make any refund herein if called upon to do so.

DETERMINATION

[5] Upon consideration of the arguments presented and the law I am of this orientation. Will the Appellant suffer substantial loss unless stay of execution is granted in this suit? This is a money decree and substantial loss would ordinarily arise if the Respondent cannot make a refund of sums paid to him. The Appellant merely stated in the submissions that Respondent has not discharged its evidential burden to show that it is financially stable and capable of refunding a sum of Kshs. 3,500,000 if it is paid to them. They also made a non-committal statement in the submission that payments made by the Respondent under paragraph 11 and 15 of the Replying affidavit do not lead to an assumption that the Respondent is still financially strong. I must re-state that the Appellant bore the legal burden of laying before court such evidence that would cast doubt on the financial ability of the Respondent to make a refund herein so as to raise evidential burden on the Respondent. Before that is done, the Respondent is not under obligation to discharge evidential burden that is non-existent. Other than the generalized statements I have stated above, the Appellant did not show that the Respondent cannot make a refund of Kshs. 3,500,000 if paid over to them. But, despite that shortfall, the Respondent, on the other hand, abundantly showed its ability to make a refund. The fact that they have been able to comply with court orders and have paid huge sums in this case impels the court to find that they are able to make a refund of Kshs. 3,500,000 if the appeal succeeds. There is nothing to show that their financial ability has now dwindled. Again, and I have said this before, there is no case made out by the Appellant as to compel the court to call for financial statements or accounts from the Respondent.

[6] The foregoing notwithstanding, I am aware that in deciding the type of security to ask for the due performance of the decree that might ultimately be binding on the Applicant:-

...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.[See SEWANKAMBO DICKSON vs. ZIWA ABBY HCT-00-CC MA 0178 OF 2005, by the High Court of Uganda at Kampala]

The Appellant has argued that the sum of Kshs. 7,000,000 is huge and may cripple their operations. That may not be a basis for not paying the decretal sum herein. However, in balancing the rights of the parties

in this case, care will be taken not to stifle the right of the Appellant to appeal or blow away that of the Respondent to immediate realization of its judgment. Thus, the overall impression of this application after taking all factors into account is this. I order the Respondent to pay ½ of the decretal sum to the Respondent within 14 days of today. The balance of the decretal sum shall await the outcome of the appeal. Costs of the application shall be -in the cause. These orders supersede those by the trial court. It is so ordered.

Dated, signed and delivered in open court at Meru this 25th day of May 2017

F. GIKONYO

JUDGE