



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 781 OF 2016**

**KENYA DIASPORA HOMES EXPO LIMITED .....APPLICANT**

**VERSUS**

**EUNICE NGANGA T/A**

**SALISBURY TRAVEL & TOURS ..... RESPONDENT**

**RULING**

1. The application dated 24<sup>th</sup> May, 2017 seeks orders that this Honourable court be pleased to grant Stay of execution of the judgment of Honourable Rachel Ngetich delivered on 1<sup>st</sup> December 2016 by Honourable E. Nyaloti and the resultant Decree pending the hearing and determination of the Appeal.
2. The application is predicated on the grounds stated therein and is supported by the affidavit and further affidavit sworn by Patricia Njeri Karanja, the Applicant's Legal Officer. On 1<sup>st</sup> December, 2016 the Lower Court entered judgment for the sum of Ksh.500,000/= as general damages for breach of contract plus costs of the suit. The Applicant is dissatisfied with the said judgment and filed the appeal herein. It is stated that the Respondent has already obtained warrants of attachment and sale from the Lower Court and has already instructed Auctioneers who have already proclaimed the Applicant's property. It is further stated that if stay of execution is not granted the Applicant will suffer substantial loss as it will be driven out of business and the appeal rendered nugatory. It is further stated that the appeal has a likelihood of success. The Applicant has offered to deposit security, preferably an irrevocable bank guarantee.
3. The application is opposed. It is stated in the replying affidavit that the appeal herein has no merits. It is stated that a similar application was made in the lower court. It is contended that a bank guarantee is not suitable security and that the deposit of the decretal sum will serve the ends of justice.
4. On record is a preliminary objection by the Respondent dated 20<sup>th</sup> February, 2017 which objects to the Memorandum of Appeal herein dated 23<sup>rd</sup> December, 2016. The grounds are that the Applicant is in breach of the Civil Procedure Rules in that the Applicant has not furnished security for the decretal sum, has made fraudulent misrepresentation and that the Appeal has been filed by an advocate who is not on record for the Appellant/Applicant.
5. The application and the Preliminary Objection were argued simultaneously. I have considered the application and the Preliminary Objection and the arguments made by the parties.

6. Order 42 rule 6 (2) provides for the conditions to be met in an application for stay thus:

**“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. The judgment of the trial court was delivered on 1<sup>st</sup> December, 2016. The Appeal was filed on 23<sup>rd</sup> December, 2016. The application at hand was filed on 24<sup>th</sup> May, 2017. There is inordinate delay in the filing of the application. The delay has not been explained. It seems the application was triggered by the execution process after the Auctioneers took possession of motor vehicle KBK 065J.

8. The decree herein is a monetary decree. There are no allegations that the Respondent is not capable of refunding the decretal sum. It has not been demonstrated what substantial loss the Applicant will suffer. 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.”**

9. On whether the Appeal has high chances of success, under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicant is seeking orders of stay of execution pending appeal from the Subordinate Court to the High Court. The Applicant is not required to prove that they have an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of the decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98- Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

10. On there having been an application for stay in the lower court, it is clear from the reading of Order 42 rule 6(1) Civil Procedure Rules that a litigant is at liberty to apply for an order of stay in the Appellate Court notwithstanding the grant or refusal of stay by the court appealed from.

11. With the foregoing, I find no merits in the application and the same is dismissed with costs.

12. The essence of a Preliminary Objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) Ea 696**. At page 700, Law, JA stated that:

**“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

Sir Charles Newbold P. added as follows at page 701:

**A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

13. On whether the Applicant has provided security for the due performance of the decree in a successful application for stay the court can exercise discretion and make appropriate orders. Issues of misrepresentation are however matters of disputed facts that cannot be handled by way of Preliminary

Objection.

14. The Memorandum of Appeal was drawn and filed by Patricia Karanja Advocate. I have perused the Lower Court file as requested by the parties. It is clear from the Lower Court file that the firm of G. N. Gichong'i Gichuhi & Co. Advocates was on record at the time the judgment of the lower court was delivered on 1<sup>st</sup> December, 2016. The firm of H. Kago & Co. Advocates on 7<sup>th</sup> March, 2017 filed an application dated 6<sup>th</sup> March 2017 seeking to come on record in the Lower Court file in place of G. N. Gichong'i Gichuhi & Co Advocates. It is not clear from the lower court when the firm of H. Kago & Co. Advocates came on record.

15. The appeal herein was filed on 23<sup>rd</sup> December, 2016 by the firm of Patricia Karanja Advocate without an order of the court or the consent of the outgoing advocate contrary to the provisions of Order 9 rule 9 Civil Procedure Rules. Under Order 9 rule 5 Civil Procedure Rules the Advocate on record in the Lower Court remains the Advocate on record until the conclusion of the matter, including any review or appeal. The Memorandum of Appeal was thus filed by an Advocate who is not on record for the Appellant. This is an irregularity that cannot be termed as a mere technicality of procedure. Consequently, I find that the Preliminary Objection has merits and the same is sustained.

16. In the upshot the application dated 24<sup>th</sup> May, 2017 is dismissed with costs. The Appeal is hereby struck out with costs to the Respondent.

Dated, signed and delivered at Nairobi this 17<sup>th</sup> day of Nov., 2017

**B.THURANIRA JADEN**

**JUDGE**