

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 296 OF 2017

DIAMOND SYSTEMS LIMITEDAPPELLANT/APPLICANT

VERSUS

JOSATRONIC DATA SYSTEMS LIMITEDRESPONDENT

RULING

This is an application by way of Notice of Motion dated 14th June, 2017 under Article 159 of the constitution and Order 42 Rule 6 of the Civil Procedure Rules, ostensibly seeking a stay of execution of the ruling of the lower court delivered on 31st May, 2017 pending the determination of the intended appeal.

The lower court had struck out the defence of the applicant on the grounds that it did not raise any triable issues, and was a deliberate attempt to evade the course of justice. Following that order, the applicant filed a memorandum of appeal on 14th June, 2017.

The application is supported by an affidavit sworn by the managing director of the applicant alongside the grounds set out on the face of the application. The respondent has filed a replying affidavit through its managing director. Both counsel have filed submissions which I have read.

Order 42 Rule 6 provides that the court will take into consideration whether or not the application has been filed without unreasonable delay and that substantial loss would occur if the stay sought is not granted. The other consideration is whether or not the applicant has provided security as shall be sufficient to satisfy any decree that may be ultimately binding in the event the intended appeal is dismissed.

The lower court having delivered its ruling on 31st May, 2017, the Notice of Motion lodged on 14th June, 2017 was without unreasonable delay. It may be prejudicial for this court to address the subject of substantial loss in view of the dispute herein, but it is sufficient to note that this was a commercial dispute upon which both parties claimed a right of due payment on one hand, and full satisfaction on the other.

The draft defence exhibited may as well contain triable issues and the decree from the lower court was not grounded on a full hearing. I would have subscribed to the prayer for security had there been a full hearing in the lower court. That was not the case. I have looked at the Memorandum of Appeal and those grounds cannot be said to be frivolous, if anything it is an arguable appeal which however does not mean it will necessarily succeed. The bottom line is, however weak the case may be, even one triable issue should be subjected to a trial. I am persuaded that there should be stay of execution in this matter pending the hearing of the appeal. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 15th Day of November, 2017

A. MBOGHOLI MSAGHA

JUDGE