



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 685 OF 2010

HEIFER PROJECT INTERNATIONAL.....PLAINTIFF/RESPONDENT

VERSUS

FOREST CITY EXPORT

SERVICES LIMITED.....1ST DEFENDANT/RESPONDENT

ELATT LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 2nd March 2017. It is brought under the provisions of; Order 42 Rule 6 of the Civil Procedure Rules, (2010), and Section 1A, B and 3A of the Civil Procedure Act and all other enabling provisions of the Law. It is based on the grounds on the face of it and the Affidavit of the same date sworn by Wesley Kiprotich Kipkore.

2. The Applicant is seeking for orders:

(i) spent

(ii) That the Honourable Court be pleased to issue an order of stay of execution of the Judgment and subsequent orders issued on 17th February, 2017 pending the hearing and determination of the intended Appeal in the Court of Appeal;

(iii) That such other orders be made as are just and expedient;

(iv) That the costs of this Application be provided for.

3. The background facts of the matter are that, the Plaintiff instituted this suit on 14th October 2010, against the Defendants seeking for orders of:-

(a) Kshs. 7,174,070

(b) General damages

(c) Costs of the suit and interest on (a) and (b)

4. On the 17th December, 2017, the Court delivered a judgment in favour of the Plaintiff in the following terms:-

(a) Kshs. 7,174.70 being the cost of the four (4) generator sets;

(b) General damages for breach of contract assessed at the value of the said four (4) generators thus Kshs. 7,174,170;

(c) Interest on (a) above from the date of filing the suit;

(d) Interest on (b) above from the date of this judgment;

(e) The 1st defendant shall be fully indemnified by the 2nd defendant from liability in this judgment. However, that shall not stop the Plaintiff from executing the decree or judgment against the 1st defendant.

5. The 2nd Defendant (herein the “Applicant”), being aggrieved by the decision of the Court, has filed and served a Notice of Appeal dated 27th February 2017. At the same time; the Plaintiff (herein the “Respondent”), has served the Applicant with a draft decree for approval. The Applicant is therefore apprehensive that, if the stay of execution is not granted, the intended Appeal will be rendered nugatory and the Applicant will suffer substantial loss, as the amount is a colossal of over Kshs 14 Million.

6. That the Appeal is against on both points of law and facts and on the whole judgment, and the Application is brought in good faith. It is therefore in the interest of justice and expedient, if an order of a stay of execution is granted until the Appeal is heard and determined. The Plaintiff/Respondent will not suffer any prejudice as the Applicant has given an undertaking as to damages.

7. The 1st Defendant (herein “1st Respondent”) supported the Application by filing grounds in support dated 9th March 2017,. The grounds states that;-

(i) The Application has been made timeously and without delay;

(ii) Both Defendants have filed notices of appeal intending to appeal against the judgment issued on 17th February 2017;

(iii) The Defendants stand to suffer substantial loss unless stay of execution is ordered;

(iv) The defendants are willing to abide with any conditions for stay of execution or such security for the due performance of the decree as the Honourable Court may impose.

8. However, the Plaintiff/Respondent opposed the Application by filing a Replying Affidavit dated 10th March 2017sworn by George Odhiambo. He deposed that there is unexplained delay of fourteen (14) days which is unreasonable. Even then, execution is yet to commence and there is no sufficient cause has been shown to warrant the issue of the order of stay.

9. That this is informed by the fact that:-

(i) This is a money decree so the intended Appeal cannot possibly be rendered nugatory;

(ii) The Defendants, other than alleging that substantial loss will result have not proved or provided particulars of such loss. A mere allegation will not suffice;

(iii) The Defendants have not demonstrated ability to provide security for the performance of the decree. In fact, it is curious that the Applicant only offers to provide an undertaking as to damages.

10. Subsequently, the Parties agreed to dispose of the Application by filing written submissions. I have considered the same and I find that , the key issue to determine is whether the Applicant has satisfied the conditions set down under Order 42 Rule 6 of the Civil Procedure Rules, 2010 to warrant the grant of the orders sought.

11. These provisions states that:-

“(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.

(2) 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 (emphasis mine).

12. I shall now consider the Application on the basis of the above principles. As regards the requirement that, the Application should be filed without unreasonable delay, I find that the Application was filed within 14 days after the delivery of the judgment. As stated in the case of; ***Jaber Mohsen Ali & Another vs Priscillah Boit & Another 2014***, whether a delay is or not reasonable depends on the circumstances of the case.

13. In the case of; ***Corporate Insurance Company Limited vs Emmy Cheptoo Letting & Another 2015, eKLR***, the Court held that, a Thirty (30) days delay was not unreasonable. In my considered opinion, taking into account, the circumstances of this case whereby the Applicant had to review the judgment and give instructions to the lawyers to file an Appeal, the 14 days delay period is not an unreasonable delay.

14. The second and main issue to consider is whether the Applicant will suffer substantial loss or whether the Appeal will be rendered nugatory if the prayers sought are not granted. The Applicant submitted that the amount involved herein is substantial, based on the draft decree, where a sum of Kshs. 19,812,198.67 is claimed. That if, this money is paid, and the Appeal succeeds, the Applicant will suffer substantial loss in that it be forced to look for the Plaintiff and may not recover the money if the money will have been expended. That the Plaintiff/Respondent has not demonstrated that, they have any cash that can be used to refund the decretal sum if the Appeal succeeds.

15. Similarly, costs will be incurred through the judicial time used in the intended Appeal, the costs both in filing, legal fees, disbursements and the time spent by Parties in this matter and that the decree would be more of an academic exercise. Reliance was placed on the cases of; *Antoine Ndiaye vs African Virtual University (2015) eKLR* and *HCCC Misc. Application No. 42 of 2011 at Bungoma James Wangalwa & Another vs Agnes Naliaka Cheseto, (2012) eKLR*.

16. The 1st Defendant/Respondent supported the submissions the Applicant in arguing that the Plaintiff/Respondent, has not demonstrated evidence on its sources of income, and therefore it will be unable to refund the sum paid, if the Appeal succeeds. Reliance was placed on the case of; *Ann Wanjiru Waigwa & Another vs Joseph Kiragu Kibarua (2009) eKLR*, where the Court held that;-

“The Applicants’ fears are however founded on the fact that the Respondent may not be in a position to refund the decretal sum in the event that they are successful in the appeal. That fear is not really unfounded as the Respondent had no answer to this bold statement.It is of course the paramount duty of the Court to which an Application for stay of execution pending an appeal is made to see it that the Appeal, if successful is not rendered nugatory. As correctly observed by Ogola J in Tropical Commodity Suppliers Ltd “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.....” .

Further reliance was placed on the cases of; *Francis Kanyiri Wanjogu vs Patrice Onsongo Obuba (2015) eKLR* and *CFC Stanbic Bank Limited vs John Kung’u Kiarie & Dyer & Another (2016) eKLR*.

17. However, the Plaintiff/Respondent reiterated that, the Applicant has not shown the substantial loss they stand to suffer if the stay is not granted. Reliance was placed on the cases of; *Republic vs The Commissioner For Investigations & Enforcement Ex-parte’ Wananchi Group Kenya Limited (2014) eKLR* and *Kenya Shell Limited vs Kbiru (1986) KLR 410*.

18. The Plaintiff/Respondent further submitted that, as none of the Defendants allege in their respective grounds and supporting affidavits that, it is not able to refund the said sum paid, if the Appeal succeeds, then the Plaintiff/Respondent has no burden to discharge. In that case, the issue they cannot raise the issue for first time in the submissions. Reference was made to the case of; *Antoine Ndiaye vs African Virtual University (supra) and the case of; The Commission for Investigation (supra)*.

19. After considering the submissions by the Parties herein, I find that, the issue of substantial loss is the cornerstone of Order 42 Rule 6 of the Civil Procedure Rules 2010. The Applicant has to establish that it will suffer substantial loss if the orders sought are not granted.

In the case of; *James Wangalwa & Another vs Agnes Naliaka Cheseto, 2012 eKLR*, the Court observed that:

“The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful Party in the appeal. This is what substantial loss would entail”

20. Similarly, in the case of; *Antoine Ndiaye vs African Virtual University (2015) eKLR*, the Court held that substantial loss is the cornerstone of granting orders for stay of execution, and observed that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.....”

21. The Court of Appeal, in the case of; *National Enterprises Corporation vs Mukisa Foods Miscellaneous Application No. 7 of 1998, Kampala, Uganda* had this to say on the same issue, that;-

“the Court has power in its discretion to grant stay of execution where it appears to be equitable to do so with a view of temporarily preserving the status quo. As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should the appeal succeed” (emphasis added).

22. Finally, in the case of; *Equity Bank Ltd vs Taiga Adams Company Ltd. (2006) eKLR*, the Court held that:-

“the only way of showing or establishing substantial loss is by showing that, if the decretal sum is paid to the respondent, that its execution is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse, she or he, is a person of no means.”

23. From the above decision, it is clear that the Applicant has to establish and or prove substantial loss if the for stay of execution is not granted. The instant case involves a money decree. In considering whether a money decree or a liquidated claim would render the success of the appeal nugatory, the Court of Appeal in the case of; *Kenya Hotel Properties Ltd vs Willesden Properties Ltd Civil Application No. NAI 322 of 2006 (UR)*, held that;-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the Applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The Court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

24. To revert back to the issue of substantial loss, I have considered the arguments of the respective parties on the same but before I make a finding on the same, I shall examine the submission on the issue of security.

25. The Applicant submitted that, the issue of security is within the discretion of the Court in the exercise of its inherent discretion as it deems fit. Save that, the Applicant has offered to give an undertaking as to damages, and is willing to abide by any conditions the Court may impose.

26. The 1st Respondent submitted that they are ready to deposit such security as the Court may deem fit to secure the Plaintiff/Respondent's interest in any event. They are willing to have the decretal sum deposited in a joint interest earning account of the Parties Advocates and therefore no prejudice will be occasioned to Plaintiff/Respondent. Reliance was placed on the case of **Eric Murungi & Another vs Jackson Muriuki (2016) eKLR**, where the Court stated;-

“I am aware that both Parties have rights; the appellants have right to appeal and their appeal should not be rendered nugatory; the Respondent has right to immediate realization of his judgment. Therefore, in order to hold these competing rights of Parties in an almost symmetrical bound, I should be guided by sound and best practices in this field of the law. Accordingly, I order that, pending the determination of this Appeal, there shall be a stay of execution of the judgment and decree in CMCC No. 25 of 2009 on condition that the Appellants shall: -(1) deposit the entire decretal sum in an interest earning account in the joint names of counsels for the Parties herein within 90 days from today...”

27. However, the Plaintiff/Respondent submitted that, the Applicant has not offered any security for due performance as required by the law. That they have not offered and are not ready to deposit security for performance of the decree as required. Reference was made to the case of; **Republic vs The Commission For Investigations & Enforcement Ex-parte' Wananchi Group Kenya Limited (supra)**.

28. The Plaintiff/Respondent further submitted that, should the Court considers granting of the orders sought, the Court should order that Kshs 7,174.70 being the cost of the generators plus interest ordered by the Court be deposited in an interest earning account, in the names of the Counsels of the Parties pending the determination of the Appeal.

29. I have gone through the documents annexed to the Affidavit in support of this Application and I find no document evidencing the financial status of the Applicant's Company. The financial status of the Plaintiff/Respondent's is also not disclosed.

30. I have also had the benefit of going through the judgment written by Hon. Justice E.K. Ogola and which I read on his behalf and I am now familiar with facts of this matter.

31. In my considered opinion, I shall allow the prayer seeking for stay of execution on condition that the right of the Plaintiff/Respondent to enjoy the fruits of the judgment is protected, in the same way the Defendants/Applicant's rights to prosecute any intended Appeal is protected.

32. The upshot of all this is that, I hereby order that, the Applicant and or the 1st Defendant/Respondent jointly and/or severally deposit the sums of money indicated under paragraph (a) and (b) below, in a joint interest earning account, in the names of the Counsels of the Parties within **Thirty (30) days** from the date of this order

(a) Kshs. 7,174.70 being the cost of the four (4) generator sets;

(b) Interest on (a) above from the date of filing the suit up to the date of this order; and

(c) The costs of this Application is awarded to Plaintiff/Respondent

(d) If the Applicant fails to comply with the orders given under paragraph a, b and/or c, the orders will stand vacated forthwith without further reference to the Court.

33. Those then are the orders of the Court.

Dated, signed and delivered this in open Court at Nairobi this 18th day of December 2017.

G.L. NZIOKA

JUDGE

In the presence of:-

Ms. Gathua holding brief for Mr. Kaingira for the Plaintiff/Respondent

Ms. Weru holding brief for Mr. Akhaabi for the 1st Defendant/Applicant

Mr. Ruto for the 2nd Defendant/Applicant

TeresiaCourt Assistant