

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 419 OF 2017

ZITRON LIMITEDAPPELLANT

VERSUS

EXECUTIVE SUPER RIDES LIMITED.....1ST RESPONDENT

LYOK LIMITED.....2ND RESPONDENT

RULING

This is an application for stay of execution pending an appeal arising from the dismissal of an objection raised by the appellant in the lower court. The 1st respondent it is said, has proclaimed movable assets of the appellants which may be carted if the court does not intervene. It is stated in the application that the appeal shall be rendered nugatory if the stay orders are not given.

The application is brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act. The grounds appear on the face of the application alongside a supporting affidavit sworn by the legal manager of the appellant. The application is opposed and there is a replying affidavit sworn by the managing director of the 1st respondent. Both counsel have also filed submissions which I have considered. The memorandum of appeal has already been lodged.

The appellant is required to demonstrate that the application was filed timeously, and satisfy the court that substantial loss may result unless the order is granted. Further, security may be required to satisfy the decree that may follow in the event the appeal fails. All this depend on the discretion of the court informed by the facts presented before it.

I have looked at the record presented before me and the ruling of the lower court which rejected the appellant's objection to attachment. Before then, a company known as Delart Investment Limited had filed objection proceedings in the same suit which however was declined by the trial court. The present application arises from the same proceedings but by a different party.

In ruling against the appellant herein the lower court had the following to say,

“I have considered the application, the submissions by both counsel for the objector and counsel for the plaintiff. I am satisfied that the objector has not proved on a balance of probability that they have a legal or equitable interest in the attached property. A similar application dated 15th February, 2016 was dealt with by this court where the court held the objector had not disclosed material facts. The application is an abuse of the court process and is dismissed with costs”.

The appellant has not demonstrated to the satisfaction of this court what substantial loss will be incurred if a stay is not granted. Going by the record, no amount of security should lock out the 1st respondent from accessing the proceeds of the decree it holds. I say so because of what the lower court observed in the two rulings.

In the two rulings, the lower court observed that there was apparent joint effort by the present appellant and the previous objector Delart Investment Limited to frustrate the 1st respondent from enjoying the

fruits of the decree in its favour. This finding was based on non-disclosure of the fact that the two objectors are related and in some instances share the same directors.

A party who is guilty of non-disclosure should not be allowed to benefit from that situation. It is instructive to observe that the appellant herein has not addressed the issue of that non-disclosure. The 1st respondent holds a lawful decree in its favour and just as the appellant is desirous of exercising the right of appeal, so does the 1st respondent eager to enjoy the fruits of its decree. The respondent may have an arguable appeal but at this stage, I find no reason whatsoever to stay the execution of the decree held by the 1st respondent. Accordingly the application is dismissed with costs to the 1st respondent.

Dated, signed and delivered at Nairobi this 14th day of December, 2017

A. MBOGHOLI MSAGHA

JUDGE