



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 65 OF 2014

PETRA DEVELOPMENT SERVICES LIMITED.....PLAINTIFF

VERSUS

1. EVERGREEN MARINE (SINGAPORE) PTE LIMITED

2. GULF BADAR GROUP (KENYA) LIMITED.....DEFENDANTS

RULING

Introduction:

1. Before the court for determination are two applications by the defendants dated 21.8.2014 and 2nd September 2014 respectively seeking stay of proceedings pending appeal to the court of appeal and setting aside an default interlocutory judgment obtained by the plaintiff on the 22.8.2014.
2. By its orders of 17.2.2015 the court directed that the two applications be heard together and set timelines within which the parties would file and exchange submissions regarding both applications. That was a direction given after the plaintiff had responded to both application by way of Replying Affidavit and Grounds of Opposition.
3. I have read the two applications, the replies filed by the Respondent/plaintiff as well as the written submission and the authorities relied upon by both sides to support their respective positions.
4. There are only two issues for determination in the two applications; whether to grant stay of proceedings pending appeal and whether or not to set aside an interlocutory judgment entered at the request and instance of the plaintiff.

The sequence of events:

5. The plaint herein was lodged in court on the 22.5.2015 together with an application under certificate of urgency seeking among other orders; a mandatory injunction directed at the defendant and compelling them to release to the plaintiff/applicant, the original bills of lading.
6. There is an affidavit of service showing that the plaint, application and summons to enter appearance were served upon on MR.MUNIR MASOUD who accepted service on behalf of both defendants on the 28/5/2015 at 11.20 am by acknowledging at the back of the documents by signature and rubber stamp of

the 2nd defendant.

7. Relevant to the applications before me is the fact that on the 25.6.2014 the defendants filed a Notice of Motion dated the same date and sought stay and setting aside of the *ex parte* orders made on the 3.6.2014. That application went through the motions was argued in the presence of both parties and a decision rendered on it on the 13.8.2014 by Kasango J, who found no merits on it and dismissed it with costs. It is that order for dismissal that has provoked an appeal to the court of appeal pending whose determination the Defendants seek the orders of stay of proceeding and an order that the time of filing defence be enlarged to some 14 days after the court of appeal shall have determined the appeal. That application for stay and enlargement of time is dated the 21.8.2014 and filed in court on the 22.8.2014.

8. The Record reveal that while the application to set aside the *ex parte* proceedings of 3.6.2014 was pending, and on the 9.7.2014, the plaintiff applied for and was granted interlocutory judgment on the basis that the defendants had failed to file a defence in time. On realising that there was a judgment over and above the order for mandatory injunction granted on the 3.6.2014 the defendants once again moved to court by this application dated 2.9.2015.

9. Preliminarily, I hold the view that if I set to consider the application dated 2.9.2014 and its prayer 1, I need not on the same breath, consider the prayer No. 4 in the application dated 21.8.2014. In this decision I will only consider the application dated 21.8.2014 is as far as it seeks stay of proceedings and devote consideration on when to file a defence to the application to set aside default judgment.

Whether to stay proceedings pending appeal:

10. The principle upon which a court stays proceedings pending appeal are not in doubt. The rationale seem to be that it runs counter the overriding objectives of the court to allow a court whose decision is challenged on appeal to proceed with the matter at the risk of the appellate court reversing its decision that precedes the trial and thereby rendering the subsequent proceedings superfluous. The flip side of this rationale is the need for expeditious disposal of court business and not to be held but by a party merely because an appeal has been preferred.

11. Owing to the two competing considerations it falls back to the trial court's discretion whether or not to stay proceedings pending an appeal. The primary considerations the court takes into account before ordering stay is whether it would be in the interests of justice. If it be in the interests of justice then the court then considers what terms would serve the established interests of justice in ordering stay of proceedings. As in all discretionary matters the court must consider all the pros and cons in granting or falling to grant stay. The tools available in weighing the said pros and cons are essentially the need for timely disposal of court cases, optimal utilisation of time as a scarce judicial resource and the arguability of the appeal (intended appeal in this case)

12. In the present case I refrain from considering the arguability of the appeal because no substance was placed before me on the same and in any event by the time the matter was argued before me the appeal was yet to be filed. I have subsequently seen a certificate of delay issued by the Deputy Registrar but that and the notice to appeal is all I can lay hands on about intended appeal since not even draft memorandum of appeal has been exhibited. It is therefore difficult and limiting for me to second guess what that appeal is likely to present itself like. Yet it is a consideration I must make. It is not lost to court that it was the onus of the applicant to avail material to prove the facts showing arguability of the appeal. The applicant has not discharged that onus and I will let rest that failure were it has fallen without disturbance.

13. The need for expeditious disposal of disputes must be looked at together with the need to employ time as a judicial resource in the most prudent and efficient manner. Those to me are the dictates of the constitution and the forerunner to the constitution as enacted in the overriding objectives of the court.

14. When put in the context of this case and the very rationale of granting stay, I take it that the primary matter for determination by the court of appeal as can be discerned from the submissions by the applicant, both before Kasango J and before me, is the question of jurisdiction of Kenyan courts to entertain this

matter on the basis of the contract between the partes.

15. I am persuaded that whether or not this matter proceeds even as the appeal pends nothing shall have been lost nor will anything unpleasant have taken place. I say so with the view that if the applicant succeeds on the appeal, and that court finds that the High Court had no jurisdiction in the matter, it shall only take the service of the order and this matter shall stand determined and buried. To the contrary if stay is granted and the appeal fails, and this being a commercial dealing between the parties in which time dictates on possible losses, such losses shall only have accumulated to whichever side they shall ultimately fall. In my assessment that is a factor that dictates against grant of stay of proceedings pending appeal.

16. Doing the balancing act aforesaid I find and hold that interests of justice in the circumstances of this case militate against grant of stay of proceedings and I decline to grant the stay sought.

Application to set aside:

17. It is now well settled that before a court of law grant final orders on the merits, it retains the power to set aside any interlocutory reliefs granted by it so as to hear and determined the matter on the merits. The remedy of setting aside, as was held in the case of **SHAH -VS- MBOGO[1967] EA 16**, is intended to guard against injustice been visited on a party out of inadvertence, accident or excusable error or mistake but not to assist a party who has by evasion or otherwise sought to obstruct or delay the cause of justice.

18. It is therefore imperative that the court looks and evaluates the conduct of the defaulting party to establish whether the default was occasioned by the factors inviting the exercise of the discretion of the court to set aside.

19. In the matter before me the applicant in both his grounds on the face of the application and the affidavit on oath are adamant that the default judgment was entered on the 22.8.2014 while the application for stay and extension of time was pending . My reading of the record reveals that is not the genuine and true position. The position of the matter is that judgment was entered on 9/7/2014 before the application dated 25.6.2014 could be heard and determine and long before the application dated 21.8.2014 could be drawn or even filed.

20. Coupled with the fact that the applicant has been accused, without rebuttal by them, of dexterity and dilatoriness, with the aim of delaying the court processes, I hold the view that this court has not been persuaded that the applicant is a person deserving of the court's discretion, even as unfettered at it is.

21. More importantly, my opinion is that every time a litigant is in default, It is his onus to explain and justify that default to the full satisfaction of the court. The entire application dated 2.9.2014 and the affidavit by the YASER EL TUNSY have steered clear of that obligation and have made not even the vaguest attempt to explain the delay between 20.6.2016 when the appearance was filed, (itself having been filed well after the 15 days dictated by the summons to enter appearance) and the 9.7.2014 when the judgment was entered. This suggest either lack of candour, evasion or just failure to give the matter the due attention deserved by it.

22. In totality I find that the two applications, lack merit and I therefore dismiss both with costs to the plaintiff/respondent.

Dated, signed and delivered at Mombasa this 19th day of February 2016.

P.J.O.OTIENO

JUDGE