



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 106 OF 2013

EMPOWER INSTALLATIONS LIMITED.....PLAINTIFF

VERSUS

ESWARI ELECTRICALS (PVT) LIMITED.....DEFENDANT

AND

KENYA ELECTRICITY GENERATING

CO. LTD.....INTERESTED PARTY

RULING

1. The Defendant's Motion dated 6th October, 2014 is seeking for stay of execution of the order of the Honourable Gikonyo J made on 14th August, 2014 pending appeal. In that order, the Defendant was to provide by way of a Bank Guarantee which was sufficient to cover the amount claimed by the plaintiff i.e 35,462,649/=. The said security was to be provided within 30 days after the issuance of the order.
2. The application was supported by the affidavit and supplementary affidavit of Rathnaraj Joenathan Ebenezer, the Country Manager of the Defendant sworn on 6th October, 2014 and 26th February, 2015 respectively. The Applicant is challenging the decision of the court on the premise that the amount of security to be provided exceeds the amount claimed in the Plaint. That the Honourable Court in granting the said Order did not take into consideration the payment of Kshs. 14, 419,243.75/= so far made to the Defendant which fact the Plaintiff had duly invited the Court to consider. That being aggrieved by the Order made on 14th August, 2014, the Defendant has lodged a Notice of Appeal and has applied for certified copies of the proceedings, ruling and order of the court in view of appealing the same. The Applicant also believes that it has good chances of success on appeal and is concerned that the same will be rendered nugatory if the execution of the order is not stayed. That though the Defendant has offices in India, it is lawfully authorized to operate in Kenya and it is not a flight risk as alleged. Accordingly, it was the Defendant's contention that though it will be able to satisfy any decree of the court as maybe passed against it, provision of security in the huge sums required will cripple its operations and occasion irreparable loss. In the same vein, the Defendant claims that it has been exposed to losses as pleaded in its counterclaim herein. It was also deposed that though the Defendant has not made an offer for security of costs, the costs of appeal was deposited whilst the Appeal was lodged at the Court of Appeal. In light of the foregoing, it was the contention of the Defendant that it had justified

grounds for the grant of the orders sought.

3. In opposing the application, the Plaintiff filed the Replying Affidavit and further affidavit of Steve Kigera sworn on 3rd November, 2014 and 12th March, 2015 respectively. The Respondent submitted that the Application lacks merit. It is contended that a closer look at the application as well as the Memorandum of Appeal, it is clear that the Applicant was challenging the amount ordered to be furnished as security as opposed to the order itself. The Applicant further claims that this renders the application premature, as an application for review of the order as opposed to the appeal would suffice. It was also the Plaintiff's argument that there was inordinate delay on the part of the Defendant in filing the application as the same was filed 2 months after the order was made. In the opinion of the Plaintiff the instant application is an attempt by the Defendant to buy time to complete the project and flee from any responsibility. It is also the Plaintiff's argument that the Defendant poses a flight risk as noted by the Court in its ruling dated 12th August, 2014. The Respondent argued that the allegation that the Defendant shall suffer irreparable loss if the orders sought are not granted is unsupported and a complete fallacy since no proof has been furnished to the court that the Defendant's operations shall be crippled if security is provided as ordered. The Respondent also asserted that the security is of vital importance to guarantee payment to the successful party if the balance of probability swings in favour of the Plaintiff and judgement. That in light of this, if the Defendant could not attain the security prescribed by the Court, then it should have presented a counter-offer for consideration. However, since the Defendant did not present any security, then it follows that its application should fail.
4. The parties presented written submissions in support of the application of which I have considered.
5. I have read and carefully considered the pleadings, evidence and written submissions by the respective parties to this application. The applicant relies on Order 42 rule 6 of the Civil Procedure Rules which concern applications for stay of execution. The conditions for granting a stay of execution pending appeal are set out in **Order 42, rule 6(1) and (2) of the Civil Procedure Rules.**

Firstly no appeal operates as a stay of execution, and secondly the grant of such stay is in the unfettered discretion of the court (rule 6(1).)

Thirdly, and more importantly, no stay of execution pending appeal may be granted unless the conditions set out in rule 6(2) of that order are fulfilled. These conditions are that;

substantial loss may be suffered by the applicant unless the order is made;

the application must be made without undue delay and finally, that the applicant offers such security as may be ordered by the court.

6. Further to this, it noteworthy that the relief of stay is discretionary although, as it has been said often, the discretion must be exercised judiciously and upon defined principles of law. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. The issues for determination are therefore whether the Applicant has met the aforesaid conditions to persuade the court to grant the orders sought.
7. With regard to the issue of whether the application before the court is proper, I am in agreement with the Applicant. It was at liberty to file an application of stay pending appeal as opposed to an application for review. I therefore find that it is not important for the court to go into the rigors of the Plaintiff's argument with regard to whether an application for review or setting aside was the appropriate means in which the Defendant could challenge the decision of the court rendered on 12th August, 2014.
8. Turning to the issue of whether the application was filed without undue delay, it was the Plaintiff's

contention that the same was filed 2 months after the orders were made. Accordingly, it was submitted that the Defendant was indolent and the application was filed as a mere after thought. The Applicant on its part refuted this claim and was firm that it had filed the application in a timely fashion. I have seen the record of the court. It is clear that the ruling and order was issued on 10th September, 2014. The application herein was filed on 6th October, 2014 almost a month after the ruling / order was issued. I am satisfied that in the circumstances of this case, the application was filed timeously as the Defendant has sufficiently demonstrated that it did not rest on its laurels. It applied and obtained certified proceedings on 29th September, 2014 including the carried copy of the ruling on 20th August, 2014. A notice of Appeal was also duly filed on 20th August, 2014 indicating that the applicant had every intention of appealing the ruling. I therefore find that the application was filed without undue delay. I rest the issue there and move on to the other two conditions.

9. As regards substantial loss the defendant contended that the amount to be provided by the Defendant as security is in the circumstances inordinately high and if the order is enforced, it could negatively affect and jeopardize the operations of the Defendant. I have examined the pleadings before the court. In the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** where **Gikonyo J** rendered himself thus on the issue of substantial loss;

“[12] All the prerequisites in Order 42 Rule 6 of the Civil Procedure Rules are as important and must be considered in an inextricable manner. But I should state that substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. There is an ample judicial authority on this issue but I need not multiply them except to cite the case of Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 where the Court of Appeal stated that:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay”

And substantial loss in the sense of Order 42 rule 6 has been described; see the following rendition in a work of Ogola J in Tropical Commodity Suppliers Ltd (Supra) 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...”

And also in the case of Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto 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...”

[13] So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent.” (emphasis added)

10. From the above, it is trite law that in an application for stay, it is not enough for the applicant to merely state that substantial loss will result. An applicant must prove such loss with specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay. Also see the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63**. Has the Applicant in this case provided such details or particulars?
11. I have gone through the Affidavit and supplementary affidavit of the Defendant sworn by

Rathnaraj Joenathan Ebenezer. The Defendant was to provide a Bank Guarantee which was sufficient to cover the amount claimed by the Plaintiff i.e Kshs. 35, 462,649/=. In paragraph 6, 7 and 8 of the Affidavit in support of the application, the Defendant argues that the amount to be offered as security is inordinately high and will potential halt the operations of the company. I find that this is a sweeping statement that is unsupported with facts or any particulars. No sufficient detail on how it shall suffer substantial loss has been offered by the Defendant, given that what is needed is merely a bank guarantee. Simply stating that if the Defendant was to furnish the security as ordered would mean depositing similar sums of money in the Bank for such bank to give a Bank guarantee and in so doing the Defendant's business will be highly jeopardized and prejudiced, in my opinion does not prove substantial loss. I think that these argument is not relevant as long as the Defendant has not shown that the Respondent cannot refund the money. In sum, I find that the Defendant/ Applicant herein has not been able to demonstrate that it will suffer substantial loss should it offer the security of a bank guarantee as ordered by the court.

12. Be that as it may, I note that in an application for stay, there are always two competing interests that must be considered and balanced by the Court. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. In order to balance this interest, the court usually gives conditional stay where the Applicant can offer security as ordered by the court. According to Order 42 rule 7, the court has the discretion of determining what constitutes security for the performance of the Decree. In the case of **Visram Ravji Halai & Ano. vs. Thorntorn & Tupin [1963] Ltd Civil App. No. NAI 15 of 1990** , it was submitted that the court ought not to place the plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered.

13. It is of note that the Applicant has in this case not offered any type of security. In its assertion, depositing costs of the appeal is sufficient security. However, I am of the opinion that the same cannot suffice. Security usually guarantees the due performance of a decree. Costs of an appeal cannot therefore ensure performance of a decree in my opinion. Further, I also note the conclusion in Gikonyo J's ruling of 12th August, 2014, that from the evidence presented before the court, there was a real possibility of flight by the Defendant after completion of the project without notice is not remote in the circumstances of this case. Without going to the merits or otherwise of that decision, I am well able to make the conclusion that the provision of security in this case is of paramount importance. Further I am also in agreement with the Plaintiff /Respondent, when it stated that the mere presence of a counterclaim cannot defeat an application of security.

14. To this end, for any stay to be issued, it is only proper that the Decretal amount is deposited in an interest earning account in the joint names of the Advocates Firm representing the parties within 30 days of this ruling or in alternative, issue a Bank Guarantee from a reputable Bank as ordered by the court through its ruling dated 14th August, 2014 within 30days from the date of the ruling herein.

15. In default of the above set conditions, the application herein will stand dismissed with costs to the Plaintiff in event of the default of condition above set.

Dated, signed and delivered in court at Nairobi this 17th day of February, 2016.

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C. KARIUKI

JUDGE