



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 53 OF 2016

BLUEBIRD AVIATION LIMITED.....
APPLICANT

VERSUS

**MSI AIRCRAFT MAINTENANCE SERVICES INTERNATIONAL GMBH AND
CO.KG.....RESPONDENT**

RULING

1. **Bluebird Aviation Limited** the applicant herein took out the motion dated 11th February 2016 in which it sought for the following orders:
 - i. *That this application be certified urgent.*
 - ii. *That this court be pleased to issue an interim stay of execution of the interlocutory judgment entered on the 20th June, 2014 pending the hearing and determination of this application.*
 - iii. *That this honorable court be pleased to issue an order of stay of execution of the judgment entered on 20th June, 2014 and all subsequent and ancillary proceedings pending the hearing and determination of the intended appeal against the said Ruling and order issued by the Honorable Rachel Ng'etich CM on 22nd January, 2016.*
 - iv. *Costs of this application be provided for.*

2. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent to have the matter dispose of by written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application. The applicant avers that the respondent intends to execute the decree unless an order for stay is granted. The applicant further pointed out that the Respondent is a foreign company with no office or branch or subsidiary located in Kenya and that its only contact is the firm of Kutz Univar Limited who have been contracted to collect the alleged debt on their behalf. It contends that it is for these reasons that should it pay the Respondent the decretal sum of kshs 7,303,895.40/=, it may not recover the money from it occasioning the it to substantial loss. The applicant also averred that it is willing to deposit security as ordered by the court and that the application has been brought without undue delay.

The respondent on its part argued that the applicant has not shown that it will suffer substantial loss as it is not enough to base the substantial loss on location of offices. It claimed that no proof has been placed before court showing the respondents inability to pay. It asserted that the applicant has not offered security and asserted that the there has been undue delay since the ruling was delivered on 22nd January 2016 and the application of stay was made on 18th February, 2016.

3. The principles to be considered in an application for stay are well settled under Order 42 Rule 6. Firstly, there must be threat of substantial loss on the part of the applicant if the orders of stay fail to issue. Secondly, the application must have been brought without delay and thirdly, the security has to be given by the applicant.

On the first principle the applicant is required to show that it will suffer substantial loss. The cornerstone of the jurisdiction of the court in determining whether or not to grant stay of execution pending appeal is the fact that substantial loss will occur upon the Applicant unless a stay is granted. The legal burden of proof lies with the Applicant to show that the Respondent will not be able to refund the decretal sum if it is paid over to them. In this case, the Applicant only claims that the Respondent will not be in position to refund the decretal sum since it is a foreign company with no office or branch or subsidiary located in Kenya. However, I note that the Applicant has referred to the firm of Kutz Univar Limited who were tasked with collection of the debt by the Respondent hence the apprehension that the Respondent will not be in a position to pay. Other than that, the Applicant has not shown that the Respondent will not be able to refund the decretal sum since the same can still be recovered. I am persuaded by the case of **Quest Resources Limited v Japan Port Consultants Limited [2015] eKLR** where the learned judge while dealing with a foreign company which had sought orders of stay stated thus:

"I am minded that the Applicant is foreign company with no assets in Kenya. From the information given by the Applicant, the company is largely solid with sound financial and asset base outside the country. I am also keen that international cooperation provides for enforcement of foreign judgment like the one in issue. But, I do not think it is apt to leave the Respondent solely on existence of a procedure which by its very nature is complicated, onerous and expensive. Parties have to transcend international or regional bottlenecks in international cooperation at great expense of time, money and other resources."

It is therefore in the interest of justice, that the issue of substantial loss be considered in this case while balancing the interests.

4. The second principle to be considered is that an applicant must file the application for stay without unreasonable delay. Judgment herein was delivered on 22nd January 2016 and this application was filed on 18th February 2016, which was 27 days later. This does not amount to undue delay.
5. Thirdly, the court must take into consideration the provision of security for the due performance of the decree. On this principle, the applicant claims that it is willing to offer such security as the court orders. Consequently, I grant the order for stay pending appeal on condition that the Appellants deposits the decretal sum of kshs.7,303,895.40 in an interest earning account in the joint names of advocates and or firms of advocates from both sides within 30 days from the date hereof. In default the motion will be treated as having been dismissed. Costs of the motion to await the outcome of the Appeal.

Dated, Signed and Delivered in open court this 20th day of May, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent