



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 502 OF 2015

WACHIRA BUILDERS LIMITED.....APPELLANT/APPLICANT

- V E R S U S -

DM ENTERPRISES LIMITEDRESPONDENT/RESPONDENT

RULING

1) The applicant **Wachira Builders Ltd** took out a motion dated 8th March 2016, in which it sought the following orders *inter alia*:

1. Pending the hearing and determination of the appeal, there be an order for stay of execution of the judgment of the court delivered on the 20th September 2015 and the ensuing decree.

2. Costs of this application be in the cause.

2) The parties have filed their respective submissions, which I have considered. I have also 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 on 29th September, 2015 judgement was entered in the trial court in favour of the respondent for an award resulting from services rendered to the appellant/applicant, being kshs.1,990,546.55 with interests at court rates . The applicant argued that its appeal is arguable since **Hon. M. Chesang** erred in dismissing the applicant's counterclaim without analysing the evidence submitted during the hearing and that the trial magistrate failed to take into consideration the appellants submissions before delivering her judgment hence shutting out the applicant from presenting its case. It is argued further that the applicant will suffer substantial loss since it is a company currently undertaking projects and if execution carried out against it, it will be greatly affected if it's assets are attached thereby exposing it to litigation from its client. The applicant also pointed out that the items sought to be attached are tools of trade. It contended that it has a duty to meet its obligations with regards to the services rendered to its clients which obligations if not met would result to losses and litigation. It further averred that the respondent only claims in its replying affidavit that it's a reputable company that will be able to repay the amount if the appeal succeeds but that the respondent has no known assets. The applicant also argued that the respondent has not furnished the court with sufficient proof of its financial capacity. It further submitted that the application has been filed without unreasonable delay. It claimed that its advocates were unable to access the file at the registry from the time of delivery since it could not be traced immediately and that it was not aware of the date of delivery of judgment. Furthermore, it stated that the matter was heard by a different magistrate from the one who wrote the judgment.

3) It also claims that contrary to the claims by the respondent, it filed its appeal within the prescribed 30 days pursuant to the provisions of Section 79G of the Civil Procedure Act. It further averred that there is no valid decree to warrant the execution.

4) The respondent on the other hand contends that the appeal was filed out of time since the judgment was delivered on 29th September 2015 and the appeal filed on 29th October 2015. It further claimed that there was no valid decree in existence hence there is no basis to apply for an order for stay of execution and that the error of dates in the decree is an error that the applicant should not base its case. It urged this court to find that there is a valid decree in place. It is further claimed that the application was brought after unreasonable delay since it was brought 5 months later without any explanation being advanced. The respondent further submitted that it is a well-established company and of means and as such, it would be able to refund the decretal sum if the appeal is successful. It argued that the fact that the process of execution is likely to be put in motion does not by itself amount to substantial loss. On the issue of security, the respondent pointed out that the applicant has avoided which avoidance is a clear sign of inability and willingness to provide the required security.

5) The principle to be considered in an application for stay of execution are well settled. Firstly, there must be threat of substantial loss on the part of the applicant if the orders for stay fail to issue. Secondly, the application must have been brought without unreasonable delay and thirdly, the provision for security has to be considered.

6) On the first principle, the applicant is required to show that they will suffer substantial loss. The corner stone of the jurisdiction of the court in determining whether or not to grant an order for stay of execution pending appeal is the fact that substantial loss will occur upon the applicants unless the order is granted. The legal burden of proof lies with the applicants to show that the respondent will not be able to refund the decretal sum if it is paid over to them. Should the applicant discharge that burden, the burden of proof then shifts to the respondent to demonstrate that he has the capacity to refund the sum if the appeal is successful. In the present case, the applicant claims that it will suffer substantial loss since it's a company currently undertaking projects and if execution is effected it will be affected since its assets being tools of trade will be attached therefore exposing itself to litigation from its clients. The respondent on the other hand claims that the applicant claims that the fact that a process of execution would be put in motion does not amount to substantial loss. It claimed that it's a reputable firm and of means hence it will be able to refund the decretal sum. It argued that the applicant has not shown other factors that the execution will create a state of affairs that will cause irreparable harm to the applicant. The applicant has claimed that if execution is to be effected against it, its tools of trade will be attached hence crippling the company. It further claims that as a result of the pending execution, its clients may file suits against it thus causing it huge losses. That in my view is enough to show that substantial loss will indeed be suffered by the applicant if the order for stay of execution is denied. Though the respondent claims that it is a company of means, the applicant has demonstrated that its likely to suffer substantial loss.

7) On the second principle of bringing the application without undue delay, the judgement was delivered on 29th September 2015 and the application was filed on 10th March 2016. Whilst a period of approximately five months can be termed as inordinate, the applicant has explained that the delay was occasioned by a failure by the applicant's advocates to access the court file at the registry from the time the judgement was delivered and that he was not aware of the date of the delivery of the judgement. I find this explanation satisfactory.

8) On the third and final principle, where the applicant is required to offer security for due performance of the decree, it is apparent that the applicant did not offer security at all in its supporting affidavit. The cardinal point is that, whether or not the appellant offers security, the court is enjoined by law to consider the issue before determining the application. The main consideration in this motion is whether or not the applicant has shown the substantial loss it would suffer if the order for stay of execution is denied. In this case the applicant has satisfied the requirement.

9) The respondent has raised a preliminary issue which is to the effect that the appeal was filed out of time. I have carefully perused the record and I am satisfied that the appeal was actually filed within 30 days as required under Section 79 G of the Civil Procedure Act. Therefore the preliminary objection lacks merit. The respondent has further claimed that the appellant has failed to incorporate the decree in the Record of Appeal. I have perused the record and it is apparent that the decree has been incorporated. The preliminary objection is therefore overruled.

10) In the end, the motion is allowed. The order for stay of execution is granted pending appeal. On condition that the appellant deposits the principal sum of ksh.1,990,546.55 in an interest account in the names of the advocates and or firm of advocates within 60 days from the date hereof. In default the motion shall be deemed to have been dismissed.

Dated, Signed and Delivered in open court this 29th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent