REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL APPLICATION NO. 197 OF 2012

APAR INDUSTRIES LIMITED ……………………….....................................PLAINTIFF

VERSUS

JOE'S FREIGHTERS LIMITED……………..…………………...………DEFENDANT

RULING

Stay of execution pending appeal

1. The Motion before me is dated 19th September 2014 and seeks orders of stay of execution of the Decree/ Judgment delivered on the 8th August, 2014 by Hon. **Havelock J** (as he then was) , pending the hearing and determination of an intended Appeal. The Motion is supported by the affidavit of Peter Muiru Gachina, the Deputy Operations Director of the Defendant/ Applicant sworn on 19th September, 2014. The Defendant avers that being dissatisfied with the decision of the High Court, it has instructed its lawyers to lodge an Appeal of which a Notice of Appeal dated 19th August, 2014 was duly filed and certified copies of proceedings and judgment consequently issued. Mr. Muiru further deposed that the defendant has an arguable appeal; that the amount decreed is substantial and execution of the decree will cause financial hardship to the Defendant, thus, occasioning substantial loss to them. Defendant. According to the Defendant, unless the orders are granted, any sums paid at this stage to the Plaintiff may not be recoverable since the Plaintiff is a foreign company based in India.

The Plaintiff opposed application

2. The Plaintiff opposed the application and filed a Replying Affidavit sworn on 14th October, 2014 by Nelish Baria, the Senior Marketing Manager of the Plaintiff Company. The deponent avers that this application is frivolous, vexatious and an abuse of the court process. The Plaintiff claims that the Defendant has since ceased business and closed down. In addition, the Defendant initiated voluntary winding-up in ***Winding Up Cause No. 6 of 2012 In the Matter of Joe's Freighters Limited*** to avoid paying the Decretal sum herein. The Plaintiff made further claims; that the Defendant is a mere shell and an instrument of fraud, formed to swindle unsuspecting and legitimate businesses like the Plaintiff. The Defendant did not make full disclosures about the Plaintiff's claim and the existence of this suit in the said winding up petition of the Defendant. Instead, the Defendant made false declarations therein. The Plaintiff stated that the intended appeal has no merit and is only meant to delay the Plaintiff from enjoying the fruits of its litigation. The Defendant is yet to file its memorandum of appeal to demonstrate any sufficient reason or ground for the appeal. In any event, the Plaintiff averred that the Defendant has

not offered security for the due performance of the decree which contravenes the rules which govern stay of execution. Finally, the Plaintiff deposed that there is no shred of evidence offered by the Defendant to demonstrate why the Plaintiff is unlikely to refund the decretal sum should the appeal be successful.

The Defendant replied

3. The Defendant answered the contentions by the Plaintiff and filed a supplementary affidavit sworn on 5th November, 2014 by Peter Muiru Gachina. The Defendant admitted that it indeed filed a voluntary winding up proceedings under ***Winding Up Cause No. 6 of 2012 In the Matter of Joe's Freighters Limited*** on 6th March, 2012 but that the same was not meant to defeat the Plaintiff's claim as alleged since the Plaintiff's suit was filed on 30th March, 2012 after the winding up petition. A stay of winding-up proceedings pending the hearing and determination of the instant suit which was applied for on 30th March, 2012. According to Mr. Muriu, the Plaintiff's assertion and the impression created that the winding up proceedings were initiated by the Defendant to defraud the Plaintiff are untrue and false and unsupported by any factual information. Mr. Muriu also denied the Plaintiff's claim that the Defendant Company has since been closed down its business. According to him, the Company is still active except that business has slowed down. He made further submissions, that the Defendant Company was incorporated in 1991 whereas the contract between the Plaintiff and Defendant was entered into the year in 2010 and thus, the Defendant is not a shell company meant to defraud legitimate businesses as claimed by the Plaintiff. He, however, deposed that the Defendant it is ready and willing to abide by any orders the court would issue on security for the due performance of the decree issued in favour of the Plaintiff.

4. The application was also canvassed by way of written submissions by the respective parties. The Defendant filed the submissions on 7th November, 2014, while the Plaintiff filed its submissions on 18th November, 2014. The large part of these submissions is an elaboration of the facts which have been placed before court by the Affidavits analyzed above. I will, therefore, give a brief synopsis of the submissions.

5. The learned Counsel for the Defendant submitted that all the requirements for the grant of an order for execution under Order 42 rule 6(2) of the Civil Procedure Rules had been met by the Defendant. The Defendant; a) brought the instant application without unreasonable delay; b) has shown that substantial loss may result unless the order is made; c) is willing to abide by any conditions the court may give for the due performance of the decree or order in granting a stay of execution. They cited the case of the ***Charles Ngatia Nguyo –v- Ekira Gathoni Kariithi & Another (2014) eKLR,*** to support the argument that this court has no obligation to assess the merits of the appeal pending before the Court of Appeal, as that would be usurping the powers of the Court of Appeal under rule 5(2) b of the Court of Appeal. It was also pointed out that the Notice of Appeal attached to the Defendant's application is sufficient to demonstrate that an appeal was pending before the Court of Appeal. Therefore, the court should allow the application and grant the orders sought.

6. The Plaintiff put forth a rejoinder; they argued that as the successful party in this case, they should be allowed to recover the moneys owed to it by the Applicant. The application herein is without merit and was only meant to delay and permanently bar the Plaintiff from recovering the money owed to it. The Plaintiff further argued that the Defendant had not been able to show the court that the Appeal herein would be rendered nugatory if the order for stay was not granted. It was not sufficient for the Applicant to simply allege that the Plaintiff being a foreign company would not be able to refund the money paid to it under the decree, should the intended appeal be successful. Learned counsel for the Plaintiff relied on the case of ***Machira T/A Machira & Co. Advocates –v-East African Standard (No. 2) (2002) KLR***, ***Cane Land Ltd and Others –vs- Delphis Bank Ltd Civil Application No. 344 of*** *1999* and ***Oriental Construction Company Limited –v- Rift Valley Water Services Board (2014) eKLR*** in support of this position. The Plaintiff further submitted that the Defendant cannot argue that the intended appeal was arguable as the same can only be ascertained by the Court of Appeal. However, it was the Plaintiff's submission that should the court feel compelled to grant the orders sought, the decretal sum as reflected in the Decree should be deposited in an escrow account in order for the Defendant to demonstrate its seriousness in prosecuting the intended appeal.

THE DETERMINATION

7. I have considered the rival submissions of parties as well as the affidavits filed in court. The relief of stay of execution pending appeal is a discretionary one; but the discretion is to be exercised in accordance with defined legal principles; not capriciously; not whimsically. Order 42, Rule 6 of the Civil Procedure Rules governs stay of execution and spells out the legal considerations the court should fathom in making the decision on whether to grant a stay of execution pending appeal. The Applicant must show sufficient reason why stay should be granted. And, in establishing whether sufficient cause has been shown, the court will consider whether;

i. ***The application has been brought without undue delay;***
ii. ***Substantial loss would occur unless stay of execution is granted;***
iii. ***The applicant has provided security for the due performance of the decree which might ultimately be binding on the Applicant.***

8. I am reminded, however, that in applying the prescriptions of the law, court should now have a much wider approach in order to serve substantive justice in accordance with principles of justice in article 159 of the Constitution as well as the overriding objective of the court in sections 1A and 1B of the Civil Procedure Act. Therefore, my own view is that the prescriptions under Order 42, Rule 6 of the Civil Procedure Rules are not really fetters on the discretion of the court but rather cardinal guiding principles of law in the exercise of the discretion; and are amenable to growth and refinement in tandem with the Constitution just like any other limb of the law.

Is application timeous?

9. Judgment was delivered on 8th August, 2014 and the application herein was filed on 19th September, 2014 which was after one month and 11 days later. I am satisfied that in the circumstances of this case, the application was filed timeously.

Prospects of the appeal

10. From the arguments by the parties, the prospects of the appeal herein have been made an issue for determination. I wish to state here-and I have stated times without number-that, the inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by requiring the Applicant to satisfy the decree which is reversed on appeal. I again cite the case of ***Jason Ngumba [2014] eKLR*** that:

‘’...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.

11. Another issue; Notice of appeal is sufficient proof of appeal under the law. This and the above rendition settle the two little issues and I will not weigh the prospects of the appeal as I have been enticed by the Defendant.

On substantial loss occurring

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 and I need not multiply them except to cite the case of ***Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)l 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"

The Court in the case of ***Adah Nyabok –vs- Uganda Holding Properties Limited (2102)***, **Mwera , J** also stated that;

"Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal"

13. Substantial loss in the sense of Order 42 rule 6 has also been described in innumerable judicial work; see for instance a work of Ogola J in ***Tropical Commodity Suppliers Ltd*** (Supra) quoting another Ugandan Case 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 the **c**ase 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...''

14. 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. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; this follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya or is a foreign company. First, I agree with the sentiments of the Plaintiff, that the fact that it is a foreign company based in India does not necessarily indicate that the said company will be unable to pay any decretal amounts that would have been paid to it should the Appeal prove successful. Second, in the modern world, international cooperation has offered means of enforcing foreign judgments or suing in foreign jurisdiction based on multi-lateral or bilateral international or regional instruments of state parties. See what the Court said in the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63***, that;

"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove 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..."

15. This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means. See ***Harlsbury's Law of England*** on this subject. In my view, substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small, the judgment-debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the Applicant shows that the Respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw;

the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money. I also think the submission by the Applicant that the sum involved is substantial and if paid out will lead to financial difficulties to the Applicant, is not relevant as long as it has not shown that the Respondent cannot refund the money. As long as the decree has not been reversed, the judgment-debtor remains liable to pay the decretal sum. The argument on financial difficulties is fit in an application to pay by instalments or in some other acceptable mode. One other thing; I agree with the Respondent that the fact that the Applicant is going through a voluntary winding-up is a matter of concern. Similarly, even if the suit was filed after the winding up proceedings were initiated, the debt was owing much earlier before the winding-up proceedings and that fact must be disclosed in such winding-up proceedings. In fact, given these circumstances, the Plaintiff has genuine and legitimate concerns and the court should not sit by and watch. The Applicant has not established substantial loss would occur. In deed it is the other way round; the Plaintiff will suffer substantial loss given the fact that there are winding-up proceedings of the Applicant in palce and its debt should, therefore, be secured.

16. But despite my above finding, and my observation that international cooperation enables enforcement of foreign judgments, I am, however, aware that reciprocal or international procedures involve complex issues of Mutual Legal Assistance requirements, rights compliance and other transnational complexities. I am also aware that both parties have rights; the Applicant has undisputed right of appeal which include its prospect; and the Respondent has rights to enjoy the fruits of its judgment. See what was stated in the case of ***Absalom Dova vs. Tarbo Transporters [2013] eKLR*** is relevant**,** that:

‘’The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination’’.

How, therefore, will the court balance the rights of parties in the circumstances of this case? The Applicant has made one commitment; that it is able, ready and willing to abide by the conditions and terms which the court may impose on granting stay of execution. The Respondent has also expressed some sort of magnanimous approach; that, should the court feel compelled to grant the orders sought, the decretal sum as reflected in the Decree should be deposited in an escrow account in order for the Defendant to demonstrate its seriousness in prosecuting the intended appeal. There is hope there. And there is room, in the best interest of justice to balance the rights of the parties in an almost symmetrical bound by ordering stay of execution subject to provision of security. From the extracted Decree the amount due on the judgment is Kshs.104, 577, 533/= in addition to costs and interest thereon. It is worth repeating that security in Order 42 rule 6 of the CPR is for the performance of the decree which might ultimately be binding on the judgment-debtor-Applicant. See the case of ***Visram Ravji Halai & Ano. vs. Thorntorn & Tupin [1963] Ltd Civil App. No. NAI 15 of 1990***, where the Court of Appeal held 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. Accordingly, I order stay of execution of the decree herein but on condition that the Applicant deposits the entire decretal sum as reflected in the decree herein in a joint escrow account at Kenya Commercial Bank, Milimani High Court Branch; Nairobi within 45 of today. The account should be interest earning account in the joint names of the counsels for the parties. The Applicant will also pay costs of the application. It is so ordered.

Dated, signed and delivered in court at Nairobi this 19th day of February 2015

F. GIKONYO

JUDGE