REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 151 OF 2014

RISHI HAULIERS LTD.....APPELLANT

VERSUS

MUSTAFA WECHULI WANJALA.....RESPONDENT

R U L I N G

1. The application for determination is the Notice of motion dated the 28/01/ 2015 certified urgent on the 29/01/2015. The same is brought pursuant to Order 42 Rules 1,2 and 6 (1), Order 51 Rule 1 of the Civil Procedure Rules Section 1A, 3,3A and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya wherein the applicant/appellant seeks for ORDERS:

    1. ……..
    2. That there be a temporary stay of execution of the exparte judgment/decree in Kakamega CMCC No.416 of 2013 delivered on 2/7/2014 pending the hearing and determination of this application interpartes.
    3. That there be a temporary stay of execution of the exparte judgment/decree in Kakamega CMCC No.416 of 2013 delivered on 2/7/2014 pending the hearing and final determination of the appeal.
    4. That this Honourable Court be pleased to order the appellant/applicants herein to deposit in court such sums as Security for costs pending the hearing and determination of the appeal.
    5. That costs be in the cause.

2. The application is premised on the grounds on the face of it and the supporting affidavit of LINAH JEPKOSGEI KIGEN an Advocate of the High Court of Kenya sworn on the same date. She depones therein that the Respondent obtained an exparte judgment on the 2/7/2014 for Kshs.400,850/= being both the general and special damages with costs yet to be taxed. She claims that they received instructions from Kenindia Assurance Company Limited on the 3/6/2014 to file a memorandum of appearance and defence but they did not do so because they were unable to trace the court file until the 2/7/2014 when the exparte judgment was delivered. Further that the defendant/applicant being dissatisfied with the said exparte judgment and decree instructed them to file an application for stay of execution and the setting aside of the exparte judgment which they did as per ANNEXTURE “LJK1 & 2”.

3. The said application was heard on the 13.08.2014 before Hon. Shitubi and the ruling scheduled for delivery on 8/10/2014. She claims that the ruling was not delivered as scheduled but was delivered on 3/12/2014 without Notice. The application for stay was dismissed on grounds that the supporting affidavit was sworn by the Applicants Advocate. That they came to learn of the dismissal on the 10/12/2014, and thereafter upon receiving instructions from their client they filed the appeal herein against the said ruling on the 31/12/2014. See annexture “LJK5” being a copy of the memorandum of appeal. The deponent claims that their appeal is arguable and raises serious issues of law and fact and it

has good chances of success. Further that they have no knowledge of the Respondent's assets and they verily believe that the Respondent is a man of straw and in the event that the exparte judgment is not reversed he may not be able to refund the money and the appeal herein may be rendered nugatory. Further that there is a bill of costs already filed by the Respondents listed for taxation on 11/2/2015. See annexture "LJK 6". She claims that the Respondent shall not suffer any prejudice should this application be allowed since he can be compensated by an order for costs and that they are ready to deposit such sum as this court may order as security for costs .

4. The application is opposed. There are grounds of opposition duly filed on the 2/02/2015 and a replying affidavit by NOEL MAHUNI an Advocate of the High Court of Kenya sworn on the 5/02/2015 wherein she claims that the applicant has not exhibited anything that shows that they received instructions as alleged nor have they filed any papers to show their intention to defend the suit. Further that the application for stay was made before the appellant came on record and that if at all they had instructions to defend the claim it was incumbent on them to follow up the matter and not shift the blame to the trial court for delayed delivery of the ruling. She also depones that the grounds upon which the appellant's application was dismissed were cogent grounds and adds that the Respondent will suffer prejudice since the appellant is using delaying tactics to deny him the fruits of his judgment. It is to be noted that the Respondent himself has not sworn an affidavit in opposition to the application.

5. Parties herein canvassed the application orally before me on the 9/02/2015.

6. It is necessary at the outset to address the issue of representation before making its findings since this is the major issue raised by the respondent in opposition to the application. Miss Mahuni submitted that proceedings in this matter commenced on the 09/10/2013 and the firm of Shilenje & co. Advocates came on record within the stipulated time as per order 6 Rule 1. She submitted that the applicants herein have not made mention of the above mentioned firm. It is submitted that the appellants filed a memorandum of appearance some fourteen (14) days after filing the application dated 08/06/2014. Mr. Kagunza for the appellant submitted that simultaneously with the application dated 08/06/2014 they filed their memorandum of appearance and so the issue of not being on record does not arise.

7. Order 9 Rule 9 (b) of the Civil Procedure Rules, 2010 provides as follows:-

> " Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
>
> 1. upon an application with notice to all the parties; or
> 2. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

8. In the absence of any consent or order by the court upon application by the Appellant to change its advocates, it is correct as submitted by the Respondent that the representation of the appellant in this matter was irregular. However, this irregularity is not one that would have rendered their application defective since there is on record a memorandum of appearance filed alongside the application whose ruling is the subject of the appeal herein. The concern of this court is therefore to do substantive justice to both parties as provided under Article 159 of the Constitution.

9. It is not in dispute that the requirements to be satisfied on an application under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 are that an applicant must demonstrate that:-

1. Substantial loss may result to him unless the order was made;
2. The application was made without unreasonable delay; and
3. He shall furnish such security as the court would order for the due performance of such decree or order as may ultimately be binding on him.

10. An applying party must satisfy all of the three (3) ingredients, which are inseparable, before he can

be granted a stay of execution pending appeal. The fact of the non- severability of the three (3) conditions aforesaid were reinforced in the cases of Mukuma vs Abuoga [1988] KLR 645 and also in HCCC No 875 of 2001 Trust Bank Ltd v Ajay Shah & 3 Others [2012] eKLR in which Mabeya J persuasively held that all the three (3) conditions set out in Order 42 Rule 6(2)(a) and (b) were cumulative and had to be satisfied before the order sought be granted.

11. In law, the fact that the process of execution is likely to be put in motion, by itself, is not a ground for granting stay of execution. The Applicant must show that substantial loss will occur if the execution is not stayed. But what does substantial loss entail? The High Court in BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO stated 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...***

12. The Court of Appeal reinforced the centrality of substantial loss in the case of ***Mukuma V Abuoga*** *supra* where it termed substantial loss as being the cornerstone of the discretion by the High Court in the granting of stay of execution orders under Order 42 Rule 6 of the CPR, when it stated that;

> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

13. Of course, a frivolous appeal cannot be rendered nugatory. The only caution however, is that this Court should not base the exercise of its discretion under Order 42 Rule 6 of the CPR only on the chances of the success of the appeal although a look at the Memorandum of Appeal shows that the appeal herein has high chances of success. It must consider factors that constitute substantial loss. Much more is therefore needed in order to pass the test set out above.

14. What the applicant in this particular application is apprehensive of is that they do not have any knowledge of the Respondent's assets and therefore believe that the Respondent is a man of straw and in the event the exparte judgment is not reversed the Respondent may not be able to refund the large decretal sum and the appeal will thus be rendered nugatory. I find that this is a genuine concern which may lead to substantial loss to the Applicant/Appellant although the Advocates for the applicant did not so much dwell on this essential requirement in arguing their application.

15. As regards the second condition, I am satisfied that the application herein was duly filed within a reasonable time from the time the applicant had knowledge of the ruling dismissing their application which was on the 10/12/2014. I only need to state that Advocates for the applicants need to correctly give the chronological sequence of the events they are referring to otherwise they run the risk of having their applications dismissed for want of proper details. Having found in favor of the appellant herein I make the following orders;

a. *There shall be stay of execution of the judgment/decree in the case appealed from pending the hearing and determination of this appeal.*
b. *The entire decretal sum amounting to KShs.400,850/= (Four Hundred Thousand Eight Hundred Fifty Thousand) to be deposited in a joint interest earning account in the names of the advocates for both parties, within 30 days from the date of this ruling, in default, the application shall stand dismissed and execution shall issue..*
c. *Costs of this application shall be paid to the Respondent..*

Delivered, dated and signed in open court at Kakamega this 19th day of February 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Vadanga for Mr. Kagunza (present)…for Appellant/Applicant

Miss Mahuni (present)…for Respondent

Polycarp ..Court Assistant