REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL APPEAL NO. 144 OF 2014

RECODA FREIGHT & LOGISTIC LTD …… APPELLANT

VERSUS

ELISHANA ANGOTE OKEYO ……..…… RESPONDENT

RULING

1. By a Notice of Motion dated 5th December, 2014, the Appellant ***Recoda Freight & Logistics Ltd*** (the applicant) sought orders of stay of execution of decrees issued by the Eldoret Chief Magistrate's court in CMCC No. 381 of 2012, CMCC No. 380 of 2012 and CMCC No. 379 of 2012 pending the hearing of its appeal filed in CMCC No. 381 of 2012. The applicant also prays that costs of the application be borne by the respondent.
2. The application is expressed to be brought under ***Section 1A, 1B*** and ***(e)*** of the ***Civil Procedure Act*** and Order ***42 Rule 6(1) & (2)*** of the ***Civil Procedure Rules 2010 (*** the ***rules).***

It is predicated on nine grounds which can be summarized as follows;

i. That on 22nd April 2014, the lower court entered judgment in default of appearance in CMCC No. 379 of 2012, CMCC 380 OF 2012 and CMCC No. 381 of 2012 in which the applicant was the defendant.
ii. That the applicant's advocates filed an application seeking to set aside the ex-parte judgments and to stay execution in the three cases and in a ruling delivered in CMCC No. 381 of 2012 which was to apply to the other two cases, the prayer seeking to set aside the ex-parte judgment entered in each case was dismissed with costs but stay of execution was granted for 30 days only.
iii. That the applicant has now filed a meritorious appeal challenging the trial court's decision in a ruling delivered on 25th November, 2014 and if stay of execution pending appeal is not granted, the appellant will suffer substantial loss if the decrees in the related suits amounting to a total of Kshs.1,243,170/- are executed as the respondents may not be able to refund the amount should the appeal be successful.
iv. That the applicant is willing to give such security as the court may order.
v. That it is in the interest of justice and equity that the orders sought be granted.

The application is also supported by an affidavit sworn by ***Mr. Mohammed Abdalla***, a director of the applicant.

3. The application is opposed through grounds of opposition filed on 15th January, 2015 which are stated as follows;

a. The application does not meet the provisions of ***Order 42 Rule 6*** of the ***Rules.***

b. The applicants have not demonstrated that they will suffer substantial loss unless stay is ordered.
c. The application has not been lodged without unreasonable delay or rather the delay has not been explained.
d. The applicants have not offered any specific security for due performance of the decree.
e. The application lacks merit.

4. To buttress their respective positions, parties chose to file written submissions. The Respondent was the first to file his submissions on 26th January, 2015 through the firm of ***C.D. Nyamweya & Co. Advocates*** while the applicant filed its submissions on 10th March, 2015 through the firm of ***Muriu, Mungai & Co Advocates.***
5. In summary, the applicant in its submissions expounded on the grounds supporting the application and urged the court to grant stay as prayed arguing that its appeal raises substantive questions of law and it is not frivolous; that if stay is not granted, the applicant will suffer substantial loss as it is a small scale transport company which cannot afford to pay the entire decretal sum of Kshs.1,243,170/- without experiencing financial constraints. The applicant further submitted that the Respondent's means are unknown and if the decretal amount is paid to them, they are unlikely to refund the same to the applicant in the event that the appeal is successful; that the application was made without delay and that the applicant was ready and willing to provide any security ordered by the court to the due performance of the decree.

   The applicant contended that it had met all the conditions necessary for the grant of stay pending appeal and that therefore its application should be allowed.

   In support of its submissions, particularly on the issue of substantial loss in money decree, the applicant relied on several authorities including the Court of Appeal decision in ***Johnson Mwiruti Mburu v Samuel Macharia Ngure [2004] eKLR; Ann Wanjiru Wangwa & another v Joseph Kibarua [2009] eKLR*** and ***Kenya Orient Insurance Co. Lt v Paul Mathenge Gichuki & Another [2014] eKLR.***

6. The Respondent on his part urged the court to dismiss the application mainly on grounds that the applicant had failed to demonstrate that it would suffer substantial loss if stay is not granted or that the respondents had no means to refund the decretal amount if the appeal succeeded. It was further submitted that the applicant had not shown that if stay was not granted, the appeal would be rendered nugatory. For this submissions, the respondent relied on two persuasive authorities namely ***Everlyn Jebitok Keter vs Henry Kiplagat Muge & 2 others High Court Civil Appeal No. 141 of 2010; O.M. Costa-Luis (suing as the liquidator of Nzama Kuu Cement Co. Ltd) v Nova Chemicals Ltd H.CCC No. 31 of 2001.***

   Lastly, the respondent attacked the validity of the supporting affidavit sworn by ***Mr. Mohammed Abdalla*** on grounds that his claim that he was authorized to swear the affidavit on behalf of the applicant which is a limited liability company had not been supported by any resolution by the applicant to that effect; that in the absence of such a resolution, the affidavit was incompetent and should be struck out; that if the affidavit was struck out, the application would be unsupported by any evidence and ought to be dismissed.

   For this proposition, counsel relied on two authorities namely ***Affordable Homes Africa Ltd vs Henderson & others HCC No 524 of 2004*** and ***Davis Wafula Nakitare and 2 others v Agricultural Development Corporation HCC (Kitale) No 80 of 2009.***

7. I have given due consideration to the application, the affidavits filed by the parties, the written submissions filed by counsel, the grounds cited in the memorandum of appeal and all the authorities cited. Having done so, I take the following view of the matter

   Order 42 Rule (6) 2 of the ***Rules*** provides the conditions which an applicant seeking stay of execution pending appeal must satisfy before the court can exercise its discretion in granting the orders sought. The applicant must demonstrate to the satisfaction of the court that substantial loss

will ensue if orders of stay are not granted; that the application had been filed without unreasonable delay and that he is ready and willing to give such security as the court will order for the due performance of the decree.

Given the requirement of this provision of the law, the question that this court must now answer is whether the applicant has met the above conditions.

8. I wish to start with a consideration of whether the application was filed without unreasonable delay. It is not disputed that the ruling which prompted the applicant's appeal was delivered on 25th November, 2014. This application was filed on 15th December, 2014 about three weeks later. A period of three weeks in my view cannot amount to unreasonable delay. I am therefore satisfied that the application was filed without unreasonable delay.
9. Regarding the claim that the applicant will suffer substantial loss if stay orders are not granted, I find that though the applicant specifically pleaded in the application that the Respondent's means are unknown and that they may not be capable of refunding the decretal amount in the event that its appeal succeeds, the respondent did not dispute this claim. It is important to note that the respondent did not file a replying affidavit in response to the application and did not therefore offer any evidence to prove that he had financial resources which he could employ to refund the decretal amount if the appeal was eventually successful.

   I wholly concur with Hon. Kasango J in ***Kenya orient Insurance Co. Ltd v Paul Mathenge Gichuki Civil Appeal No. 40 of 2014 [2014] eKLR*** when she held that when an applicant pleads in an application such as the current one that the respondent is not possessed of means to refund the decretal amount if the appeal succeeded, the burden of proof immediately shifts to the respondent to prove that he has capacity to refund the decretal sum if the pending appeal was determined in the applicant's favour : See also ***ABN AMRO Bank N. V vs LE Monde foods limited Civil Application No. NAI 15 of 2002.***

   In this case, the respondent chose not to respond to the applicant's claim that his financial means were doubtful. He therefore failed to discharge the evidential burden shifted to him by the applicant of proving that he had income or property that would enable him refund the decretal sum in the event that the appeal succeeded.

10. It is not disputed that the total decretal amount in the three related cases amounts to Kshs.1,243,170. I agree with the applicant that this is a substantial amount. If the applicant is forced to pay the decretal amount by way of execution of the decree and the respondents are unable to refund the same if the appeal is successful, I am satisfied that the applicant will suffer substantial loss.
11. The respondent has urged the court to dismiss the application on grounds that the applicant has not offered a specific security for the due performance of the decree but has just left the matter to the court. In my view, the law does not require an applicant to offer a specific security for the due performance of a decree though nothing stops an applicant from doing so if he so wishes.

    Under ***Order 42 rule 6(2) (b)*** of the ***Rules***, it is the court which should decide in its discretion what kind of security if any an applicant should provide for the due performance of a decree depending on the circumstances of each case. It is sufficient for purposes of compliance with ***Order 42 Rule 6 (2) (b)*** if an applicant gives an undertaking that he is ready to provide the security the court would in its discretion impose for the due performance of the decree.

    I am with due respect unable to find any merit in the respondent's submission on this point.

12. I now wish to turn to the Respondent's submission that the application should be dismissed as it was allegedly supported by an incompetent affidavit for failure of the applicant to annex a company resolution to prove that he had been authorized to swear the affidavit on its behalf. I have given careful consideration to this submission and the authorities cited in its support, namely ***Affordable Homes Africa Ltd v Henderson & 2 others HCCC 524 OF 2004 [2004] eKLR 473***

and ***Davis Wafula Nakitare & 2 others vs Agricultural Development Corporation HCC No. 80 of 2009.***

I find that these authorities are inapplicable to the instant application because the decisions there in related to the filing of suits in a company's name without availing a resolution of the company's board of directors or shareholders authorizing the commencement of the suits in question. In our case, what is in issue is an affidavit filed in support of an application. It is not a verifying affidavit accompanying a plaint commencing a suit in the name of a company.

13. I have gone through ***Order 19*** and ***Order 51*** of the ***Civil Procedure Rules 2010*** which contain rules governing the validity of affidavits and the hearing of applications respectively and nowhere do they require that an affidavit in support of an application filed by a limited liability company should be sworn by an officer or a director who is duly authorized by the company under seal to do so.

The only time the rules require authority of the company under seal for its officers to swear an affidavit on its behalf is when a suit is being commenced in the name of a corporation or a company. In such a case, ***Order 4 Rule (4)*** requires that a verifying affidavit accompanying the plaint should be sworn by an officer of the company duly authorized under the seal of the company to do so. This is the only time in my view when a company resolution to prove authority to swear an affidavit on its behalf may be required.

14. In any case, even if there was merit in the respondent's submissions on this point, the most the court can do is to ask the applicant to file the requisite authority rather than to dismiss the application without considering its merits.

Holding otherwise would amount to sacrificing the interests of substantive justice at the alter of legal technicalities which would fly in the face of the letter and spirit of ***Article 159 (2) (d)*** of the ***Constitution of Kenya 2010*** which lays emphasis on the administration of substantive justice.

15. In the result, I am satisfied that the instant application is merited. The application dated 5th December 2014 is consequently allowed in terms of prayer 3. The costs of the application shall abide the outcome of the appeal.

16. It is so ordered

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 30th day of April 2015.

In the presence of:-