



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 848 OF 2010

CAPE SUPPLIERS LIMITED.....PLAINTIFF

VERSUS

SINOHYDRO CORPORATION LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Ruling is pursuant to the Notice of Motion application by the Plaintiff dated and filed in court on 21st November 2014. The application is filed under Order 42 Rule 6 of the Civil Procedure Rules and seeks the following orders:-

1. *That this application be certified urgent.*
2. *That there be a stay of execution pending appeal against the orders made herein on 24th October 2014.*
3. *That costs of this application be costs in the cause.*

2. The application is premised on the grounds set forth therein among them that the Plaintiff is aggrieved by the orders of this court made on 24th October 2014 and has filed an appeal against the said orders; the Plaintiff was granted 30 days to deposit a sum of Kshs.9,474,982/= and may be cited for contempt unless the said orders are stayed pending the appeal; and that the Plaintiff has an arguable appeal with high chances of success and that unless the stay order is granted the appeal shall be rendered nugatory. The Plaintiff further states that the application has been filed without unreasonable delay and that the Plaintiff may suffer substantial loss if the application is not granted and the Plaintiff is willing to provide such security as the court may order.

3. The application is supported by the affidavit of **Peter Kinaro** who deposes that he is one of the directors of the Plaintiff company. The deponement in his supporting affidavit mainly expounds on the above grounds.

4. The application is opposed by the Respondents vide Grounds of Opposition filed in court on 27th November 2014, and states that the application is frivolous and an abuse of the process of the court and has not satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules. In any event, the Respondent states that the intended appeal will not be rendered nugatory because the order of court is to deposit the sum of Kshs.9,474,982/= in an escrow account in the joint names of the parties advocates as security for this suit.

5. With the leave of the court parties filed written submission which I have considered together.

6. The brief background to the application is that Judgment in default of appearance was entered against the defendant way back in **14th July, 2011**. Vide an amended application dated 16th July, 2012, the defendant sought to set aside that judgment and to be permitted to defend the suit against it on merits. Vide a ruling delivered on the **30th May, 2014** this Court set aside the default judgment hitherto existing against the defendant company and the court made the following specific orders:-

- a. ***The sum of Kshs. 9,474,982 paid to the plaintiff shall be deposited in the interest earning account in the names of the party's advocates, and shall act as security for this suit. The said deposit shall take place within 10 days from the date of the ruling(30/05/2014);***
- b. ***The defendant is herewith given an opportunity to defend the suit on its own merits;***
- c. ***Costs shall be in the cause.***

7. In compliance with the said ruling, the defendant filed and served its statement of defence, the supporting documents and the plaintiff/Applicant also promptly filed a reply to the defence clearly setting stage for a hearing of the case on its merits as ordered by the court. On the **10th June, 2014** (after expiry of the period granted by court), the applicant herein filed an application dated 9th June, 2014 seeking to set aside and/or review the orders of court made on the 24th October, 2014. The supporting affidavit sworn by Peter Kinaro a director with the plaintiff stated at paragraph 12 as follows:-

“That the period of 10 days granted by the court within which money is to deposited in a joint account is too short to be said to be reasonable under the circumstances.”

8. Vide a ruling delivered on the 24th October, 2014 this Court dismissed the review application for lack of merit. However, the court gave an extension of time to an otherwise non-deserving party to enable the applicant purge the contempt on the face of the record. The applicant was granted an additional period of 30 days from the date of the ruling to fully comply with the orders of the court made on the 30th May, 2014. The plaintiff yet again has filed the instant application seeking for stay of execution pending appeal against the orders of court made on the 24th October, 2014.

9. The Plaintiff/Applicant in his submission mainly dwells on the merits of its intended appeal. However, in my view the main issue is whether or not the application satisfies order 42 Rule 6 of the Civil Procedure Rules, and that is the issue for determination by this court.

10. The Applicant submitted it has an arguable appeal and that if the stay is not granted the appeal shall be rendered nugatory. The Applicant cited the case of East Africa Portland Cement Company Limited d-Vs – Superior Homes Limited where the court of appeal observed that:-

“An arguable appeal need not be one that must succeed. . Nor does an applicant have to demonstrate a plethora of plurality of arguable points of law to show the appeal is arguable. Even a solitary arguable point is sufficient.”

The submission seems correct to me, except that it does not appear to address principles stated under Order 42 Rule 6.

11. The Respondent on its part submitted that the application is an abuse of the process of the court. The Applicant is abusing the due process of the court. The order to deposit the money was first made on 30th May, 2014 in which the Applicant was requested to deposit the money within 10 days. Later, the Applicant filed an Application on the tenth day i.e. 10th June, 2014, after expiry of the period granted, seeking to set aside the order made on the 24th October, 2014. The court, mercifully, granted the Applicant an extension of 30 days to comply with the earlier orders of 30th May, 2014 and to enable the applicant purge the contempt apparent on the face of the record. Now, the Plaintiff has filed Application to stay the said orders pending appeal. It is the defendant's submission that the plaintiff is mischievously

using the court process to avoid and/or delay the compliance with the court orders.

12. The Respondent cited the case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** where the court defined abuse of the court process by quoting a South African case, **BEINOSI v WIYLEY 1973 SA 721 [SCA]** heard by the Appeal Court of South Africa, at page 734F-G where **Mohomad CJ**, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

13. The Respondent also cited the case of the **Kenya Section of the International Commission of Jurists v The Attorney-General & 2 others [2012] eKLR**, where the court at paragraph 36 stated the concept of the abuse of the court process as follows-

“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice.”

The Respondent submitted that the current application is a clearly abuse of the process of this court. The Court had granted the Applicant a period of thirty (30) days to comply with the orders issued on the 24th day October, 2014 which period was to expire on 24th day of November, 2014. The Applicant waited for a period of 27 days and filed the Application, though he filed the Notice of Appeal on the 28th day of October, 2014. In the circumstances of this case the Respondent submitted that there was undue delay. The Notice of appeal was filed on the 28th October, 2014 and no justifiable reason has been offered to explain the filing of the application much later on the 21st November, 2014.

14. I have carefully considered those submissions. Under **Order 42 Rule 6(2)** of the Civil Procedure Rules, 2010 the principles for grant of stay of execution are stated thus:-

“No order of stay of execution shall be made under sub rule (1) unless-

- a. *The court is satisfied that substantial loss may result and that the application has been made without unreasonable delay; and*
- b. *Such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the applicant.*
- c. *Notwithstanding anything contained in sub rule (2) the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending hearing of a formal application.*

See also the decision of the High Court in the following cases:-

Chesilyot Enterprises Limited -Vs- Co-operative Bank (K) Limited [2008] eKLR.

In Re the Estate of Zakayo Kipkoech Kirui (Deceased) [2014]eKLR

15. The Applicant may have the right to appeal. However, the Applicant has not satisfied this court how it will suffer substantial loss if the stay is not granted. In the case of **Machira T/a Machira & Co. Advocates Vs. East African Standard (No.2) (2002) KLR 63**, it was held as follows;

“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...”

16. Other than the difficulty of paying, the Applicant is not demonstrating that this intended appeal has merit. This court has not been told either by way of a draft memorandum of appeal or generally in the application what the intended grounds of appeal would be. The court ordered the sum obtained from the defendant totaling to Kshs. 9,474,982 to be deposited in a joint account of the plaintiff and the defendant advocates. This is the crux of the order which the plaintiff keeps challenging. The applicant has failed to demonstrate the grounds upon which it intends to challenge this before the Court of Appeal.

17. Besides, the applicant has failed to demonstrate how depositing money in an escrow account where its advocates are a signatory would render the appeal nugatory if they were to succeed. **In Re the Estate of Zakayo Kipkoech Kirui (Deceased) [2014]eKLR**, the Court held that it is important that the court in determining an application for stay do balance the interest of the applicant and those of the respondent. That a party seeking stay of execution pending appeal must therefore demonstrate that they are not using the appeal to delay justice. They must not only show that they have an arguable appeal but also that they have come to court without undue delay.

18. Pursuant to the foregoing paragraphs of this Ruling, I am not satisfied that the current application dated 21st November 2014 by the Applicant seeking the stay of execution is merited.

19. The said application is herewith dismissed with costs to the Defendants/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Gachie for the Plaintiff

Mr. Sifuna holding brief for Wanga for the Defendants

Teresia – Court Clerk