



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

CIVIL SUIT NO. 217 OF 2015

MUWA TRADING COMPANY LIMITED.....PLAINTIFF

Versus

KENYA POWER & LIGHTING CO LIMITED.....DEFENDANT

RULING

Stay pending appeal

[1] I am confronted with an application dated 4th June 2015. It is an application for stay of execution of the ruling delivered on 28th May 2015 and all consequential orders arising therefrom pending the hearing and determination of the intended appeal herein. The application is expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Rules, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. the application is grounded upon the Supporting Affidavit of Emily Kirui, the grounds set out in the application as well as other adduced in the written and oral submissions by counsel for the Applicant.

The Applicant's gravamen

[2] The Applicant argued that the intended appeal herein raises arguable points with high chances of success. They urged that they have inadequate storage facilities to house the transformers in question as was ordered by the court. Their explanation is that they continuously receive bulky and numerous commodities including transformers. Due to the inadequacy of storage facilities, the Applicant normally requires its suppliers to dispatch deliveries to the field for immediate installations to avoid creating bottlenecks at its facilities as well as avert the high risk of damage and or deterioration of the fragile and delicate equipment and machines. Therefore, the order for storing the transformers presumed that the Applicant has adequate storage facilities which is not the case, thus, the ruling is highly prejudicial to the Applicant as it will create extreme bottlenecks in the available facilities. Counsel argued also that the transformers belong to the Respondents and not the Applicants. Counsel was categorical, therefore, that the order places unbearable burden on the Applicant to take goods which are not theirs. The costs of storing the transformers are enormous and so substantial loss will occur to the Applicant unless the order is stayed. According to counsel, the court was aware of these prohibitive costs when it directed the Respondent to provide undertaking as to damages. He stated that the Respondent should keep the transformers until the suit is heard and determined. The Applicant relied on the cases of **Kinyati Kiragu vs. AG & ANOTHER [2006] eKLR** and **Justus Wambua Kavya vs. KCB eKLR**.

[3] The Senior Counsel, Ahmed Nassir Abdullahi argued further that the other loss arises from the order

on restoration of guarantee herein. He was firmly of the view that prohibitory injunction was in vain. The order of status quo ante was essentially an order of mandatory injunction and is draconian as (1) it will require the Applicant, which is a company that provides essential services to restore Kshs. 50,000,000 from its clients' account which is colossal sum of money; and *(2) it was issued in a case that is not clear. According to counsel, the order for restoration of guarantee fused the two contracts, i.e. of Tender and Guarantee whereas both are distinct. Counsel also submitted that the guarantee was between the guarantor and Prime Bank. He did not stop there. He submitted that the contract herein was terminated and that fact was not in dispute. But the order which the court issued was substantive mandatory injunction especially when it ordered the restoration of the guarantee. Counsel was of the view that the order was made despite the fact that Prime Bank which issued the guarantee was not a party in the contract or the suit. The Respondent is also a total stranger to the Guarantee and cannot apply on a guarantee which has already been performed. Counsel continued to urge that a mandatory injunction is only available in a case that is very clear, simple and capable of summary resolution by the court. It must also be a case where the Applicant intends to steal a march from the Respondent. Counsel stated that the ruling by this court bestowed rights on parties where none existed.

[4] In sum, counsel concluded on the question of substantial loss. He said that the loss herein is qualitative and substantial because the period the transformers will remain in the storage of the Applicant is not certain and could be stretched as long as possible. The effect thereto is to render the appeal herein nugatory. He referred to judicial authorities filed in support of this contention. Again, the money paid as guarantee belongs to the bank and the bank has not complained. He stated that the application was filed in good time and so on the basis of the grounds argued above, it should be allowed.

[5] Counsel for the Applicant replied to the submissions by counsel for the Respondent which he said had taken the wrong trajectory as loss to the Applicant is what matters in an application under Order 442 Rule 6 of the Civil Procedure Rules. He said that counsel for the Respondent has not analysed the consequences of the orders herein upon the Applicant. He insisted that specific performance can only be ordered at the trial. In any event, there is no property on the goods that has passed to the Applicant and so specific performance cannot issue. Counsel was of the view that the court rightly avoided the issue of specific performance at page 12 of the ruling. The only quarrel he had with the ruling was that it placed a burden on the Applicant before rights between the parties had been determined by the court. He said that Order 40 of the CPR has no relevance to the case at hand as it is not a case for detention or inspection of property. There is no evidence of high-handedness by the Applicant. As there is no prejudice to the Respondent, the court should grant stay of execution.

Respondent opposed application

[6] Mr Oraro, Senior Counsel argued the Respondent's case. He relied on the replying affidavits filed as well as the judicial authorities which he filed in court. He distinguished all the judicial authorities submitted to court by the Applicant and stated that all of them relate to execution of final order and not interlocutory injunction. He termed them to be irrelevant. He took the view that the court considered two motions; for restraint and reversion to status quo ante. The orders were granted by the court in the circumstances of the case. He submitted that the contract in issue was specially meant to procure goods tailored to the Defendant only and not any other person. Stay of the orders herein will only blow away the substratum of the plaintiff's cause of action. Also, termination of such contract required that reasons for termination be stated. But the contract was terminated without any reason. And to date no reason has been given for the termination. Counsel urged that the Defendant kept on revising the contract and eventually the Defendant allowed the Plaintiff to deliver the transformers only to make an abrupt about-turn which was purely a manifestation of the high-handed conduct of the Defendant. The decision to terminate the tender was, therefore, high-handed one- this is the kind of conduct that is envisioned under Order 40 of the CPR and which would justify issuance of a mandatory injunction. The goods must be preserved. The order granted was the best one in the circumstances as the Defendant has the capacity and know-how to store the transformers as the case is heard. Counsel referred the court of paragraphs 9-15 of the affidavit by the Defendant which averred that they are the only ones who can handle the matter at hand. They relied on the case of **Astro Acito Navegacion S.A. vs. Southland Enterprise Co. Ltd & Another (No. 2)** to support the order on restoration of guarantee. Therefore, preservation of the guarantee is essential.

The delivery must also be taken as part of preservation of the goods lest the plaintiff will never be able to realize the relief it is seeking. The Plaintiff cannot even import the transformers unless they are inspected by KPLC which is the only power distribution company in Kenya. He argued that the goods cannot even be shipped back to the country of origin. Yet the shipping agents are already asking for their containers back. He quipped; what other loss can one suffer? Counsel was surprised that the Defendant is not keen on the hearing of the case- which is the standard procedure. His position is that they are disinterested in the hearing because they will suffer no prejudice. This will result into substantial loss on the part of the Plaintiff. Counsel lamented the high-handedness of the Defendant and stated that they have even ordered another batch of 5000 transformers yet they are seating on Kshs. 50,000,000. They concealed the fact that they ordered a huge consignment of transformers. Counsel accused the Defendant of not being candid at all and so they have come to court without clean hands.

[7] The Plaintiff's counsel also addressed the question of Guarantee. He submitted that the Bank guaranteed to pay on demand and following default by the Plaintiff. The default is yet to be determined in this case. How then can they declare default when the issue is in controversy before the court? He asked. The guarantors are now exposed because they will be called upon by the bank to pay them. He added that restoration of the guarantee will not at all render their appeal nugatory. Looking at all the factors herein, counsel was convinced that the balance of convenience tilts in their favour. He submitted that the court was within its power to ask for undertaking as to damages which is sufficient in this case where an injunction was granted. See order 40 rule 2 of the CPR. He emphasized that it is common knowledge that KPLC has, in the past engaged in similar high handed conduct like it has done in this case. on the basis of the above reasons, he asked the court to dismiss the application.

DETERMINATION

The test

[8] I wish to state that the enactment of the Constitution of Kenya 2010 and the introduction of the principle of Overriding Objective in the body of our law established a new scheme in the adjudication of cases, such that, *inter alia* courts of law should dispense substantive justice as dictated by the circumstances of each case. Needless to say also that the new scheme stresses that courts should take a much broader approach in applying and interpreting any principles that have been prescribed in any law to govern a particular relief. See the case of **E. Muiru Kamau & Another vs. National Bank of Kenya Ltd (2009) eKLR** from which the court quoted the following;

“The Courts including this court in interpreting the Civil Procedure Act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objectives include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by enduring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on an equal footing.”

Therefore, in applying the grounds set out in Order 42 Rule 6 of the Civil Procedure Rules, the court should follow the dictates of the Constitution and the scheme in the administration of justice prescribed therein.

[9] Order 42 Rule 6 (1), (2) & (4) of the Civil Procedure Rules provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made to , to consider such application and to make such order thereon as may seem just, and any person aggrieved by an order of stay made by the court from whose decision the

appeal is preferred may apply to the appellate court to have such order set aside.”

(2) No order for stay of execution shall be made under subrule (1) unless-

- a. The court is satisfied that substantial loss may result to the Applicant unless the order is made 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 ultimately be binding on him has been given by the applicant.**

(3) For the purposes of this rule the Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

[10] It is not in doubt that the relief of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules is discretionary; except, the discretion of the court should be exercised judicially. See **Shah vs. Mbogo**. I will seek to see whether there is any *sufficient cause* shown to impel the court to order stay of execution of my orders. In doing so, I will be guided by the major considerations set out in Order 42 rule 6 of the CPR which are:-

- a. Whether the court is satisfied that substantial loss may result to the Applicant unless the order is made and**
- b. Whether the application has been made without unreasonable delay; and**
- c. Whether the court should order for provision of such security for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

On unreasonable delay in filing the application

[11] This is the easier ground to start with. The ruling sought to be stayed was delivered on 28th May 2015. The Applicant filed this application on 4th June 2015. Doubtless, using any measure and the circumstances of the case, the application was filed timeously. I will proceed to examine the other considerations in law.

On substantial loss

[12] This case presents unique circumstances as it will be borne out later. Each side of the divide has argued that it will suffer irredeemable loss. The Applicant claims the substantial loss which will occur unless stay is granted is twofold; (1) it has been condemned to shoulder an enormous burden of storing the transformers for the Applicant yet the rights of the parties have not been determined; and (2) it will be required to pay a colossal sum of Kshs. 50,000,000 from its clients' account if *status quo ante* on the guarantee is resumed. The Applicant argued that the Respondent is a stranger to the Guarantee and cannot sue on it or obtain orders against the Bank. The Respondent on the other hand saw irredeemable loss occurring if stay is granted because; (1) the Applicant deliberately and without any reason purported to terminate the tender after it had already allowed the Respondent to ship and deliver the transformers in question; to them- this is a habitual high-handed conduct by the Applicant and is *mala fides*. (2) The transformers are specially tailored for use by the Applicant only as it is the only power distribution company in Kenya. The Respondent averred that they cannot sell the transformers to another person or even ship them back. But, following the submissions by counsel for the Applicant, the question that arises is; whether the substantial loss envisioned in Order 42 rule 6 of the CPR relate only to the Applicant.

[13] The above question is of real jurisprudential worth. My view is that in determining whether or not to grant stay of execution under Order 42 rule 6 of the CPR, the court engages in a novel balancing act of two competing rights; on one hand there is the Applicants right of appeal which includes the right that the appeal should not be rendered nugatory; and on the other hand, there is the Respondent's right to the

fruits of the judgment or order of court made in his favour. I should state here that a relief which a party has been given by the court, whether at interlocutory or final stage of the suit, for as long as it has not been reversed or reviewed, entitles that party the right to enjoy the fullest extent and benefits of the judgment or order as the case may be. I think that, any view to the contrary, especially one which tends to remove interlocutory reliefs from the above bracket will diminish the legal and probative value of court orders as legal remedies. I should think also that such argument that ventures to make a distinction between interim relief and final orders may be futile. I could be wrong, but I am certain that, the correct position of the law is that the court will not ignore the right of a party to a relief that has been granted by the court when assessing substantial loss for purposes of stay of execution. Accordingly, substantial loss to the applicant envisaged in Order 42 rule 6 of the CPR will be determined after the court has considered all factors in the case. Similarly, as stay is discretionary remedy, the conduct of the Applicant as well as alleged acts of *mala fides* are necessary and relevant matters for consideration by the court.

[14] Let me tackle the submission that restoration of the Guarantee is a source of substantial loss for which stay would issue. First of all, on prima facie basis, the court issued an injunction restraining termination of the contract in issue. There was abundance of evidence of high-handedness on the part of the Applicant especially in the manner it attempted to terminate the contract herein. See what the court found in the following excerpt of the ruling that:-

“At some point, the Respondent realized that the completion date of January 2014 was not feasible and amended delivery schedule to August 2014. Further waivers were also requested for by the Applicant and were granted by the Respondent. The relevant request for waiver is the one made through letters dated 4th and 13th April 2015. The approvals were granted by the Respondent through their letter dated 27th April 2015. The Respondent also acknowledged the submitted routine test results of all the units in question were satisfactory as per the IEC 60076 tender specifications. The Respondent gave the Applicant in the said letter a go-ahead to deliver the transformers except they were to be subjected to inspection and test before acceptance to KPLC stores. The termination letter was then written on 5th May 2015 which is hardly 8 days thereafter. The letter alleges breach of contract without giving any specific details thereto. The letter dated 5th May 2015 does not even make reference to the letter dated 27th April 2015 yet it was written after the Respondent had given the Applicant the go-ahead to deliver the remaining transformers in a letter dated 27th April 2015. The letter dated 27th April 2015 has not been denied. This conduct of the Respondent in terminating the contract is not one which respects the rights of the other party in the contract, and may excite estoppel being issued. On *prima facie* basis, this conduct smacks high-handedness approach which affects the rights of the offended party. The contract recognizes extension of contract and dates of delivery and if termination is to be done it must be in accordance or [with] reference to the extension so granted. Although the time of delivery was not exactly specified in the extension contained in the letter dated 27th April 2015, the termination should have made reference to the extension allowed. It is not adverse to state that, in ordinary course of things, depending on the nature of the goods to be delivered a party should act reasonably. In this case we are talking of transformers which are huge loads and are normally collected through the port of Mombasa with all its encumbrances. Again, on *prima facie* basis, there is a possibility of oppression and infringement of a right which would require protection by the court. Estoppel would even issue in these circumstances. And where a right is being infringed or likely to be infringed, an award of damages cannot be an alternative remedy. Therefore, the balance of convenience favours granting of an injunction to restrain the Respondent from terminating the contract until this case is heard and determined”.

[15] It is on the above premises that the court ordered a restoration of the guarantee. The court is aware that a bank guarantee avails the money payable to the beneficiary who is normally the buyer readily at hand once the seller defaults to deliver on the contract, and he need not go far away to seek for damages. Except, however, where there is fraud, or duress or coercion or undue influence of which the buyer is aware of or he has committed it himself, the buyer cannot claim the performance bond. See a work of the

court in the case of **Lagoon Development Limited vs. Beijing Industrial Designing & Research Institute [2015] eKLR** that:-

The previous acts by the Plaintiff in handling the entire issue of the performance guarantees and realization thereof was quite unpleasant and paints a picture of a Plaintiff who insists on default just to give it a ground to call-up for the performance guarantee. Such “tyrannical posture” or high-handed conduct of a plaintiff is force and fraud on the other party, and it will be a ground to estop such plaintiff from calling-up for a performance guarantee given upon the contract. Such conduct will never excite approval of equity for any purpose. Thus, as it has been said before, and I repeat it again, any such party coming to court for equitable relief will be denied remedy. I should state that in common parlance, a true description of the conduct of the Plaintiff in this case may require strong language to be used. But, as a court of law, I have used appropriate and measured language [that] to demonstrate that the Plaintiff does not deserve any equitable relief sought’...

Other offensive actions by the Plaintiff consist in the manner they dealt with the initial Malindi case and the contempt proceedings which had been commenced therein. All these things will not allow a court of law in its true mind to lend its process or hand in aid of the Plaintiff. The Plaintiff was also aware that the Final Certificate was challenged which put to doubt its conclusiveness as proof of breach of contractual obligations herein. Therefore, an inescapable conclusion is that the Plaintiff has come before this Court with unclean hands, and would therefore not be eligible for an equitable relief. Accordingly, I dismiss the plaintiff’s application with costs to the Defendant.

[16] I hold the view that forced or coerced or induced default will be classified under fraud or duress and should be considered under the “tempo of the parties” obligations to act bona fides. The facts of this case reveal force and unprovoked declaration of purported default by the KPLC in order to give it a ground to call for the performance guarantee. In any event, the Guarantee will be available for realization by the Applicant should the court find that there was default on the part of the Respondent. Therefore, in the circumstances of this case, I do not see how restoration of the guarantee will be a source of substantial loss to, as claimed by the Applicant. It is important to note that the alleged default by the Respondent in the contract herein is what is in controversy in this case, and it would be unfair to allow the Applicant to benefit from the guarantee before the issues herein have been resolved by the court. I think such action would take away the entire substratum of the cause of action herein and the Respondent may litigate in vain. Again, the issues raised in the case are not frivolous issues they are bona fide triable issues which should be canvassed without one party having undue advantage over the other. Therefore, contrary to the arguments by counsel for the Applicant, the circumstances of this case portray a party whose aim was to steal a match from the other and so, a mandatory injunction was merited. Accordingly, the argument based on the allegation that restoration of the guarantee is a source of substantial loss fails to persuade the court. I do not think, and I have stated this earlier, that the restoration of the guarantee will even render their appeal nugatory as the guarantee will be available for realization by the Applicant should the court find that there was breach on the part of the Respondent. I reject the argument and as a ground for issuance of stay pending appeal. I will now consider the other argument on substantial loss based on storage of the transformers.

[17] Counsel for the Applicant argued strongly that the transformers belong to the Respondent and no goods have passed in law to the Applicant. He also argued that the storage would stretch the Applicant’s facility. There is merit in these arguments. There is also merit in the Respondent’s argument that the Applicant deliberately terminated the contract to cause hardship to the Respondent and it is the only suitable person to store the transformers. These two adverse arguments are eminent. The court is surely in doubt whether there will be substantial loss on the Applicant should stay not issue. The court is looking at the circumstances of the case. However, although the Applicant has not come to court with clean hands, the court is persuaded to stay only the order requiring the Applicant to house the transformers in their warehouses or stores. As I have not stayed restoration of the Guarantee, upon such restoration of the guarantee the Respondent will not be under an obligation to pay up the guarantee sum to the bank. For certainty, the restoration of the guarantee should be done within 14 days of today. I do not think that there

is anything which stops the court from taking the path I have taken as most appropriate remedy in the circumstances of the case, and in obedience to the constitutional command that; courts should take a much wider view of justice in interpreting the law such as Order 42 rule 6 of the Civil Procedure Rules so as to fashion remedies that are appropriate. I must admit that, like all other limbs of law, even the prescriptions of law on stay pending appeal under Order 42 rule 6 of the Civil Procedure Rules depends on the circumstances of each case, it is not cast in stone and keeps on ***growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before.*** On this see the decision in **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589** Ojwang Ag. J (as he then was) at page 607. See also Article 159 and 259 of the Constitution which envisage serving substantive justice, building of jurisprudence and development of the law. I said in the opening part of this determination that this case presents unique circumstances which would require very innovative intervention by the court in order to promote justice for the parties. Accordingly, I refuse to stay the orders which restrained the purported termination of the contract and restoration of the guarantee. But, I stay the order requiring the Applicant to house the transformers herein in their warehouses or stores. But, is there any need for security?

[18] I think yes. But what form of security? Again, the squirm in the case raises its ugly head. But courts are experienced at unravelling such difficult case. I should think that an undertaking from the Applicant that it shall reimburse all the costs of storage of the transformers and pay damages thereto should the Respondent succeed in its case is in order. Such undertakings as to damages are not foreign in law as security. Accordingly I order that the Applicant shall file in court and serve the Respondent with an undertaking as to damages as well as reimbursement to the Plaintiff of all storage expenses of the transformers which may have been incurred for this court order if ultimately the court finds the order of stay ought not to have been granted in the first place. The undertaking shall be filed within seven (7) days of today. Meanwhile, I agree with the Respondent that the circumstances of this case would require expeditious disposal of this case. Therefore, the parties are given 21 days to file their respective documents and have the matter set down for hearing. Should any party fail to adhere to this order, any party may apply for appropriate orders including the setting aside of any of the interim orders a party is enjoying. It is so ordered.

Dated, signed and delivered in court at Nairobi this 25th day of August 2015

F. GIKONYO

JUDGE