



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 142 OF 2013

DILPACK (K) LIMITED.....APPELLANT

VERSUS

WILLIAM MUTHAMA KITONYI.....1ST RESPONDENT

FALCON RECOVERY AUCTIONEERS.....2ND RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 20th January 2015 filed by the Appellant under the provisions of Articles 48, 50 and 159 of the Constitution, section 3A of the Civil Procedure Act, Order 10 Rules 22 and 25 and Order 42 Rule 6(1) of the Civil Procedure Rules . The Appellant is seeking orders that there be a stay of execution of the judgment entered against M/S Diplack Kenya Limited in William Muthama Kitonyi –VS Diplcak Kenya Limited, Machakos CMCC Number 1045 of 2011, and that the court be pleased to make such orders as it deems mere and just.

The Appellant’s grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on 20th January 2015 by Wairimu Mwaura, an employee in the Human Resources Department of the Appellant. The main ground is that the Appellant is faced with the prospect of imminent execution premised from a judgment obtained *ex parte*.

The Appellant gave a chronology of events arising from the said *ex parte* judgement. It is deponed that on 16th June 2013 the Appellant’s application to set aside the aforesaid *ex parte* judgment was dismissed, and the Appellant has filed an appeal from the said decision. Further, that on 17th December 2014 the Respondent proclaimed and attached the Appellant’s movable property through his auctioneers to recover the decretal sum of Kshs. 2,346,100.00/=, and has obtained warrants of attachment and sale of the said property for purposes of execution of the *ex parte* judgment.

The Appellant averred that in the event that the aforesaid execution is permitted to proceed, his appeal shall he rendered nugatory, and that the Appellant shall not be able to continue carrying on its operations and shall be forced to shut down thereby rendering over 300 (three hundred) employees jobless. The Appellant also disclosed that it had previously filed a similar application dated 12th July 2013 which has been withdrawn and a fresh one herein filed due to the commencement of the execution process.

On the issue of security, it was contended by the Appellant that raising a deposit of the funds that are the subject of the execution would be overly exerting and difficult, and that in the event that the court deems it fit to consider such a deposit, that the same be replaced by an alternative financial instrument or

undertaking such as a bond or guarantee as the deposit of such a vast sum of funds would render its operation impossible.

The Response

The 1st Respondent opposed the Appellant's application in a replying affidavit filed on 2nd February 2015. The 1st Respondent also filed a notice of Preliminary Objection dated 2nd February 2015 in which he sought that the Memorandum of Appeal filed herein and the Appellant's application be struck off, on the grounds that the appeal herein is not against the decree whose execution is sought to be stayed, but against the trial magistrate's ruling declining to set aside the trial court's judgment. Therefore, that the orders appealed against do not exist and the decree of judgment is not the subject matter of this appeal, which appeal is thereby not valid.

The 1st Respondent in his replying affidavit stated that judgment was entered in his favour on 17th January 2013 for a total sum of Kshs. 2,057,500/= in damages together with costs of the suit and interest. Further, that the Appellant did not appeal against the said judgment, and filed an application on 12th March 2013 seeking to set aside the said judgment which the 1st Respondent opposed.

The 1st Respondent further stated that the application upon being heard was dismissed in a ruling dated 18th June 2013, and the Appellant lodged an appeal against the said ruling on 15th July 2013. According to the 1st Respondent, the Appellant's aforesaid Memorandum of Appeal purports to appeal against a ruling and decree dated 16th June 2013, but that there are no orders or decree of that date.

The 1st Respondent averred that he has applied for execution of this court's decree dated 17th January 2013, which is the date of the trial court's judgment, and that the said judgment/decreed is not the subject matter in the purported appeal herein. Therefore that a stay of execution of the lower court's decree cannot be granted in the said circumstances and there is no valid appeal on record.

The 1st Respondent detailed the proceedings since the filing of the Appellant's application dated 12th July 2013 seeking orders of stay of execution pending appeal, until the filing and hearing of the present application on 20th January 2015, and stated that the Appellant was abusing the court process.

The Submissions

The Court at the hearing of the Appellant's application on 10th March 2015 directed that the said application and the 1st Respondent's Preliminary Objection be canvassed by way of written submissions. The Appellant through its advocates, Robson Harris & Company Advocates, filed written submissions dated 8th June 2015, while the Respondent's Advocates, Nzei & Company Advocates, filed submissions dated 21st September 2015.

The Appellant submitted that it is faced with the prospect of imminent execution premised on a judgment irregularly obtained *ex parte*, notwithstanding the preliminary objection raised on the issue of the court's jurisdiction. Therefore, that this is a judgment that is likely to be set aside an appeal. The Appellant in this regard cited the decision of the Court of Appeal in **Peter Gichuki Kingara –vs- Independent Electoral and Boundaries Commission & 2 Others, Nyeri Civil Appeal No. 23 of 2013.**

Further, that the Appellant company's net worth is about Kshs. 2,000,000 /= and employs over 300 persons, who stand to lose their employment and source of livelihood. Besides, that if the execution is permitted to proceed unchecked, the appeal shall be rendered nugatory, and would visit grave injustice upon the Appellant since it would not be able to continue carrying on its operations.

On the provision of security for the due performance of the decree, the Appellant submitted that while the general norm has been that the applicant seeking an order of stay should deposit the decretal sum, the Appellant company's net worth is about Kshs. 2,000,000/=, and the Appellant will be incapable to raise

the decretal sum in cash if this court so directs. However, that this Court has discretionary powers under Order 42 Rule 6 (2) of the Civil Procedure Rules to grant a temporary injunction on such terms as it thinks just, and is thus given the discretion to consider other modes of security.

It was submitted that the Appellant's situation is deserving of the exercise of the Court's discretion to waive making an order as to security, or in the alternative to consider directing that the Appellant provides an insurance, surety bond or a bank guarantee as security. The Appellant also submitted that its application has been made without unreasonable delay, having been filed on 20th January 2015, very soon after the proclamation and attachment of the Appellant's moveable property which was done on 17th December 2014.

The Appellant's submissions on the 1st Respondent's Preliminary Objection dated 2nd February 2015 were that the substance of the preliminary objection is an issue that the Respondent had raised when this matter came up for directions. Further, that this Court had addressed itself to it when granting an interim order of stay, and noted that failure to grant an interim order, regardless of whether the appeal is against the decree arising from the judgment or the orders of the trial court, would render the Appellant's appeal nugatory. In addition, that the Memorandum of Appeal discloses that the Appellant was dissatisfied with 'the whole Judgment/Ruling and decree' in Machakos civil suit number 1045 of 2011.

The 1st Respondent on his part submitted that the legal question before the court was whether this Court, sitting as an appellate court, can be called upon to stay execution of a decree which is not the subject of the appeal before it. Further, that Order 42 Rule 6 of the Civil Procedure Rules gives power to the Court to order stay of execution of a decree which has been appealed against. It was submitted that the Machakos Chief Magistrate's Court's judgment/decree is dated 17th January 2013, that the same was never appealed from, and that this Court cannot order stay of execution of a decree which has not been appealed from, and which is not the subject of the appeal before it.

It was further submitted by the 1st Respondent that the Appellant has not annexed the Lower Court's said decree dated 17th January 2013 to its application, and that the appeal before this court appears to be against the lower court's ruling/order dated 18th June 2013, by which the said court declined to set aside its judgment/decree dated 17th January 2013. Further, that there is no decree dated 16th June 2013, neither is there any ruling/order dated 16th June 2013, and that the purported appeal before the court is a frivolity.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The 1st Respondent has raised the preliminary issue as to whether there is a valid appeal before this Court from the judgment which is sought to be stayed. If so, then the substantive issue to be determined is whether the judgment in William Muthama Kitonyi vs Diplcak Kenya Limited, CMCC Number 1045 of 2011 should be stayed pending the hearing of this appeal.

I will first address the preliminary issue raised by the 1st Respondent. The 1st Respondent has argued that there is no decree or order dated 16th June 2013 that can be appealed against, and that the decree of the judgment entered on 17th January 2013 is not the subject of the appeal before the Court. I have perused the proceedings of the lower Court and the Memorandum of Appeal filed herein, and have the following observations to make in this regard.

The Appellant has appealed against the judgment and/or ruling of the lower court and decree of the lower court delivered on 16th June 2013. In its supporting affidavit, the Appellant explains that 16th June 2013 is the date the learned trial magistrate delivered his ruling on the Appellant's application to set aside the judgment of the lower Court. From the grounds of appeal it is evident that the Appellant is contesting both the judgment and ruling of the lower court. Some of the grounds of appeal in this regard is that the lower court did not have jurisdiction to enter the interlocutory judgment, and did not consider the Appellant's preliminary objection on this account.

The reference to the date of 16th June 2013 if erroneous is not fatal to the appeal, as the law allows for amendment of the memorandum of appeal to reflect the true position. I therefore find for the above reasons that the 1st Respondent's preliminary objection has no merit.

Coming to the substantive aspects of the Appellant's application, stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“6.(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 consider such application and to make such order thereon as may to it 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present appeal, as regards the first condition for stay, the judgment of the lower Court was delivered on 17th January 2013. The Appellant then filed an application dated 11th March 2013 to set aside the said judgment in the lower court. The ruling on the said application was delivered on 16th June 2013, whereupon the Appellant filed its memorandum of appeal and first application for stay on 12th July 2013. The Appellant deponed that this application was withdrawn and the present application filed due to the new development which was that the Respondent had commenced the execution process. In my view the first application for stay which was the precursor of the present application was in the circumstances brought timeously, and there was no unreasonable delay in doing so.

On the fulfillment of the second condition, the Appellant set out in its affidavit the substantial loss it would suffer if stay was not granted, in terms of the effect that payment of the decretal sum would have on its continued existence and operations. The Appellant in this regard stated that it shall not be able to continue carrying on its operations and shall be forced to shut down.

Lastly, on the third condition, the Appellant sought the exercise of this Court's discretion to impose another security other than the deposit of the decretal sum, due to its inability to raise the said sum, and

submitted that it was ready to give an insurance, surety bond or a bank guarantee as security. It is indeed the position that this Court has such discretion under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules and the important fact to be considered in the provision of security is that it must be sufficient to ensure the due performance of any decree that may have been granted by a court.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 20th January 2015 is allowed in the following terms:

1. There shall be a stay of execution of the judgment entered against M/S Diplack Kenya Limited in **William Muthama Kitonyi –VS Diplcak Kenya Limited**, Machakos CMCC Number 1045 of 2011, pending the hearing and determination of this appeal only on condition that the Appellant shall *secure the decretal sum of Kshs. 2,346,100.00/= by way of a Bank Guarantee from a reputable bank executed by the Appellant in favour of the 1st Respondent*, pending the hearing and determination of this appeal. *The said Guarantee to be executed and deposited with the Appellant within thirty (30) days from the date of this ruling, failing which the stay orders herein shall stand vacated.*
2. The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 28th day of October, 2015.

P. NYAMWEYA

JUDGE