

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 467 OF 2015

GOGNI RAJOPE CONSTRUCTION COMPANY LTD.....APPELLANT

VERSUS

PATRICK MUTISYA MUSAU.....RESPONDENT

RULING

1. The subject of this ruling is the motion dated 1st October 2015 in which the applicants sought for orders for stay of execution of the decree in Milimani CMCC NO. 740 of 2011 pending the hearing and determination of the appeal and costs be borne by the respondent. The motion is supported by the affidavit of **Eng. George Guya** sworn on 1st October 2015. When served with the motion the respondent filed a replying affidavit he swore to oppose the motion.
2. I have considered the grounds outlined on the face of the motion plus the facts deponed in the affidavit filed in support and against the application plus the replying affidavit. As it appears on the face of the motion, the Appellant is basically asking to be granted orders for stay of execution pending appeal. The history behind the motion is that the respondent sued the appellant before the Milimani Chief Magistrates court for damages arising from injuries he sustained while in the course of employment with the defendant. The respondent claims that he entered into a six months contract with the respondent to carry out duties in Sudan. He claims that on 10th July, 2009 while in the course of employment he was injured by fuel drum due to the negligence on the part of the appellant who failed to provide him with the necessary protective clothing and equipment. **Hon. T.S Nchoe**, the learned Senior Resident Magistrate heard the case and in the end, the Respondent was awarded kshs. 200,000/= plus costs and interest. The Appellants are unhappy with the award hence this appeal.
3. The Appellant claims that it is at a risk of execution of the decree which will result in it suffering substantial loss and that the intended appeal will be rendered nugatory if the orders sought are not granted. It has also stated that it is ready to deposit the security for the due performance of the decree as a condition for the grant of the order of stay. I have carefully considered the rival arguments. The appellant claims that the lower court heard the matter exparte and delivered its judgment which the appellant tried to stay and set aside without success. This is what has pre-empted this appeal which the appellant avers is arguable. The respondent on the other hand argues that the orders by the lower court is a negative order that is incapable of execution and orders of stay cannot issue to stay that order. He argued that the orders that the appellant seeks to stay are the ones dated 29.9.2015 which are to the effect that the lower court was satisfied there was proper service on the appellant who failed to enter appearance in time leading to the dismissal of the application dated 8.12.2014, therefore such orders cannot be executed. He argued further that the appellant has not proved that he will suffer substantial loss and that he is apprehensive that the appellant will not pay him the compensation.
4. Looking at the court record, I have established that the Ruling being appealed from has not been annexed to the application though the appellant claims that it has annexed it. I however take note that there is a decree issued on 23.3.2014. Indeed as submitted by the appellant, failure to grant the orders sought will result in the appeal being rendered nugatory in that by the time of hearing the appeal execution will have been undertaken and completed. I have also perused the memorandum of appeal and I am satisfied that the appellant has an arguable appeal.

5. The second principle to be considered is the provision for security. The Appellant has proposed to deposit the entire decretal sum. I am satisfied that is a good proposal which this court accepts. There is also no doubt that the application for stay was timeously filed.
6. In the end, I find the motion dated 1.8.2015 to be well founded. It is allowed as prayed save that costs shall abide the outcome of the appeal and on condition that the appellant deposits the principal sum of Kshs 200,000/= in an interest earning account in the joint names of firms of advocates within 60 days from the date hereof. In default execution to issue without further reference to court.

Dated, Signed and delivered in open court this 20th day of November, 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent