



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 553 OF 2011

ROTAM AGROCHEMICAL COMPANY LIMITEDPLAINTIFF

VERSUS

TWIGA CHEMICAL INDUSTRIES LIMITED..... DEFENDANT

RULING

INTRODUCTION

[1] The Defendant has filed a Motion dated 25th April, 2013 expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rules 9 (a) and 10, Order 22 Rule 22(1) and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Motion carries one significant prayer: stay execution of the decree herein, either, pending the determination of the intended appeal, or alternatively, pending finalization of HCCC NO 135 of 2011. The Defendant states that the said suit is pending between the parties herein upon being referred to arbitration by Hon. Justice Njagi. It also asks for costs of the application.

[2] The application is premised on the following grounds:

- a. On the 25th March, 2013 the Defence was struck out following the plaintiff application dated 7th May, 2012 and judgment was entered for the Plaintiff in the sum of USD 597,600.41.
- b. The Defendant was dissatisfied with the ruling delivered on 25th March, 2013 and has preferred an appeal.
- c. In the meantime, there is an imminent danger of execution of the Decree which is the subject matter of HCCC No.135 of 2011 that was referred to Arbitration and it's only fair that a stay of execution be granted pending the finalization of the Arbitration proceedings.
- d. That the learned Judge committed a glaring error in entering judgment for monies not owed by the Defendant judgment debtor but by associated companies incorporated outside the country for example Twiga Chemicals Industries (T) Ltd, Twiga Chemicals Industries Uganda.
- e. That if the plaintiff is allowed to attach the defendant's property it would render the intended appeal nugatory as the decree holder has not a single local asset capable of paying back the amount in the decree should the appeal succeed.
- f. That whereas the appeal is intended and indeed arguable the Defendant is apprehensive that the plaintiff may move to pre-empt its appeal by executing the decree hence this application.
- g. That the respondent does not stand to suffer any prejudice which cannot be compensated with

costs.

DEFENDANT'S SUBMISSIONS

[3] The Defendant amplified the above ground through its submissions. It submitted that the Defendant is the appointed distributor of the Defendant's products in Kenya. Twiga Chemical Industries Tanzania and Twiga Chemical Industries Uganda entered into signed a similar distribution agreement. The distribution agreement was terminated by the Plaintiff. Before the agreement was terminated the defendant had invested heavily in the marketing and sale of the Plaintiff's products to the tune of Kshs. 43,872,198. The Defendant had done so in the belief that the contract would continue to be renewed. The termination of the agreement led the defendant to institute **HCCC No.135 of 2011 Twiga Chemicals Vs Rotam Limited** where the Defendant was seeking the following prayers:

- a. A permanent injunction restraining the Rotam from arbitrarily terminating the contract pending arbitration.
- b. Special damages of Kshs.39,922,151
- c. General damages for loss of business and future expected earnings.

[4] Hon. Justice Njagi referred the matter to arbitration in a ruling dated 20th December, 2011.

[5] The Defendant submitted that on 8th December, 2011, the Plaintiff/Decree holder filed this suit seeking the sum of Kshs. USD 597,600 being monies allegedly owed to them. The alleged debt was purported to arise from the distribution agreement. The monies in question are monies for products that were delivered to Twiga chemicals Industries Tanzania, Twiga Chemicals Uganda and the defendant herein Twiga Chemical Industries Ltd (Kenya) the plaintiff herein. Each company is responsible for its own debt despite them being sister companies. On he 25th March, 2013 the defence was struck out and judgment was entered for the Plaintiff. The Plaintiff/decree holder has now Chaka Auctioneers to proclaim and attach the defendant/judgment debtor property thus necessitating the present application. The defendant being dissatisfied by the ruling filed a notice to appeal on the 8th day of Aril 2013.

[6] According to the Defendant, contrary to the submissions by the Plaintiff, the existence of HCCC 135 of 2011 cannot be wished away since the defendant is claiming an almost similar amount monies from plaintiff in that suit. The previous rulings considered the issue of stay of the proceedings of HCCC 553 of 2011 pending arbitration. It would be inequitable for the plaintiff to be allowed to execute whereas it is indebted to the defendant. In addition, the plaintiff's claim that the Plaintiff in the present suit and the defendant in **HCCC 135 of 2011 Twiga Chemicals Ltd vs Rotam Ltd** are two different companies, is incorrect because no evidence has been adduced to prove that there are two different companies.

[7] The Plaintiff contended that the court has an absolute and unfettered discretion in granting or refusing a stay of execution. In determining whether or not stay should be granted the courts are guided by two principles:-

- i. That the applicant has an arguable appeal, in other words, the appeal is not frivolous.
- ii. If a stay is not granted, the appeal, if successful would be rendered nugatory.

The appeal is arguable for the learned judge in his ruling dated 25th March, 2013 erred in striking out the defence for being frivolous, vexatious and abuse of the court process. See what Madan J.A in **DT Dobie & Company (Kenya) Ltd v Muchina (1982) KLR1** stated that

"...the power to strike out pleadings which ends in driving a party from the judgment seat should be used sparingly and only in cases here the pleading is shown to be clearly untenable."

[8] The defendant was never afforded the opportunity to test the plaintiff's evidence by way of cross-examination. It would have been in the interest of justice to afford the defendant the opportunity to do so. Keeping in mind that the decretal sum is quite high and if executed would greatly hamper the operations of the defendant company. We submit that the learned judge in exercising his discretion greatly prejudiced the defendant's rights. Finally the judge failed to acknowledge that some of the monies alleged to be owed were owed by companies separate from the defendant. It would be unfair to expect the defendant to pay another party's debt. The invoices clearly show that some of the deliveries were made directly to Twiga Tanzania and Twiga Uganda. The plaintiff has not disputed this. The Defendant referred the court to paragraph 16 of the affidavit of Niu Ben Bin the president of Rotam Limited that stated:-

“That I clarify there were separate distribution agreements entered into between the parties for distribution of various products in various countries including Kenya, Tanzania, Zambia, Malawi and Uganda and each relating to the distribution of different products.”

If stay is not granted, the appeal would be rendered nugatory.

[9] The judgment debtor is a company that has been in operation for a number of years. If called upon it, it is in a position to provide security in any form. The plaintiff company is a company incorporated in China. It has no assets in the country. Should the intended appeal succeed it would prove difficult for the judgment debtor to get a refund of its monies. The Decree holder has not produced any evidence that it would be in a position to refund the judgment debtor should the appeal succeed. The court has a duty to ensure that the defendant does not end up with a paper decree. See the words of Brett L.J. in *Wilson v Church* (No.2) Ch. D (1879) who stated:-

“it has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.”

See also the words of Cotton L.J. said at page 458:-

“I will state my opinion that when a party is appealing, exercising his undoubted right to appeal, this court ought to see that the appeal if successful is not nugatory.”

And also **CIVIL APPLICATIONS 53 OF 2010 AFRICAN SAFARI CLUB LTD v SAFE RENTAL LTD** on the overriding objective;

“...this being an application under Rule 5(2) (b) of the court's rules the two conditions to be satisfied by an applicant are first, that it has an arguable appeal, in other words, the appeal is not frivolous and second, if a stay is not granted, the appeal, if successful would be rendered nugatory. It is beyond question that these two requirements have served the cause of justice in this field of law for a long time and will continue to do so. However, after the enactment of the overriding objective, we believe that the court is now required to take a much broader view of justice and therefore, the two requirements can no longer be regarded as exhaustive. Rule 5(2) is subject to the overriding objective and therefore this court in exercising its power under the rule, must give effect to the overriding objective – the reason for this is that the court derives the power to prescribe the two requirements from rule 5(2) (b) and also from the Appellate Jurisdiction Act.”

[10] Though the application was before the court of Appeal under the court's 5(2) (b) rules we submit it is also bound to give effect to the overriding objective which is provided for in the Civil Procedure Act. It is incumbent upon the court, pursuant to the overriding objective to act justly and fairly. The first role of the court in this regard is to consider the hardships of the two parties before it. The second role is to put the hardships on the scales. If execution is allowed to proceed it would irreparably hurt the defendant company. Even if the monies are eventually refunded the damage will have been done and it would take the defendant a while to regain its footing. The

plaintiff on the other hand would suffer no prejudice if the application for stay if allows. In the interest of justice the court should order a stay of execution.

PLAINTIFF'S SUBMISSIONS

[11] The Plaintiff submitted that the Defendant's application has no merits, is frivolous and is a blatant abuse and misuse of the court process. The same is only meant to frustrate and to delay the execution of the judgment entered herein. The application is hopelessly and fatally defective since although it seeks a stay of execution pending appeal it does not even invoke order 42 Rule 6 of the Civil Procedure Rules. In the circumstances, the application is not grantable. The provisions invoked have nothing to do with stay of execution pending appeal. Order 22 Rule 22 is the only one which is close to the issue of stay but it deals with instances where a Decree has been sent to another court for execution and which is not the case herein.

[12] The Plaintiff is of the view that the application should fail because **Milimani HCCC No.135 of 2011** is a separate suit, and its existence has already been fully addressed in the separate rulings delivered herein by the Honourable Mr. Justice Mabeya on 13th March, 2012 and again on 25th March, 2013, and the learned judge found it to be incapable of having any effect on this instant suit there being no set-off or counter-claim in this case. Accordingly, a stay of execution cannot be based on the existence of Milimani HCCC No.135 of 2011. The issue of the said Milimani HCCC No.135 of 2011 is in fact now *res judicata* as far as this suit is concerned. Further, although Justice Njagi on 20th December, 2011 referred the said Milimani HCCC No. 135 of 2011 to arbitration, what the defendant is suppressing from this court is that Justice Njagi by the same ruling also dismissed the Defendant's application for injunction in the suit having found the termination of the Defendant's contract as proper and lawful and holding the Defendant's claims to be frivolous and as failing to disclose a *prima facie* case capable of success. Secondly, the defendant is cleverly concealing the fact that since the said order for arbitration by Justice Njagi was made on 20th December, 2011, to date, almost 1 and ½ years later, the Defendant has made no efforts to initiate the said arbitration. In any event and casual perusal of the pleadings, Rotam Limited the Defendant in the said Milimani HCCC No. 135 of 2011 is obviously different from Rotam Agrochemical Co. Limited, the plaintiff herein. The parties in the two suits are clearly different. A stay of execution cannot in law be granted on the mere ground of existence of a separate suit and particularly where no judgment has been passed.

[13] The purported single issue raised by the Defendant which is being alleged to be a "*strong ground of Appeal*" namely; that some of the payments were to be made by the Defendant's sister companies incorporated in Uganda and Tanzania, apart from being a frivolous, was not raised by the Defendant during the hearing of the matters leading to the striking out of its Defence or in any of its pleadings filed herein and logically therefore, the same is an afterthought and cannot be raised at appeal. In its defence, the Defendant admitted all the deliveries herein and the Exhibits attached to the Affidavit in support of the application for summary judgment dated 7th May, 2013 reveal that all LPOs, Invoices and Import Declarations were issued in the name of the Defendant as "*Consignee*" and "*invoice*" and not its Tanzanian or Ugandan subsidiaries. The Plaintiff invited the court to peruse for instance, the LPOs appearing at pages 16, 23, 29, 36, 42, 48, 56 and 68 of the said Exhibits. The Defendant ordered the respective products but directed that deliveries of some of them be made to its Tanzanian and Ugandan subsidiaries. The alleged role of the sister companies cannot excuse the Defendant from its contractual liabilities. Kenyan courts are now more alive to the mischief of companies of attempting to avoid obligations by alleging that such obligations are the duty of subsidiaries in blatant abuse of the *Salomon v Salomon* rule of company law. It is a matter of Judicial Notice that our courts now more than ever, are consistently "*lifting the veil of incorporation*" to avoid abuse by sly Company directors. The Defendant's said subsidiaries or sister companies are nothing but extensions of the Defendant and are wholly controlled by the Defendant in one management. No wonder the defendant has cleverly omitted to even exhibit the List of Directors and shareholders of the companies.

[14] But should the court in its wisdom decide to grant a stay of execution, the Defendant ought to be ordered to deposit the decretal sum in an interest earning Bank account to be opened in the joint names of the respective law firms herein. In such unlikely event, the Defendant should be ordered to immediately pay auctioneers fee and cost to Messrs Chaka & Co. Auctioneers arising from the proclamation already effected.

COURT'S RENDITION

Stay of execution pending appeal

[15] The application herein is asking for stay of execution pending appeal or in the alternative, pending the finalization of **NBI HCCC NO 135 OF 2011**. Nowhere in the application is Order 42 of the Civil Procedure Rules cited. I may not hold too much regard to that omission in the face of Article 159 of the Constitution of Kenya, 2010. And on that basis, I will disregard the objection by the Plaintiff that the application is defective. Instead, I will determine the substance of the application.

[16] Courts of law have said time and again that the jurisdiction of the High court in ordering a stay of execution pending appeal is governed by Order 42 of the Civil Procedure Rules, which has set out very clear conditions which the party applying must satisfy. It suffices to cite the holding in the case of **TARBO TRANSPORTERS LTD v ABSALOM DOVA LUMBASI [2013] eKLR** that:

1. ***The granting of stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is granted at the discretion of the court when sufficient cause has been established by the Applicant that:***
 - a). ***Substantial loss may result to the Applicant unless the order is made;***
 - b). ***The application has been made without unreasonable delay; and***
 - c). ***Such security as the court orders for the due performance of the decree has been given by the Applicant.***

[17] The party applying bears the burden of establishing the above grounds. See the Halsbury's Law of England, vol.17, paragraph 14 on the ***Incidence of the legal burden*** and also the **TARBO TRANSPORTERS CASE (supra)**.

Substantial loss occurring; delay and provision for security

[18] The fact that the process of execution has been undertaken against the judgment-debtor is not, by itself, a ground for granting stay of execution. Execution, albeit coercive, is a legal process to enforce court orders. What a stay of execution under Order 42 of the CPR prevents is substantial loss occurring upon the Defendant by the execution; which presupposes that such execution will prejudice a concurrent right of the Defendant in the case. The Defendant's right which may be prejudiced is in the possibility of abrogating the prospects of the appeal unless a stay of execution is ordered and that should be what the rules refer to as substantial loss. The court had the following to say about what substantial loss entails in the sense of Order 42 of the CPR in the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIAKA CHESETO** the Court stated that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

[19] The Court of Appeal reinforced the centrality of substantial loss in the case of *Mukuma V Abuoga*.

[20] Has the Defendant established it will suffer substantial loss? Let me tackle a matter that the Defendant has raised on the ability of the Plaintiff to repay the decretal sum if paid over to it. I am content to quite the holding in the **Tarbo Transporters** case that:

The burden of proving that the Respondent will not be able to refund to the Applicant any sums paid to the Respondent lies on the Applicant. But where the records show some financial limitations on the part of the Respondent, it may as well raise evidential burden on the Respondent to file an affidavit of means. In this case the Respondent's income is such that it may not be sufficient to constitute ability to pay and on that basis I find that the Applicant will suffer substantial loss if an order of stay of execution is not granted.

[21] The Defendant has only submitted that:

The plaintiff company is a company incorporated in China. It has no assets in the country. Should the intended appeal succeed it would prove difficult for the judgment debtor to get a refund of its monies. The Decree holder has not produced any evidence that it would be in a position to refund the judgment debtor should the appeal succeed.

[22] It is the Defendant who bears the...*burden of proving that the Respondent will not be able to refund to the Applicant any sums paid to the Respondent...* The only exception is...*where the records show some financial limitations on the part of the Respondent, it may as well raise evidential burden on the Respondent to file an affidavit of means.* The Defendant has not discharged that burden and there is no prima facie evidence provided by the Defendant as to raise an evidential burden on the shoulders of the Plaintiff. The Defendant has made mere allegations on the Plaintiff's inability to refund any sums paid. The fact that the *plaintiff company is a company incorporated in China or that it has no assets in the country*, alone does not prove inability to refund the decretal sums. This is not an application for Mareva injunction or for security of appearance or to satisfy a decree which may be passed in this case against the Plaintiff. It is an application for stay of execution pending appeal where much more is needed if the allegation of inability to make a refund is to pass for substantial loss occurring in the sense of Order 42 of the CPR.

[23] The Defendant claims that it has an arguable appeal which will be rendered nugatory. I do not wish to go into the merits of this argument in this application for stay of execution lest I should exceed my jurisdiction. What I need to observe is that, the Defendant has an appeal which raises the issue that it ought to have been given an opportunity to be heard on the merits of its case as opposed to the summary rejection of its defence. It matters to the court that the Defendant has right to the prospects of his appeal just as much as the plaintiff has a right to the fruits of its judgment; which impels the court to carry out a delicate balancing between those rights of the parties. **Both parties' right must be safeguarded to avert substantial loss from befalling the Applicant and a total trodden over the Respondent's prima facie right to the fruits of his judgment.** On that basis, I would grant a stay of execution on conditions I will set out presently. Meanwhile, I should state that the existence of the other case, NBI MILIMANI HCCC NO 135 OF 2011 is not a ground for stay of execution under Order 42 of the CPR. Perhaps it would be a ground for stay of suit under section 6 of the Civil Procedure Act but only where the two cases are pending hearing. That section may not apply where one of the cases has been determined; section 7 of the CPA on res judicata would invariably be the relevant one. I also do excuse the delay in bringing this application which I think has been explained reasonably.

[24] The Defendant has undertaken to abide by any condition on provision of security which the court may attach to the grant of stay of execution pending appeal. Provision of security is a requirement under Order 42 of the CPR and any person who does not make such commitment as

to security may not excite a magnanimous attention from the discretion of the court in an application for stay of execution pending appeal. I, therefore, direct that there shall be a stay of execution pending appeal herein provided that the Defendant will deposit the entire decretal sum in an interest earning account in the names of the advocates of the parties and the Deputy Registrar, Nairobi Milimani Court within 45 days of today. Such deposit is the property of the law held by court for purposes of the due performance of such decree or order as may ultimately be binding on the Defendant in the fullness of time; hence, the inclusion of the DR as a signatory to the account. The security will be so held until further orders of this court. I must also state that, I think, a security which is given in the form of money or funds should be invested for the benefit of whichever party succeeds as return on investment. Otherwise, the court will be acting out of touch with economic realities of the day. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 30th day of July 2014

F. GIKONYO

JUDGE