



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL APPEAL NO. 683 OF 2013

THE STANDARD LIMITED.....1ST APPELLANT

SWALEH MDOE.....2ND APPELLANT

HEZRON OBADIAH.....3RD APPELLANT

VERSUS

EDICUS WANJALA PIUSRESPONDENT

RULING

1. The application before this Court is a Notice of Motion dated 23.12.13 brought under Order 42 Rule 6 of the Civil Procedure Rules. The appellants /applicants hereinafter referred to as the applicants seeks the following orders:-

- i. Spent
- ii. **THAT** pending inter partes hearing of this Application, this Honourable Court be pleased to issue an order of stay of execution of the Judgment dated 10th December 2013 and all consequential orders.
- iii. **THAT** at the inter partes hearing, this Honorable Court be pleased to stay the execution of the Judgment dated 10th December, 2013 and all consequential orders pending the hearing and determination of this appeal.
- iv. **THAT** pending the hearing and determination of the appeal there be a stay of execution from the Judgment delivered by Honourable Mr. Obulutsa on the 10th December, 2013.
- v. **THAT** the cost of this application be in the cause.

2. The application is premised upon the following grounds:

- i. **THAT** the Applicants herein are aggrieved by the decision of the Honourable Court (Mr. Obulutsa) in the CMCC 9708 of 2006 delivered on 10th December 2013, wherein the court ordered the Defendants/Applicants to pay Kshs.2,700,000.00 to the Respondent plus interest.
- ii. The Applicant has filed an Appeal in terms of Order XLII rule 4 (4) having filed a Memorandum of Appeal in this cause and applied for certified copies of the proceedings, judgment and decree. The appeal is arguable with high chances of success and the same is still pending.
- iii. **THAT** the intended Appeal raises several issues for determination as is succinctly detailed in the Annexed Memorandum of Appeal.
- iv. **THAT** the pending appeal is meritorious and raises several serious issues of law.

- v. THAT the Applicants stand to suffer substantial loss and damage as they have good reason to believe that the Respondent will take advantage of the situation to levy execution over their assets before the Applicants have their day in court.
- vi. THAT the Applicants stand to suffer substantial loss as the Applicant is unaware of the Respondent's financial means and the Respondent shall move to execute unless this Honourable Court urgently intervenes with a view to preserving the status quo.
- vii. THAT in light of the aforementioned it would be a gross miscarriage of justice to occasion harm to the Applicants by allowing the Respondent to execute against them.
- viii. THAT this application has been made without unreasonable delay.
- ix. THAT any loss or prejudice which the Plaintiff/Respondent may suffer can be adequately compensated in by a suitable award of costs.
- x. THAT it is in the best interest of justice for the orders sought to be granted.

3. The application is grounded on the affidavit of Ronald Lubyathe Legal Officer of the applicant sworn on 23rd December 2012. He reiterated the grounds on the face of the application and further deposed that on 10th December, 2013 the lower Court in CMCC 9708/2006 ordered the defendant to pay the plaintiff/respondent Kshs. 2.7 million prompting the defendant to file the current appeal which he argues raises several issues of law for determination and that the same has high chances of success; that he has since applied for certified copies of the proceedings, judgment and decree to enable them prosecute the said appeal expeditiously and stands to suffer substantial loss and damage as the Respondent is likely to proceed to execution of the Judgment of Hon. Mr. Obulutsa delivered on 10th December 2013 if this Court does not issue the Applicants with a stay of execution against the Respondent their appeal will be rendered nugatory; that the application has been made without unreasonable delay; that any loss or prejudice which the Respondent may suffer can be adequately compensated by a suitable award of costs and it would be in the interest of justice for the orders sought to be granted.

4. The application was opposed and the respondent filed a replying affidavit sworn by Edicus Wanjala Pius on 7th March 2014. He deposed that the applicants' application is scandalous, frivolous and vexatious and ought to be struck out for reasons that; the application claimed to be urgent was filed on 23rd December 2012 but served on him 2 months later; that this suit was filed in 2006 and the applicants continue to cause inordinate delay which is unjust. The applicants have failed to satisfy the minimum threshold that they are willing to furnish security to satisfy the decretal sum and have not demonstrated sufficient cause for order of stay of execution, prejudice or substantial loss he is likely to suffer that he has a right to enjoy the fruits of his judgment. He denies knowledge of any appeal and pointed out that it was not clear whether the appeal has already been filed or was yet to be filed and urged the Court to strike out the offending paragraphs. He argued that the orders sought were untenable and calculated to further delay this matter, protracting the prejudice upon him and hence the application should be dismissed with costs to the Applicants. He argued that the grounds relied on were based on non-existent evidence, facts which are well within the knowledge of the Applicants, who insist on pursuing this Application thus abusing the process of this Court; that the Applicants are not deserving of any day in Court as their application is a waste of this Court's time and the same ought to be struck out with costs and that he is capable to repay any amounts paid by the Applicants towards the decretal amount in the event that ANY appeal succeeds; that they have not demonstrated to this Honorable Court that there are any good, persuasive and/or compelling reasons, which in the interest of fairness and justice, should cause his right to execute the decree awarded to me to be postponed and/or suspended and that it is against the rule of natural justice and he dictum of international law and practice that an applicant should be allowed to trample over the rights of the respondent and purport to make up for the same by an award of costs.

5. The applicant filed written submissions and came for highlighting of the same on 12th May, 2013. The respondent did not file submissions nor attend Court when the same came for highlighting. The Applicants in their submissions reiterated the grounds on the face of the application and further submitted that the fruits of a judgment can be deprived for a just cause. Counsel referred the Court to Order 42 rule 6 provides that;

“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.

He referred to ***D.T. DOBIE & COMPANY (K) LTD –VS- WANYONYI WAFULA CHEBUKATI CIVIL APPEAL 88 OF [2008]*** where *the* court held that;

- i. That there is sufficient cause to order stay of execution
- ii. That substantial loss may result to the applicant unless the order of stay of execution is granted.
- iii. The application has been made without undue delay
- iv. That it has given or offered security for due performance of the decree as may ultimately be binding on it.

6. Counsel submitted that filing an appeal constitutes sufficient cause to order stay of execution as the same is not frivolous and it raises serious points of law. On substantial loss he submitted that the judgment entered by the learned Trial Magistrate of Kshs. 2,700,000 is a colossal amount and the applicant is apprehensive it will be placed out of reach of their hand if the decree is executed; that the application filed 3 days after filing the memorandum of appeal hence the same is made without undue delay. Counsel refuted delay on service of the application claiming that the same was first heard ex parte on 23rd December 2013 and granted an inter partes date of 12th March, 2014 whereby they served the respondent on 14th February, 2014. Counsel further submitted that the applicants were ready to offer security if directed to do so by the Court on this Counsel referred the Court to the case of ***Mutua Mutuku –vs- Peter Njoroge Chege Civil Appeal No. 45 of 2008.***

7. I have carefully read and considered the parties affidavits and applicant's written and oral submissions. In considering this application am guided by the provisions of Order 42 rule 6(2). I note that the application was brought without delay. The ruling was delivered on 10th December 2013 and the Memorandum of appeal was filed on 20th December 2013. The application for stay of execution was filed on 23rd of December, 2013 and served on the respondent on 14th February 2014. From the Court record the applicant was given a date for the application on 27th December 2013 for hearing on 12th March 2014. The applicant could not dictate the date the application was to be heard and having been given a date in March it was in order for them to serve in February 2014.

8. The next issue I have to consider is whether the applicant will suffer any substantial loss. In considering this as a Court I must consider the rights of the appellant and the respondent. The appellants argue that they will suffer substantial loss as they are unaware of the respondent's financial means to satisfy the decretal sum which is a colossal sum. The respondent however claims he has sufficient means to repay the decretal sum in the event the appeal succeeds. It is upon the applicants to explain the loss they will suffer; merely stating that the respondent will likely not be able to repay the decretal sum is not sufficient reason, though I note that the respondent does not disclose how he would repay the decretal sum in the event the appeal succeeds. I have perused the grounds and note there are issues raised in the

memorandum of appeal on evidence adduced, law on defamation and award given, issues to be determined at the appeal. The applicants are ready to offer security to avoid execution. I find that the respondent will suffer no prejudice if the Court grants the applicants stay on condition that the applicants deposit security for the due performance of such decree.

9. I therefore grant a stay of execution of the Judgment delivered by Honorable Mr. Obulutsa on the 10th December, 2013 pending the hearing and determination of the appeal on condition that the applicants deposit the sum of Kshs. 2.7 Million in Court or a joint earning interest account in the names of the parties or their counsels, within 15 days from the date of this ruling. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **18th** day of **July** 2014.

R.E. OUGO

JUDGE

In the presence of:-

.....For the Appellants / Applicants

.....For the Respondent

.....Court Clerk