



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO 161 OF 2012

ORIENTAL CONSTRUCTION COMPANY LIMITED..... PLAINTIFF

VERSUS

RIFT VALLEY WATER SERVICES BOARD..... DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated and filed on 26th August 2013 was brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21, Order 42 (6) of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. It had sought a stay of execution against the Ruling and Order of Mutava, J delivered on 12th July 2012 pending the hearing and determination of **Civil Appeal No 268 of 2012** filed in the Court of Appeal.
2. The Defendant relied on several grounds to support its application, the main ones being that the said learned judge struck out its Defence and entered judgment against it, that it would suffer irreparable loss and damage if the Plaintiff was not restrained from auctioning its goods which had been proclaimed, that it had made its application without unreasonable delay and that the Plaintiff stood to suffer no prejudice irredeemable by an award of costs.
3. Its application was supported by the affidavit of Lewis Lapiyoi Tikani, its Legal Officer sworn on 26th August 2013 and his Further Affidavit sworn and filed on 4th September 2013. On 28th November 2013, Victor Omwebu, an advocate acting for the Plaintiff also swore another affidavit filed on the same date evidencing payment of the sum of Kshs 7,882,793/=. It was also filed on the same date. In response thereto, Ezekiel N.K. Wanjama, the Plaintiff's advocate swore a Replying Affidavit on 2nd September 2013. The same was filed on the same date.
4. The Defendant's written submissions were dated and filed on 28th August 2013 while those of the Plaintiff's written submissions were dated 31st October 2013 and filed on 26th November 2013.

LEGAL ANALYSIS

5. The Defendant submitted that an applicant who had filed a Notice of Appeal was entitled to apply for stay of execution of appeal as was held by the Court of Appeal in the case of **Civil Application No 102 of 2000 Thabiti Insurance Brokers Limited vs Joseph Ogero Obonyo**

(unreported). While that may have been correct, it is important to point out that, as the Plaintiff had stated in its Replying Affidavit, the mere fact of lodging of an appeal did not bar it from executing the orders that were made by Mutava J on 12th July 2013. It was emphatic that the Water Act 2002 under which the Defendant was seeking protection did not give it protection from execution of court orders.

6. This is well captured in Order 42 Rule 6 of the Civil Procedure Rules 2010 which stipulates as follows:-

“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or an order appealed from... the court appealed from may for sufficient cause order stay of execution of such decree or order...”

7. So as to be granted a stay of execution pending appeal, the Defendant was therefore required to satisfy the court that it had met the threshold set out in Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 which requires an application to show that:-
- Substantial loss may result to the applicant unless the order was made;**
 - The application was made without unreasonable delay; and**
 - Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.**
8. It was the Defendant’s argument was that it was never served with a Hearing Notice of the Plaintiff’s application to strike out its Defence and that Mutava J erred both in law and fact in summarising the case and concluding that the bill of Kshs 7,882,793/= was payable to the Plaintiff without the benefit of direct evidence.
9. Its concern was that if its goods were attached, its appeal would be rendered nugatory. It referred the court to the case of **Kenya Shell Limited vs Kibiru & Another [1986] KLR** where the Court of Appeal observed that the appeal therein would be rendered nugatory if the Respondent therein was unable to refund the decretal sum and the appellant succeeded in its appeal.
10. It argued that it was evident from Paragraph 10 of the Plaintiff’s Replying Affidavit that the Plaintiff was facing financial problems as it had contended that it was **“forced to borrow heavily from commercial banks at very high interest rate in order to finance its operations”**.
11. The Court of Appeal recognised the importance of balancing the rights of a successful litigant who should not be kept away from its fruits of judgment against those of an appellant who would face the possibility of not being able to recover the paid amounts in the event he succeeded in his appeal.
12. In the case of **Kenya Shell Limited vs Kibiru & Another**(Supra), where Hancox JA (as he then was) held as follows:-

“I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay should be properly given. Parallel with that is the equally important proposition that of a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause...The first Respondent is a person of substance, with a good position and prospects...there is no evidence ... that the first Respondent will not remain in his job until pensionable age....There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to pay the money..”

13. A close perusal of the Paragraph 10 of the Plaintiff’s Supporting Affidavit does not reveal that the Plaintiff was in any financial difficulty. Indeed, there was no evidence furnished by the Defendant to demonstrate that the Plaintiff would not be able to refund it the decretal sum in the event the Defendant succeeded in its appeal. What the court gathered was that the Plaintiff was forced to take the aforesaid action while the decretal amount remained unpaid. It does appear to the court that it was the Plaintiff that would suffer prejudice if the decretal sum remained unpaid. On the first ground, the court finds that the Defendant did not make out a good case that it would suffer substantial loss if the stay of execution of Mutava J’ s Ruling and Order was not granted.
14. The Plaintiff’s case was that the Defendant applied for a stay of execution on 13th March 2013

- which was eight (8) months after the orders in question were granted. The court agrees with the Plaintiff that there was indeed inordinate and unreasonable delay in the Defendant filing the present application herein. While Mutava J delivered his Ruling and Order on 12th July 2012 in the presence of counsels for the Plaintiff and the Defendant, the Defendant did not take any action to file an application for a stay of execution pending appeal until 26th August 2013 when its goods were attached.
15. In the absence of any plausible explanation, none of which was provided in the Defendant's two (2) affidavits in support of its application, the court finds that the Defendant did not meet the second criteria set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010.
 16. Pursuant to the order of Kimondo J who was also at one time seized of this matter, made on 28th August 2013, the Defendant deposited a sum of Kshs 7,882,793/= into a joint interest earning account in the names of the advocates on 25th November 2013. This was evidenced in the RTGS exhibit marked "VO 1" attached to the Affidavit of Victor Omwebu. However, the same was deposited outside the seven (7) days that the learned judge had directed as a result of which the temporary stay of execution pending the hearing and determination of the present application automatically lapsed.
 17. When the matter came up before Mabeya J on 5th September 2013, interim orders were extended. The Plaintiff's counsel consented to the same and duly executed the court record and since then, the said interim orders have always been extended. In the circumstances, this court can only come to the conclusion that the Plaintiff had waived its right to object to the extension of interim orders herein and could not therefore raise it in its submissions. It was estopped from challenging the late deposit due to its conduct of mutually extending the interim orders or acquiescing to the deposit of the said monies out of time.
 18. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "**and**". It connotes that all three (3) conditions must be met simultaneously.
 19. It is therefore clear that the Defendant did not meet the said prerequisites for a stay of execution pending appeal and its application ought to be dismissed at the very first instance. Its apprehension was that the residents of Nakuru County would have their services interrupted on account of the grounding of very essential services that would be occasioned by the Plaintiff's attachment of its goods would not have been a sufficient reason for this court to grant the orders sought.
 20. The above notwithstanding, the question of whether or not the Defendant was served with a Hearing Notice in respect of the Plaintiff's Notice of Motion application dated and filed on 4th May 2012 is not one that this court can brush aside in a casual manner as the Defendant is entitled to a fair hearing as enshrined in Article 50 of the Constitution of Kenya, 2010.
 21. It is for that reason that the court deemed it necessary to look at the proceedings of 14th June 2012 when Mutava J heard the Plaintiff's Notice of Motion application dated 4th May 2012 seeking to strike out the Defendant's Defence. It is evident from the minutes on the court file that the hearing date for the said application was taken *ex parte*.
 22. Save for averring in Paragraph 5 of its Supporting Affidavit that the said application proceeded *ex parte*, the Defendant did not specifically state that it was not served with a hearing notice. It only did so in its written submissions, a fact that this court would not consider as such evidence cannot be introduced in any other manner other than by way of an affidavit.
 23. The Plaintiff did not make any reference to this issue of service in its Replying Affidavit at all or furnish the court with an Affidavit of Service to confirm such service. This was critical because the Defendant's case was actually hinged on this ground. As Mutava J was seized of this matter when the said application came up for hearing, this court is not able to conclusively state whether or not there was previously on the court file, an Affidavit of Service evidencing service of any hearing notice for that date. All that this court can observe is that there does not appear to have been an affidavit of service on the court record and that the date for the hearing of the Plaintiff's said application was taken *ex parte*.
 24. Although this court is not sitting to determine an application for setting aside of the *ex parte* judgment, which this court believes would have been the best course of action as the Defendant was adamant that it was not served with a Hearing Notice instead of appealing against the Ruling and Order of Mutava J delivered on 12th July 2012 and it is also not sitting on appeal on the said

learned judge's Ruling and Order as his was a court of equal and competent jurisdiction such as this, the court cannot be blind to the fact that the question of whether or not the Defendant was served with a Hearing Notice in respect of the Plaintiff's aforesaid application is an important one that the Court of Appeal ought to determine. Appreciably, that is one of the grounds in its memorandum of appeal.

25. Accordingly, having considered the parties' pleadings, affidavits, written submissions and the case law relied in support of their respective cases, it is the view of this court that it would be in the interests of justice that the parties ventilate their issues before the Court of Appeal. This is not because this court has found the Defendant to have made a good case of why it should be granted a stay of execution pending hearing and determination of its appeal but rather the same has been granted purely because of the peculiar circumstances of the case.

26. The court is of the considered view that the Plaintiff will not suffer great prejudice bearing in mind the entire sum of Kshs 7,882,793/= it had sought in its Plaint dated 13th March 2012 and filed on 19th March 2012 was and continues to be well secured in a joint interest earning account in the names of the advocates for both the Plaintiff and the Defendant. The court has noted that the Defendant has already lodged the Record of Appeal at the Court of Appeal thereby demonstrating its seriousness in prosecuting its appeal.

DISPOSITION

27. Accordingly, the upshot of this court's ruling is that the Defendant's Notice of Motion application dated and filed on 26th August 2013 was merited and the same is hereby allowed in terms of the Prayer erroneously shown as Prayer No (5) therein. Costs in the course.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of August 2014

J. KAMAU

JUDGE