



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 361 OF 2014**

**MASTER FABRICATORS LIMITED.....APPELLANT**

**VERSUS**

**PATRICK OMONDI NDONGA.....RESPONDENT**

**RULING.**

1. The respondent sued the appellant in Milimani CMCC No. 626 of 2012 for damages arising out of an industrial accident. The matter went for trial and Judgement was entered in favour of the respondent. The appellant was at the time insured by Blue Shield Insurance Company Limited (*'Blue Shield'*) which company was placed under statutory management and a moratorium declared. The moratorium stopped the prosecution of suits against Blue Shield and its insured. The appellant then filed an application before the trial court seeking orders for stay of execution on the basis of the moratorium. When the appellant sought for leave to file a supplementary affidavit, it was granted but its supplementary affidavit was later expunged from the record and stay orders were extended on condition that the appellant deposited the decretal sum in court within 14 days. Ruling on the application was scheduled for 14<sup>th</sup> October, 2014.
2. The appellant felt aggrieved by the trial court's orders mentioned above and has now filed a Notice of Motion dated 14<sup>th</sup> August, 2014. The motion is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules (*'the Rules'*) and Sections 1A, 1B and 3A of the Civil Procedure Act (*'the Act'*). It seeks for stay of proceedings and execution of the decree in Milimani CMCC No. 626 of 2012 pending hearing and determination of this appeal.
3. The application is premised on the grounds stated on the face of the application and the supporting affidavit of Dharminder Singh Virdee sworn on 14<sup>th</sup> July, 2014. The appellant's gravamen is that the trial court heard and decided the matter to which an order for stay by the High Court existed and secondly that the appellant was never informed by Blue Shield to defend the matter occasioning the matter to proceed without the appellant's knowledge. The deponent averred that the respondent relied on forged documents in opposing the application for stay before the trial court but this issue was not addressed by the trial court considering that the supplementary affidavit which raised the said issue was expunged. It is averred without prejudice that the respondent had been paid KShs. 75,600/= under Section 16(1) of the Workmen's Compensation Act (Cap 236) Laws of Kenya prior to the institution of Milimani CMCC No. 626 of 2012. The deponent also averred that the fact that there existed a civil claim No. 3312 of 2009 between the same parties over the same subject matter was never disclosed to the trial court by the respondent. He lamented that the respondent has commenced the execution process which shall prejudice the appellant considering that its tools of trade have been proclaimed. It is also the appellant's position that it has a meritorious appeal.
4. In opposing the application, the respondent filed a replying and further affidavit of Fidelis Maithya Mutisya sworn on 21<sup>st</sup> August, 2014 and 4<sup>th</sup> September, 2014 respectively and grounds of

- opposition dated 4<sup>th</sup> September, 2014. The respondent denied the appellant's averments. It was particularly contended that; the appellant has jumped the gun by filing this application since there is a similar application before the trial court pending ruling and that the appellant is in contempt having failed to abide by the trial court's orders; and that the order in High Court Miscellaneous Application No. 547 of 2012 barring prosecution of matters relating to Blue Shield has no bearing in this suit. It is contended that the appellant has failed to furnish evidence that it took out a policy cover for work injury benefits. He contended that technically the application has been dispensed with since the decretal sum was deposited in court and that the ruling/order the appellant intends to appeal against has not been attached to the application. He argued that the application is unmeritorious and ought to be dismissed.
5. Parties agreed to canvass this application by way of written submissions. The said submissions reiterate the parties averments. I have considered the depositions and the submissions therein. Order 42 Rule 6 (2) of the Civil Procedure Rules lay down the conditions which must be satisfied by an applicant to grant the orders for stay of execution pending an appeal. The applicant must first establish that he/she stands to suffer substantial loss if the orders are not granted. Secondly, the application must be filed timeously and thirdly, the applicant must offer security for due performance of the decree or order.
  6. As for stay of proceedings, I wish to reiterate this court's holding in *UAP Insurance Company Limited v. Washington Gatura Kimani [2014] eKLR* that "***there is no provision in the Civil Procedure Rules or Act which specifically deals with stay of proceedings. The court is therefore under duty to invoke its inherent power under Section 3A of the Civil Procedure Act which calls upon the court to do justice to prevent abuse of the court process. The court ought to consider matters such as the need for speedy disposal of the case and the prima facie merits of the intended appeal.***"
  7. The applicant should therefore establish that he/she has prima facie arguable appeal, the application must be filed timeously and the applicant should establish sufficient cause that it is in the interest of justice to grant the orders sought.
  8. It is not in dispute that the application was filed timeously. The appellant has also deposited the decretal sum in court. What is in contention therefore is whether the appeal is arguable, whether the applicant will suffer substantial loss and whether it would be in the interest of justice to order for stay of proceedings.
  9. The appellant's lamentation is that the trial court heard and decided the matter despite existence of a High Court order staying Blue Shield matters and that the it was never given the chance to defend itself in the suit and that it was not given the chance to contend that the respondent relied on forged documents in the application before the trial court. It is for the aforesaid reasons that the appellant seeks to appeal. These are in my considered view arguable grounds and I find and hold that the appeal is not frivolous.
  10. The appellant averred that it stands to suffer substantial loss since its tools of trade have been proclaimed. On this issue I am of the view that the provisions of Section 44 of the Act does not apply to corporate bodies and share the same opinion as the court in *Blackwood Hodge Kenya Ltd v. Lead Gasoline Tank Clearing Sam and Chase (K) Ltd* where it was held that:  
  
***"Section 44 of the Civil Procedure Act (Cap 21), in which it is provided that the tools and implements of a person for the performance of his trade or profession shall not be liable to attachment or sale, is not intended to protect corporate entities but artisans whose livelihood depends on their workmanship. The word person in that section does not include a corporate body."***
  11. It may also be argued that the subject matter is a money decree that can be recovered in the event the appeal succeeds. Despite this, however, the appellant was subjected to deposit the decretal sum in court and at the same time it is exposed to execution. This will in my considered view expose the appellant to substantial loss.
  12. As has been said earlier in this ruling, the appeal is arguable and may have a bearing on the merits of the suit, it is only fair and just for the proceedings and execution of the decree in Milimani CMCC No. 626 of 2012 to be stayed pending the hearing and determination of this appeal. I accordingly allow the application. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 28<sup>th</sup> day of November, 2014.

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent