



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 274 of 2009

LABH SINGH HARMAN SINGH LTD ..... PLAINTIFF

VERSUS

AHMED SALIM AHMED JEIZAN ..... DEFENDANT

BETWEEN

JOHN M. MBIJIWE T/A BEALINE KENYA ..... APPLICANT

AND

OKONG'O, WANGAGO & CO. ADVOCATES ..... RESPONDENT

RULING

1.The Respondent/Advocates' application for the Court's determination is dated 10<sup>th</sup> December, 2012 in which the advocates seek for stay orders pending their intended appeal of the Ruling of this court delivered on 4<sup>th</sup> December, 2012. The application for stay is brought under the provisions of **Order 50 Rule 6, Order 52 Rule 7(2) and Order 42 Rule 1 & 2** of the *Civil Procedure Rules (2010)* as well as **Sections 1A, 1B, 3A and 63 (e)** of the *Civil Procedure Act (2010)*. In the alternative, the advocates seek for stay pending the determination of taxation matters in **H.C.C.C No. 574 of 2012** and **H.C.C.C Misc Application No. 540 of 2012** by way of a further extension of the period of compliance of the order of 4<sup>th</sup> December, 2012 for another 60 days. The application is predicated on the grounds that the Advocates will suffer substantial loss if the said orders sought are not granted and that they have grounds for stay pending appeal.

2.In the affidavit of Amos Ogutu Wandago in support of the application, the deponent averred that it had provided sufficient grounds for appeal for the grant of stay orders, given that the Respondent owes the firm a substantial amount of money totaling to Kshs. 679,449/- in the two High Court matters previously mentioned above. Further, the deponent maintained that the Orders sought in the alternative would, however, suffice i.e. extension of the compliance period and a stay pending determination of taxation matters, as it would be in the interests of justice to do so.

3. In their submissions, the Advocates reiterated the contents of their application and the Affidavit in support stating that they had a right to appeal under **Order 43 Rule 1 sub-rule (1) (z)**. They relied on the authorities of **James Wangalwa & Another v Agnes Naliaka Cheseto, Bungoma H.C Misc Application No. 42 of 2001 (unreported)** and **Mukumu v Abuoga (1988) KLR 645**.

4. On the grounds adduced by the Advocates i.e. that the execution be stayed pending the taxation of their bills of costs and further for extension of compliance period, the Advocates have not shown grounds as to why each or both are sufficient grounds for granting stay orders. In order to seek the court's indulgence on issues as regards the interests of justice or equality and fairness under the "**Oxygen Principles**" as elucidated under **Sections 1A and 1B** of the *Civil Procedure Act*, an applicant has to show what injustice he/she stands to suffer, in order for the court to invoke its inherent powers under **Section 3A** of the *Civil Procedure Act*. Failing to do so, the Court will not grant orders in exercise of its discretion and as such the application would fail. **Order 52 Rule 6** provides that as regards the enlargement of time, the Court will only do so in the interests of justice. In this case, I am not satisfied that the advocates will stand to suffer any injustice should the compliance period not be extended.

5. However, the advocates have also relied on **Order 42 Rules 1 and 2** of the *Civil Procedure Rules* for their application. That Order provides for the procedure in making applications for appeals against any order or judgment that a party may feel aggrieved by. In seeking prayer 3 and 4 of its application, the advocates submitted that they should not put any emphasis on the provisions of this Order as such would not form a basis for their argument. **Order 42**, however, provides the fundamental procedural framework for an application for stay, such as the instant one. In such an application, the Court is guided by the provisions of **Order 42 Rule 6 sub-rule (2)** which reads-

**“(2) No order for stay of execution shall be made under sub rule (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.**

In determining what amounts to substantial loss, Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001 (unreported)** held that;

**“...substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”**

As regards the holding of **Mukuma v Abuoga** (supra) on substantial loss, the learned judges of the Court of Appeal held:

**“...substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo”.**

6. In my opinion in this matter, the Advocates have not established how they stand to suffer substantial or prejudicial loss should the Orders sought not be granted. In following the findings in both **Mukuma v Abuoga** (supra) and **Daniel Chebutul Rotich v Emirates Airlines** (supra), substantial loss has to be shown in order for the court to make appropriate orders. In the instant application, the decree against the Advocates is for only Kshs. 269,000/-. The sole reason adduced by the Advocates to support their supposed substantial loss is that the Respondent allegedly owes them Kshs. 679,449/- which, in their own admission, it relates to fee notes raised which have not even been taxed by the Taxing Master. In my opinion, this does not establish 'substantial loss' in the purview of the aforementioned cases nor as provided for under **Order 42 Rule 6 (2) (a)**.

7. I have considered the Replying Affidavit sworn by **John M. Mbiyiwe** dated 30 January 2013. The deponent contended therein that the Notice of Appeal filed on 7 December 2012 did not amount to an

appeal and is no more than any intention to appeal. The deponent was of the opinion that the Applicant should have filed a draft Memorandum of Appeal so as to indicate to the court just what its grounds were as regards this Court's Ruling of 4 December 2012. Further, Mr. Mbiyiwe pointed to the fact that the bills of costs filed by the Applicant as against the Respondent in **HCCC Nos. 574 and 540 of 2012** had nothing to do with the matter before court. As the deponent put it:

**“The applicant, not unless he has arranged with the court or knows without a shadow of doubt that the taxations shall be in his favour and he is assured of getting Shs. 700,000 in the taxation is, he should not even talk about these taxations.”**

However, in its submissions dated 18<sup>th</sup> February, 2012, the Respondent at paragraph 17 submits that the extension of time should be allowed for the Applicant to comply with the orders of 4<sup>th</sup> December, 2012 as a sign of good faith. This would be in accordance with **Order 50 Rule 7** whereby the Court could allow for enlargement of time by consent.

8. Therefore, after careful consideration of the Application and the submissions made therein as well as the Response thereto, this Court, in making its determination for stay orders, and in pursuance of **Order 42 Rule 6 (2) (b)**, is inclined to adopt the ruling of Mabeya, J in the case of **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** in which it was held:

**“...I also note that the Plaintiff has indicated that she stands to suffer prejudice that will be occasioned by the further delay in realizing the fruits of litigation. As I stated in the case of KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced”**

**In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”**

The issues as elucidated in the aforementioned case are similar to those in the present case. In view of the Respondent's concession in detailing that it considers it fair that the Applicant to have a further 60 days to comply with this Court's order of 4 December 2012, I so order with effect from the date hereof. However, such Order will be subject to the deposit of the Kshs. 269,000/-by the Applicant in a joint interest earning account in the names of the advocates for the Applicant and the Respondent, by 29 March 2013. In the circumstances, I make no order as to costs.

**DATED and delivered at Nairobi this 20<sup>th</sup> day of March, 2013.**

**J. B. HAVELOCK  
JUDGE**