IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 94 OF 2008

TIMSALES LIMITED…………………APPELLANT/APPLICANT

VERSUS

HIRAM GICHOHI MWANGI……RESPONDENT/RESPONDENT

RULING

The Appellant/Applicant (hereinafter referred to as the Appellant) has moved this court by the application dated 22nd February, 2013 seeking the following prayers:-

a. **That there be stay of the court's judgment/decree dated 18th January, 2013 and delivered on 31st January, 2013 in this suit pending full hearing and determination of the intended appeal to the Court of Appeal.**
b. **Costs of this application.**

The application is premised on the grounds on the face of the application and the averments in the supporting affidavit of the Counsel having conduct of this matter **Mr. Tombe Charles**, sworn on 22nd February, 2013. He attributes the failure to prosecute the appeal herein to the inability to trace the lower court file (CMCC No. 141 of 2000) which reason he says was addressed in a replying affidavit filed following service of a notice to show cause. However, on 18th May, 2012 a date set for mention to show cause why the appeal should not be dismissed, the matter was not in court. Subsequently, when the matter came up for ruling, Emukule J, delivered a final judgment on behalf of Ouko J, as to the substantive matters in the appeal. He added that the Respondent will suffer no prejudice if this application is allowed as the Appellant is willing to furnish security and that the appeal is meritorious.

The Respondent filed grounds and a replying affidavit dated 7th March, 2013 in opposition to this application. The Respondent contends that; the application is misconceived as it seeks stay pending an intended appeal i.e. there is no competent appeal on record with chances of success; there is no substantial loss the Appellant stands to suffer given that the award was for Kshs. 29,750/=; this court is now *functus officio* considering that it had delivered a ruling dismissing the appeal; the matter is a small claim originally from the lower court and not worthy of being before this court; the Appellant is acting in breach of the provisions of Sections 1A, 1B and 72 of the Civil Procedure Act and that the application is defective since it is premised on the affidavit of counsel seized of the matter and deponed to issues of contested fact which is hearsay.

Counsel for the parties reiterated the averments in the affidavits in their submissions. I have read the affidavits and considered the submissions tendered.

It is the Respondent's position that this court is *functus officio* considering that it delivered its ruling

dismissing the appeal for want of prosecution on its own motion upon notice to the Appellant. I must note that the Appellant herein intends to appeal to the Court of Appeal and not this court. I therefore disagree with the Respondent's position, basis being on order 42 Rule 6(1) which provides as follows:-

> **"No appeal or second appeal shall operate as 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 …"**
>
> **(emphasis my own).**

From the above provision, it is clear that an aggrieved party can apply for stay of execution in the court which made the order or decree being appealed against.

It was also the Respondent's position that the entire application is misconceived as it seeks stay pending an appeal yet to be filed. I am alive to the fact that authorities appear inconsistent on the essence of lodgement of a notice of appeal, some stating that the lodgement of a notice of appeal is an intention to appeal and cannot amount to the actual appeal that must be lodged by filing a memo of appeal, record of appeal, payment of fees and security for costs. I lean toward the reasoning in **Application No. 178 of 2005 Sewankambo Dickson v. Ziwa Abby [E.A.] 227** which quoted **Ujgar Singh v. Rwanda Coffee Estates Ltd. [1966] E.A. 263** with approval. In **Ujgar Singh** (*supra*), Sir Clement De Lestang, Ag. V. P. stated:-

> **"…It is only fair that an intended Appellant who has filed a notice of appeal should be able to apply for a stay of execution to the Court …as soon as possible and not have to wait until he has lodged his appeal to do so…"**

I therefore find and hold that the notice of appeal filed by the Appellant on 8th February, 2013 herein is sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay. However, such stay shall only be granted in appropriate cases where the threshold for grant of stay is met

Having so found, I will now consider whether the instant application meets the requirements for grant of orders of stay of execution as prayed namely:-

a. **That the application has been made without unreasonable delay**
b. **That security for costs has been given by the Applicant; and**
c. **That substantial loss may result to the Applicant unless the order of stay is made.**

I have had the liberty to peruse the record. The judgment was read on 31st January, 2013 and this application filed on 25th February, 2013 it appears to me that the application was made timeously.

The Appellant has offered to furnish security for the due performance of the decree. This is a sign of good faith that the Appellant is ready and willing to commit to giving security.

The question therefore, is, whether the Appellant has demonstrated that substantial loss will occur unless an order for stay of execution is issued? The Appellant said that substantial loss will result as their appeal will be rendered nugatory and would thereby occasion it substantial loss as the Respondent is not involved in any economic activity. The Respondent on the other hand, said the Appellant has not established that substantial loss will occur unless an order for stay is made.

The mere fact that the process of execution has commenced is likely or is to commence or has been completed by itself, does not amount to substantial loss for the reason that execution is a lawful process.

The Appellant must establish other factors which show that the execution will irreparably negate his right as the successful party in the appeal. See: **Silverstein N. Chesoni [2002] 1KLR 867** and ***Mukuma case (supra)***. The Court in the latter case while referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution stated as follows:-

> **"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory…"**

The claim is for only KShs. 29,000/=. It is minimal. The Respondent has been waiting for this judgment since the year 2000 when this suit was filed in court. However, this court gave judgment in 2008. An appeal was filed in the same year but not prosecuted until 2012. The decretal sum is only KShs. 40,000/=. Denying the Respondent such a minimal sum for a period of over 13 years is grave injustice and balancing the loss that may be suffered, it is my view that the Respondent will suffer more prejudice by being denied the fruits of his judgment. The court acknowledges that the Appellant has a right to appeal but the Respondent too has a right to enjoy fruits of his judgment.

There was no evidence that the Respondent is impecunious and not able to repay the decretal sum in the event the appeal succeeds. Mr. Tombe swore two affidavits but did not advert to that fact. In any event as Counsel, he was not in a position to depose to such facts as he could not depose to the Respondent's ability or inability to pay the decretal sum.

On 26th February, 2013, Counsel appeared before Judge Omondi under certificate of urgency. The court declined to grant stay of execution but gave 12th March, 2013 as the date for hearing. The application was not heard on that day. The Appellant did nothing in the matter till Counsel came to court with a certificate of urgency on 11th June, 2013. The court granted an order of stay on condition that the decretal sum was deposited in court within 14 days. Later, Counsel claimed it was deposited in the lower court. What was deposited must have been 70% of the decretal sum. Judge Ouko had found liability on 100% basis and so the decretal sum should be calculated on KShs.40,000/= basis. The Appellant did not therefore comply with the court's orders. In attempting to balance the interests of the two contesting parties, the decretal sum being minimal and the fact that the applicant has not demonstrated that the respondent cannot repay the said sum, it is my view that I decline to grant the order of stay because the Respondent will suffer more prejudice than if the decretal sum is not paid. In the end, I dismiss the application with costs.

DATED and DELIVERED this 27th day of September, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Wanjiru holding brief Mr. Tombe for the appellant

Ms Omwenyo holding brief for Mr. Githiru for the respondent

Kennedy – Court Clerk