



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 91 OF 2011**

**KAKAMEGA PAPER CONVERTERS  
LIMITED.....PLAINTIFF**

**-VERSUS -**

**MOHANLAL ARORA.....1<sup>ST</sup> DEFENDANT**  
**SUSHILA MOHANLAL ARORA.....2<sup>ND</sup> DEFENDANT**  
**PASPULATI JAYASURYA SUNIL RAJ.....3<sup>RD</sup> DEFENDANT**  
**EAST AFRICA PAPER CONVERTERS LTD.....4<sup>TH</sup> DEFENDANT**  
**BANK OF BARODA (KENYA) LTD.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. There is before the court a Notice of Motion dated 2<sup>nd</sup> September 2011 by the 4<sup>th</sup> defendant seeking, in the main, a stay of execution pending appeal. The intended appeal is against the decision of the court given on 24<sup>th</sup> August 2011 entering summary judgment in favour of the plaintiff against the 4<sup>th</sup> defendant for Kshs 51,462,424 together with interest and costs.

2. The motion is expressed to be brought under sections 1A and 1B of the Civil Procedure Act, the inherent powers of the court and order 42 rule 6 of the Civil Procedure Rules. It is supported by the annexed affidavit of Mohanlal Arora sworn on 2<sup>nd</sup> September 2011 and the marked annexures thereto. The applicant avers that the plaintiff and 4<sup>th</sup> defendant entered into a sale agreement dated 29<sup>th</sup> October 2010 for sale and purchase of the plaintiff's business, plant, buildings, machinery and stock. The 4<sup>th</sup> defendant issued post dated cheques totaling Kshs 51,462,424 as the purchase price. The 4<sup>th</sup> defendant

avers that some time on 17<sup>th</sup> January 2011 it rescinded the sale agreement on grounds of fraud or misrepresentation and directed its bank not to honour the cheques. The plaintiff filed this suit and sought summary judgment based on the said cheques. The court entered summary judgment for the amount of Kshs 51,462,424. The applicant, being aggrieved, has filed a Notice of Appeal and thus prays for stay of execution of the judgment pending the determination of the 4<sup>th</sup> defendant's intended appeal.

3. The application is contested. The plaintiff has filed a replying affidavit sworn by Dipak Panachand Shah, a director of the plaintiff, together with annexures marked thereunder. The plaintiff in sum avers that the 4<sup>th</sup> defendant received full consideration for each of the 61 post dated cheques totaling Kshs 51,462,424, that it took possession of the subject matter of the sale agreement, that there was no fraud or misrepresentation and that in all the circumstances of this case there was nothing irregular in the grant of summary judgment by the court except that it went against the 4<sup>th</sup> defendant. Paragraphs 3,4,5,6 and 7 of the replying affidavit summarize those averments.

4. It is important to clarify at the outset that I am not being called upon to determine the merits of the order of summary judgment of the Honourable Muga Apondi Judge of 24<sup>th</sup> August 2011. And neither am I sitting on an appeal to it or being called upon to determine the chances of success of an appeal to the Court of Appeal. In deed, at the moment, only a Notice of Appeal has been filed dated 2<sup>nd</sup> September 2011 which for purposes of order 42 rule 6(5) of the Civil Procedure Rule 2010 constitutes an appeal.

5. What is for my consideration is whether the applicant has met the conditions for grant of stay of execution set out at order 42 rule 6(1) and (2) of the Civil Procedure Rule 2010 which provides:-

“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.”

6. There is an abundance of legal authorities defining the parameters and key considerations that guide the court in an application for stay pending appeal. I thank both learned counsels in this matter for their well argued submissions and extensive lists of authorities. I have considered those authorities. The applicant sought to rely on Harit Sheth vs Shamas Charania [2010] eKLR Nairobi Civil Application No.68 of 2008, Butt vs Rent Restriction Tribunal [1982] KLR 417 Civil Application No.6 of 1979, Joseph Rading Wasambo vs Standard Group Limited [2006] eKLR, Josephine Moraa vs Ken Sagini [2010] eKLR Kisii HCCA No.34 of 2010, Madhupaper International Limited vs Kerr [1985] KLR 840, Kisumu Civil Application No.116 of 1985, Westmount Power Kenya Limited vs Fredrick & Another [2003] KLR 357 Nairobi Civil Application No.135 of 2003 (69 of 2003 UR), Doge vs Kenya Cannery Limited eKLR Nairobi Civil Application No.11 of 1983, Kenya Shell vs Karuga [1982-1988] 1KAR 1018 Nairobi Civil Application No.97 of 1986, Anglican Church of Kenya vs Alfred Imbwaga Musungu [2009] Mombasa HCCA No.2 of 2009 and Alliance Media Kenya Limited vs World Duty Free [2005] EKL

Nairobi HCCC No.678 of 2004.

The respondent on its part relied on

Halai & another vs Thornton & Turpin [1963] Ltd [1990] KLR 365 C.A. Civil Application No.NAI 15 of 1990, Bamburi Cement Ltd vs Joseph Kamuli Kaindi [2008] eKLR C.A. Civil Appeal 193 of 2007, Equatorial Commercial Bank Ltd & 2 others vs Retreat Villas Limited [2006] eKLR, Dr. Daniel Chebutuk Rotich vs Morgan Kimaset Chebutuk [2005] eKLR, Bethuel Muiruri Benjamin vs Development Bank of Kenya [2006] eKLR.

In the case of Butt vs Rent Restriction Tribunal [1982] KLR 417 the learned Judge, Madan JA (as he then was) quotes with approval the views of Brett L.J. in Wilson vs Church (No 2) 12 ch D [1879] 454 AT 459

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

Justice Madan then rendered himself thus in the Butt case (Supra) at page 419,

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

7. Again the court will grant a stay if special circumstances of the case dictate so. See Attorney General Vs Emerson and others 24 QBD [1889] 56 at page 59. In the Butt decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a

“special circumstance” that gave the applicant an undoubted right of appeal. These general principles were also stated in Madhupaper International Limited vs Kerr [1985] KLR 840. See particularly page 846.

8. In addition the court should also pay regard to the overriding objective to do justice to the parties captured at section 1A and 1B and as read together with section 3A of the Civil Procedure Act. I can not put it better than the court of Appeal in Harit Sheth T/a Harit Sheth Advocate vs Shamas Charania [2010] eKLR (Civil Application No 68 of 2008;

“The next aspect of such an application like this is, however, difficult to resolve. This is whether or not the appeal, if successful would be rendered nugatory. In our view, the sum of Shs.32 million is relatively substantial taking into account the station of the applicant’s legal practice. We draw guidance herein from this Court’s decision in the well known case of Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd [1999] 1EA 236. Further in this regard, we have also taken into account the provisions of section 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23<sup>rd</sup> July, 2009. By these new concepts of jurisprudence the courts, including this Court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined in the two Acts. The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See E. Muriu Kamau t/a Muriu Mungai & Co. Advocate vs. National Bank of Kenya Ltd Civil Application No.Nai. 258/2009 (unreported).”

9. So the parameters are clear and the beacons of legal authorities well laid out. The key task is then to see whether the applicant's motion has risen to meet that threshold. The applicant submitted that as it had pleaded fraud and that it has an intended counterclaim, the order of summary judgment was misplaced. On those two arguments I am of the view that the ruling sought to be overturned on appeal considered and made some findings on the fraud and that is not a matter to be re-opened before me on this application. It might as well be a good ground of appeal. Regarding the counterclaim, the record shows clearly that there is no counterclaim filed by the 4<sup>th</sup> defendant applicant. What the 4<sup>th</sup> defendant has on record is an application, without a return date, dated 24<sup>th</sup> August 2011, for leave to amend its defence to plead the counterclaim therein.

10. It is instructive that in the decisions in *Wilson vs Church* (No 2) 12 ch D [1879] 454 or *Madhupaper International Limited Vs Kerr* [1985] KLR or even the case of *Doge Vs Kenya Cannery Limited* Civil Appeal No 11 of 1983 (unreported) dealt with situations where there was a claim or counterclaim pending that made an order for summary judgment inappropriate. Thus it is stated in the *Doge* case (Supra) that;

“As stated in that case, and in the 1979 Rules of the Supreme Court, in the relevant commentary, the proper order where there is a plausible though not necessarily bona fide counterclaim is to give judgment on the claim and to stay execution until the trial of the counterclaim”.

Those circumstances, clearly are different in the present case and the latter case may well be distinguishable.

11. Along with this is the fact that this is a money decree. Even the 4<sup>th</sup> defendant in its written submissions conceded that “ it is not normal for an appeal to be rendered nugatory in a monetary decree”. But the 4<sup>th</sup> defendant fell back on the limb of substantial loss to say that the judgement is irregular or what its counsel called in its submissions “regularity of judgment” and the fact that the sum in the decree of Kshs 51,462,424 is substantial. The decisions in *Ujagar Singh vs Runda Coffee Estates Ltd* [1960] E.A 263 and *Kenya Shell Ltd vs Benjamin Karuga* [1982 – 1988] 1 KAR 1018 are ample authority for the proposition that an appeal will not be rendered nugatory in monetary decree if payment is made.

13. I have no doubt that the applicant is entitled to an appeal and has taken steps by filing a Notice of Appeal. In attacking the findings of the Judge on fraud, there may well be an arguable appeal. On the basis of attack based on an intended counterclaim for which leave to file an amended defence has not been granted, it would be doubtful. What I find is that in a monetary decree as the one in this case, the enforcement of decree by payment, does not, of itself render the appeal nugatory. The mere fact of the value of the decree does not bring the applicant to the threshold of sufficient cause or substantial loss set out at order 42 rule 6 of the Civil Procedure Rules 2010 aforementioned. I am satisfied that the application for stay has been filed without delay and on that score the applicant is well within the requirement of order 42 (6) (1) (a).

14. I note the applicant has not made any offer in the application or affidavit to provide security. The applicant did say in its oral submissions that they would provide security in the sums, which he said were not much or known, held at the 5<sup>th</sup> defendant bank but the sums, in any event, were not disclosed. It was, in my view, not a serious offer to furnish security for due performance of the decree.

I did not hear the applicant say that the plaintiff would not be in a position to repay the sums if the judgment is overturned on appeal. The failure to make an offer or show serious commitment to furnish security for due performance of the decree prejudices the applicant's motion. See the decisions in *Kenya Shell vs Karuga* [1982-1988] 1 KAR 1018, *Halai & Another vs Thornton & Turpin [1963] Ltd* [1990] KLR 365 and *Dr. Daniel Chebutuk Rotich vs Morgan Kimaset* [2005] eKLR.

15. Lastly, whether or not to grant a stay of execution is entirely in the discretion of the court. Considering what I have said, primarily that the applicant though entitled to an appeal that may be

arguable has not shown sufficient cause, or demonstrated how it would suffer substantial loss and has not offered any security for due performance of the decree, I would be reluctant to grant a stay.

16. From the deliberations above and for the foregoing reasons, I find that the applicant's notice of motion dated 2<sup>nd</sup> September 2011 lacks merit and I proceed to dismiss it with costs to the plaintiff.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 28<sup>th</sup> Day of October 2011.

**G.K. KIMONDO**  
**JUDGE**

Ruling read in open court in the presence of:

Mr. Kingara holding brief for Nagpal for the Plaintiff/Respondent

Mr. Mureithi holding brief for Alibhai for the Defendant/Applicant.