



IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 164 of 2010

KEMUSALT PACKERS PRODUCTION LIMITED.....APPELLANT/APPLICANT

-VERSUS-

PAUL CHARO MUKOKA.....RESPONDENT

RULING

The applicant moved the Court by Notice of Motion under Orders XLI [Rule 4], L of the earlier edition of the Civil Procedure Rules, and ss.1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap.21, Laws of Kenya), dated **26th July, 2010**.

The one substantive prayer still pending is for Orders:

*“THAT this Court be pleased to Order a stay of execution of the Ruling and Order of [the Principal Magistrate]...given on **22nd July, 2010**, the decree dated **8th June, 2009** and all consequential orders... pending the hearing and determination of the appeal herein.”*

The grounds for the application are set out as follows:

*(i) the applicant is aggrieved by the Ruling and Order of the Principal Magistrate made on **22nd July, 2010** in Mombasa SRMCC No.4102 of 2004 and has appealed against the same;*

(ii) the appeal herein is arguable and has high chances of success;

(iii) unless this application is granted the appeal will be rendered nugatory;

(iv) unless stay is granted, the applicant will suffer a substantial loss;

(v) the applicant is ready and willing to furnish such security as the Court may deem fit, pending the hearing and determination of the appeal;

(vi) there is sufficient cause to warrant a stay of execution of the Ruling, Order and decree of the Subordinate Court pending appeal;

(vii) it is in the interest of justice and fairness that there be a stay of execution of the Ruling and Orders aforesaid;

(viii) the application has been made without delay.

The applicant's Director, **Hassan Zubeidi**, on **26th July, 2010** swore a supporting affidavit giving relevant facts. The deponent deposed that "*the applicant is ready and willing to offer an acceptable bank guarantee or any other form of security this Court may order, pending the hearing and determination of the appeal.*" The deponent avers that he believes to be true, the advice of his Advocates, that the respondent has applied for warrants of attachment to issue against the appellant with the intention of proclaiming the appellant's property in execution of the decree of the Subordinate Court of **8th June, 2009**.

The respondent deposes, in his replying affidavit of **17th August, 2010** that he believes it to be true, as advised by his Advocates, "*that there is no...merit in the application...as the grounds [stated] had been exhaustively dealt with in the lower Court in the delivery of its ruling on 22nd July, 2010 and that the same is meant to occasion untenable delay and/or to derail [the respondent] in reaping the fruits of the Judgment*". The deponent avers that he is "*a man of means with full pecuniary capacity to effect any possible refund of money of any amount paid by the appellant in satisfaction of the decree in the lower Court, in the possible event the appellant succeeds in its appeal.*"

Learned counsel **Mr. Langi**, for the applicant, submitted that his client was required to demonstrate that a substantial loss will ensue if an order of stay is not granted; that the application has been made without unreasonable delay; that the appellant was willing and able to give such security for due performance of the decree as may be ordered (Order XLI (4)); and that there is sufficient cause to justify the granting of an order of stay. Counsel submitted that there was sufficient cause to sustain the application, insofar as the applicant had filed an arguable memorandum of appeal: the same arising from the refusal by the Subordinate Court to set aside the *ex parte* Judgment entered against the appellant on **23rd April, 2009** and the consequential decree of **18th June, 2009** and all consequential orders.

As regards the question of substantial loss, counsel urged that in the event the appeal succeeds, the respondent will not be in a position to refund the decretal amount of more than Kshs.1,000,000/= – for there is evidence in the appellant's depositions that "*the respondent has no tangible assets and property*"; and the respondent "*has not shown whether he has any cash deposits in any bank.*" Counsel submitted: "*We have on a balance of probability shown that if the appeal succeeds the respondent will be unable to refund the decretal amount.*"

Counsel submitted that the application also came within the terms of ss.1A and 1B of the Civil Procedure Act: the Court, in interpreting the Civil Procedure Act, or exercising any power, is to take into account the overriding objective of civil dispute settlement – especially, the need to act justly in every situation, the need to have regard to proportionality, the need to provide a level playing ground for all the parties; ***E. Muriu Kamau & Another v. National Bank of Kenya Limited***, Civil Appl. No. 258 of 2009 [2009] eKLR.

Learned counsel, **Ms. Lutta**, for the respondent, contended that the applicant had established no reasonable grounds for grant of the orders sought.

Upon considering the facts emerging from the affidavits herein, and upon taking into account the submissions of learned counsel, I have come to the conclusion that the applicant's undoubted right of appeal should not be rendered devoid of effect, by permitting execution of the decree in hand regardless of the possible outcome of the appeal. Just as the Court should sustain suits properly filed, notwithstanding any limited defects of procedure, so should the Court set the stage for the proper hearing of an appeal by which a party questions the merits of the Judgment of the Court of first instance. This may be regarded as an essential principle of justice in civil litigation, and I will uphold it in this case by laying conditions to sustain the appellant's appeal. However, the considerations of justice linked to that reasoning equally dictate that the respondent be not denied all prospect of an assurance as to the fruits of the Judgment already given. On this account, I will grant the applicant's prayer, but with a condition attached; I will order as follows:

(1)I hereby order stay of execution of the Ruling and Order the Principal Magistrate given on 22nd July, 2010, the decree dated 8th June, 2009 and all consequential orders, pending the hearing and determination of the appeal herein.

(2)The appellant herein shall deposit the entire decretal sum in an interest-bearing account held in the joint names of the Advocates' firms with the conduct of this matter, this to be done within 60 days of the date hereof.

(3)This matter shall be listed for mention and directions 60 days from the date hereof.

(4)The costs of the instant application shall be in the appeal.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 7th day of November, 2011.

**H.M. OKWENGU
JUDGE**