REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 521 of 2009

SIDRA MOTORS SALES & SPARES LIMITED…….APPLICANT/APPELLANT

-VERSUS-

1. ONESMUS NZIOKI MWINZI

2. ONESMUS MWASHIGADI…………………….…........................RESPONDENTS

RULING

The appellant came before this Court by Notice of Motion dated and filed on 29th October, 2009 brought under Order ***XLI*** rule 4 of the Civil Procedure Rules and s. 3A of the Civil Procedure Act (Cap. 21, laws of Kenya). The main prayer in the application is thus set out:

> ***"THAT there be a stay of execution of the Judgment and Decree issued in Senior Resident Magistrate's Court at Voi Civil Suit No. 102 of 2008 and stay of orders and/or all further or other consequential orders issued in SRMCC No. 102 of 2008 against the appellant/applicant pending the hearing and determination of an appeal filed by the appellant/applicant against the said Judgment and Decree made herein on 1st October, 2009 on such terms as appear just and proper".***

The application is founded on several grounds, as follows:

(i) ***the applicant's appeal against the Judgment and Decree "has good prospects of success";***

(ii) ***substantial loss will result to the appellant if a stay of proceedings is not granted;***

(iii) ***if the intended execution of the decree is allowed to proceed, then the appeal which raises serious grounds, shall be overtaken by events and thereby rendered nugatory;***

(iv) ***the appellant is prepared to give appropriate security for the decretal amount.***

The Managing Director of the appellant company, ***Mr. Mohamed Rafiq*** has sworn a supporting affidavit which, however, lacks the character of an evidential document, insofar as it substantially contains material that ought to come from counsel making submissions. It is not surprising that the other parties did not file replying affidavits.

In his submissions, counsel for the applicant stated that he already had, on ***28th October, 2009*** filed his client's appeal, which carried as many as 14 grounds. Counsel's own assessment of the merits of these grounds of appeal is thus expressed: "These grounds are very sound and arguable …and there is a very good chance of the appeal succeeding." Counsel urged that the appellant is exercising its "undoubted right of appeal", and hence he was calling upon the Court "to exercise its best discretion in [such] a way….as not to prevent the appeal, if successful, from being rendered

nugatory." Counsel submitted that there is an impending execution of the decree and, if the appellant were to succeed after execution has taken place, then the appeal would have been rendered nugatory: and so "it will serve the interest of justice if orders of stay of execution are issued pending the hearing and determination of the appellant's appeal".

Counsel called in aid the High Court's decision (***Ringera, J***.) in ***In the Matter of Global Tours & Travels Limited***, Winding up Cause No. 43 of 2000, Nairobi Milimani Commercial Courts; the relevant passage thus reads:

> ***"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by…virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether or not to order stay the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the*** *prima facie* ***merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."***

Counsel urged that unless orders of stay of execution are issued, substantial loss will result to the applicant. He contended that the sum awarded in the Lower Court judgment was "quite colossal" and 1st respondent was already threatening to execute for the entire decretal amount which stood at Kshs. 367,350/=. The appellant apprehended that if the said decretal sum was at this stage paid to 1st respondent, there would be much difficulty recovering it if the appellant were to succeed in the appeal.

Counsel urged the Court to take into account the fact that the appellant had acted without delay, in the filing of this application: judgment was delivered on ***1st October, 2009*** and, by ***29th October, 2009*** this application had been filed; and the memorandum of appeal was filed on ***28th October, 2009***.

Counsel urged that the appellant was ready and willing to deposit any security towards payment of the decretal amount, in the event the appeal does not succeed.

Counsel submitted that there was an imminent threat of execution for the decretal sum, and that 1st respondent's Advocates have already demanded payment within 30 days.

A contrasting position is taken by counsel for 1st respondent, who submitted that the appellant's application "is bad in law and an abuse of Court process". Counsel cited this Court's (***Mutungi, J***) decision in ***Equity Bank Limited v. Taiga Adams Company Ltd*** [2006] eKLR as requiring, for the success of an application such as the instant one, full compliance with the terms of Order ***XLI*** rule 4 (1), (2) of the Civil Procedure Rules: and that such compliance entails that the Court is to be satisfied that substantial loss would ensue from a refusal to grant stay; that the applicant is to furnish security; that the application is made without unreasonable delay.

Counsel then urged that the applicant had not shown any ***substantial loss*** it stood to suffer, and, as was held in a decision of the High Court (***Visram, J***), ***Teresia Kimani v. Githere Investments Limited***, Nairobi H.C. Civ. Appeal No. 944 of 2003,

> ***"A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused."***

Counsel submitted that the applicant herein had not demonstrated that it stood to suffer substantial loss if the application for stay of execution was not allowed. Such a demonstration, counsel urged, could only be realized if the applicant showed that if he paid the decretal sum to the decree-holder, the decree-holder would be unable to repay it in the event of a successful appeal: ***Equity Bank Ltd v. Taiga Adams Company Ltd***. Counsel contended that the 1st

respondent being an Advocate who "cannot be said to be a man of no means", was in a position to refund paid-up decretal sums, in the event the appeal was successful.

Counsel sought to distinguish the decision in ***In the matter of Global Tours & Travels Limited*** (2000), and to place reliance instead on ***Visram, J's*** ruling in ***Hall Equitorial Limited v. Olympic Fruit Processors***, Nairobi H.C.C.C No. 5400 of 1991 in which it was held, in relation to Order ***XLI*** rule 4, that "the onus is on the applicant to satisfy all the conditions through his depositions, and not through bold statements from the Bar".

Counsel submitted further, that the application had been "sought in a vacuum", as no decree had been exhibited to prove that the 1st respondent intended to execute the same.

Counsel urged that the application be dismissed with costs, but that If it is allowed, then the applicant be ordered to deposit the entire judgment-award in a joint interest-earning account in the names of 1st respondent and the appellant's advocates.

The 2nd respondent's submissions were in perfect agreement with the applicant's position: it was urged that the application be allowed with costs to 2nd respondent. Counsel submitted that the applicant's appeal would succeed, ***inter alia***, because the trial Court had erred in law and fact, in holding that there was sufficient evidence showing liability on the part of 2nd respondent – when all the evidence pointed to the contrary.

It was further contended that the trial Court was in yet another error of law and fact, in assessing liability at 100 per cent against 2nd respondent, in disregard of the evidence given by 2nd respondent. It was 2nd respondent's position, further, that the trial Court fell into another error of law and fact, by inflating the amount awarded in general damages.

Of the authorities relied on, the most detailed and most relevant one, dealing with the guiding principles for a Court considering an application such as the instant one, is ***In the Matter of Global Tours & Travels Limited*** (2000): and that case sets up the principle that the appeal, to benefit from stay of execution, has to be an ***arguable*** one; that the ***judicial discretion*** is overriding, as the basis for grant or refusal of stay orders pending appeal; and that the Court is to consider the criteria set out under Order ***XLI*** rule 4. It has not been doubted that both the appeal and application were filed without unreasonable delay, and that the applicant is ready and willing to furnish such security as the Court may order.

Although the appellant has not attempted to prove that the 1st respondent would be unable to reimburse paid-up decretal sums in the event of a successful appeal, the appellant clearly apprehends that it would suffer substantial loss if it paid the decretal sums and then it was successful in the appeal. Although counsel for 1st respondent contends that proof of such substantial loss ought to have been done, in my opinion, the relevant details cannot in all cases be mathematically established; and therefore the proof required of substantial loss must be tested, in most cases, on the basis of ***probabilities.*** Similarly the question whether or not the judgment-creditor will be unable to refund paid-up decretal sums, will in most cases be tested only at the level of probabilities.

After taking into account the appellant's grounds of appeal, and considering the timeousness of that appeal, I have come to the conclusion that a serious appeal has been lodged, of an arguable nature.

The appellant has stated that it stands to suffer substantial loss if it had to pay now the decretal sums, and then later it succeeds on appeal. I do not see, in the circumstances of this case, any reason to reject that position.

In exercise of the Court's discretion, I am inclined to allow the application, and I will make specific orders as follows:

(1) I grant stay of execution of the decree of the trial Court in SRMCC No. 102 of 2008, pending the hearing and determination of the applicant's appeal.

(2) The appellant/applicant shall pay into the cash office of the High Court the entire decretal amount,

within 30 days of the date hereof, pending the outcome of the appeal.

(3) The costs of this application shall be in the appeal.

DATED and **DELIVERED** at **MOMBASA** this 14th day of May, 2010.

J. B. OJWANG

JUDGE