REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 34 OF 2010

BRIDGESTONE CONSTRUCTION CO. LTD. :::::::::
APPELLANT/APPLICANT

V E R S U S

EZINAFA AYESA KAVERE WILSON CHAVANGI ::::::::::::::::::::: ::::::::::::::::::::::::::::::
RESPONDENTS
(suing as defendant of the estate of AGRIPA KAYELE ADOLI *[DECEASED])*

R U L I N G

1. The Notice of Motion dated 24.3.2010 is brought under the provisions of ***Section 3, 3A*** and ***63*** of the Civil Procedure Act, and Order XLI Rule 4 of the Civil Procedure Rules. The Applicant, Bridgestone Construction Co. Ltd., seeks orders of stay of execution of the judgment and decree in Kakamega CMCC No.205/2008 together with all consequential orders pending the hearing and determination of the Appeal herein.

2. From the Supporting Affidavit (and its annextures) sworn on 24.3.2010 by Raymond Odak, Principal Officer of the Appellant company, the Appeal is against a Ruling delivered on 23.3.2010 by the subordinate court. In the Ruling, the learned Principal Magistrate declined to reinstate an application that had been dismissed for non-attendance. The Application was seeking the setting aside of an ex-parte judgment entered in favour of the Respondents. Further, that consequent upon that Ruling, the Respondent proceeded to execute the decree and in that regard, certain properties belonging to the Appellant were proclaimed to satisfy the decretal sum of **KShs.1,056,960/=** or thereabouts.

3. It is also the Appellant's case that unless the execution of the decree is stayed, the Appellant's appeal would be rendered nugatory and substantial loss and irreparable damage would be occasioned to it.

4. In the grounds in support of the Application, the Appellant/Applicant has stated as follows;

"*The Appellant/Applicant has preferred an appeal against the said ruling and has actually lodged a memorandum of appeal in this court which appeal is arguable and has overwhelming chances of success for the reasons that:*

i) The court misdirected itself in suo moto invoking the provisions of order III Rule (A in any event

misapplying/miscomprehending the same in favour of the plaintiff.

ii) The trial court made a finding that the defendant was served with summons to enter appearance contrary to overwhelming evidence on record.

iii) That in any event the issue of service was not to be canvassed in the application for reinstatement hence irrelevant in ruling.

iv) The court determined the defendants defence and application for reinstatement without hearing the defendant over the same.

v) The learned Magistrate erred in law and in fact in failing to find that the appellant had demonstrated on a balance of probability that its failure and that of its counsel to attend court on 9th February, 2010 when its application dated 18th November, 2009 was dismissed was inadvertent.

vi) That the learned magistrate erred in law and in fact in failing to find that his failure to set aside his exparte order delivered on 9th February, 2010 would occasion injustice and hardship to the appellant yet the appellant's failure to attend court was as a result of an excusable mistake and/or error.

vii) The learned magistrate erred in law and in fact by turning his back to a litigant who had clearly demonstrated excusable mistake, inadvertence, accident or error as reasons for his failure to attend court and that of its advocates."

5. For the above reasons it is further argued that the Application has merit and should be granted on such terms as the court deems fit.

6. The Respondent's answer to the Motion is contained in a Replying Affidavit sworn on 13.4.2010 and of relevance to the Application, is that the same has been overtaken by events because the parties have already filed a consent order in the lower court in which the Applicant was granted thirty (30) days to settle the claim failure to which execution would proceed. That therefore the present Application is calculated to overturn that consent order and deny the Respondent the fruits of a judgment lawfully obtained. She prays that the same be dismissed with costs.

7. I have taken into account the elaborate submissions by advocates for the parties which sadly do not address the issues to be taken into account and I should begin by reproducing Order XL1 Rules (1) and 4 (2) of the Civil Procedure Rules which provide as follows;

"1 …….

2 ……..

3 …….

4 ***(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 a 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." *(Emphasis added)*

8. In submissions and I have alluded to the issue above, the advocate for the applicant went to great lengths to fortify the faults that the Applicant finds in the Ruling under appeal and I have reproduced those matters elsewhere above. In both the Supporting Affidavit and in submissions however, little is said of that all important consideration in an application of this nature i.e. evidence of substantial loss to be suffered if the stay order is not granted – see New Stanley Hotel Limited vs Arcade Tobacconists Ltd. [1986] KLR 757. Substantial loss, it has been held often, is the cornerstone for any application such as the one before me and without the issue being proved, then no orders can issue. It has been said time and time again that Order XLI Rule 4 (2) fetters the discretion of any court and is not one of those rules that give the court unfettered discretion. Granted, the Application was brought without delay but that is not a sufficient reason to accede to it. Further, conditions to be attached to the stay order is a matter for the court to determine and not the parties.

9. To compound the difficulties I have with the Application, any party seeking the exercise of discretion must come to the seat of equity with clean hands. The Applicant herein, failed to disclose from the outset that on 29.3.2010, a week or so after the offending Ruling, a consent order was recorded in the following terms;

"By Consent of both parties;

a) There be a 30 days' stay of Execution of the decree herein to pave way for negotiations.

b) The Stay period to start running from the date of this Consent and the same shall automatically lapse at the end of the 30th day in the event that negotiations fail to bear fruits whereafter execution of judgment herein to proceed forthwith."

10. The above order has not been set aside and its terms are binding on the Applicant. It may well be that negotiations broke down or were unable to bear any fruits but that fact should have been disclosed from the outset because the default clause is still operative, a fact well known to the Applicant. This court should not purport to set aside such an order in proceedings that touch on the default clause lawfully and voluntarily entered into between the parties. I say so well aware of the wording of Order XLI Rule 4 (1) of the Rules.

11. This would otherwise have been a fit case for grant of stay order on conditions to be given but the approach taken and the framing of the Motion as well as the conduct of the Applicant would sway my mind away from exercising discretion in its favour.

12. In the event, the Application dated 24.3.2010 is dismissed with costs to the Respondent.

13. Orders accordingly.

Delivered, dated and signed at Kakamega this 30th day of September, 2010.

ISAAC LENAOLA

J U D G E