



No. 174

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 67 OF 2007

MASOSA CONSTRUCTION CO. LTD.....PLAINTIFF

-VERSUS-

KISII MUNICIPAL COUNCIL DEFENDANT

RULING

Before me is a Notice of Motion dated 13th April, 2010 seeking a stay of execution of the judgment and decree of this court delivered on 23rd March, 2010 pending the hearing and final determination of the applicant's appeal. The application is expressed to be brought under Orders XLI Rule 4, L rule 1 of the **Civil procedure rules** and section 3A of the **Civil Procedure Act** together with **all other enabling provisions of the law**. The application is founded on the grounds that the applicant has an arguable appeal with a high probability of success, the intended appeal would be rendered nugatory and the applicant will suffer irreparable damage if stay is not granted. That the applicant is ready and willing to deposit such sum as this court may order in a joint ascrow account to the order of the parties advocates and finally that the application has been made without undue and unreasonable delay.

The affidavit in support of the application states in brief that on 23rd March, 2010, judgment was entered against the applicant and in favour of the respondent in the sum of Kshs. 15,556,986.70 plus costs and interest. The applicant being aggrieved and dissatisfied with the said judgment opted to appeal. Towards this end it had filed a Notice of Appeal on 29th March, 2010 and simultaneously applied for certified typed copies of the judgment and proceedings. The applicant was apprehensive that if the decretal amount is paid to the respondent, it would not be in a position whatsoever to refund the same if the intended appeal is successful. The appeal too may be rendered nugatory and the applicant will suffer irreparable loss and damage if stay is not granted as the applicant will not be able to carry out its

operations and statutory obligations.

The respondent opposed the application through a replying affidavit sworn by **Maxwel Okemwa Mogere**, the managing director. It maintained that it was a vibrant and liquid company and in a position to repay or refund the decretal sum to the appellant if the intended appeal succeeded. Even though the applicant contends that it would suffer irremediable loss, if the decretal sum is paid, no evidence of such suffering has been captured and or disclosed. The intended appeal was frivolous and otherwise legally untenable in so far as the applicant had failed to serve the notice of appeal on the respondent within the statutory period. Consequently the applicant has not shown any sufficient cause, to warrant the orders of stay of execution sought. In any event, the inability of a litigant to raise or pay the decretal sum, is not a ground for granting an order of stay pending appeal. Finally, it deponed that the application had been made with inordinate and or unreasonable delay, which delay had not been explained.

Being application for stay of execution pending the hearing and determination of an intended appeal, it is imperative upon the applicant to satisfy this court on the following salient issues:-

- There exists sufficient cause or basis to warrant the stay sought.
- That the applicant is bound to suffer substantial loss, unless the order of stay is granted.
- The application has been made without inordinate and or unreasonable delay.
- The applicant is prepared to offer security, as the court may deem fit and expedient to order.

This is the essence of order XLI rule 4 of the **Civil Procedure rules**. See also **Kenya Shell Limited V Benjamin Karuga Kibiru & Another (1982-88) 1 KAR, National Media Group Limited V John Joseph Kamotho & 3 Others eKLR, ABN Amro, N.V V Le monde Foods Limited, Civil application Number Nai 15 of 2002 (UR) and Prime Capital & Credit Ltd V Nationwide Electrical Industries Ltd, HCCC No. 524 of 1998 (UR).**

The applicant has filed a Notice of appeal evidencing its desire to contest the judgment and decree in the court of appeal. The respondent counters this by stating that, having filed the Notice of Appeal, it was incumbent upon it to serve the respondent with the same within 7 days. The applicant failed to do so and instead served the same 2 days outside the statutory period having regard to the provisions of rule 76(1) of the court of appeal rules. Thus the Notice of appeal as filed is prima facie incompetent. It cannot therefore be said that the applicant has a sufficient cause or basis, upon which this court can exercise its discretion to grant the orders sought. The applicant's response is that it is not within my jurisdiction to determine the validity or otherwise of the Notice of appeal. I entirely agree with the applicant that it is not for this court to determine whether the intended appeal is arguable or frivolous including the validity of the Notice of appeal filed and served. That is a matter entirely for the court of appeal to consider should an application to that effect be made. For now however, I am satisfied that the applicant has demonstrated sufficient cause or basis to warrant the grant of the order sought as it has initiated and invoked the appeal process.

The decretal amount involved is substantial. The applicant contends that if it is compelled to pay, it may not be able to carry out its essential services to the subjects within its geographical jurisdiction. However, I do not think that this is a consideration in application of this nature. The applicant contracted the respondent to widen, grade and gravel selected roads within its municipality. Those contracts were worthy millions of shillings. The applicant knew it was bound to pay the amount upon the execution of the contracts by the respondent. The respondent duly performed the first contract and was paid. However the 2nd contract abated after the respondent had conducted preliminaries and deployed tools, machines and work force on the site. The decree herein is as a result of the consequences of the abatement or termination of the contract by the applicant. It is also apparent that the respondent borrowed some money it used to execute the contractual works in favour of the applicant. In this regard, the respondent has had to repay the loan together with attendant interest. This notwithstanding the respondent has continued to engage in gainful business with the Government and is currently contracted by Government to execute substantial contractual works to the tune of over Kshs. 200,000,000/= . This means that the respondent is financially stable and hence its ability to be contracted and be retained by the Government. It cannot therefore be said that the respondent will be unable to refund and or repay the decretal sum, if the intended appeal is eventually successful.

I do feel that much as the applicant may suffer loss as a result of the execution of the decree and as stated by **Onyango Otieno J.** (as he then was) in **Prime Capital & Credit Limited** (Supra) “...and such suffering of loss is the natural result of having a judgment against a party....”, I also must accept that the respondent is also in law entitled to the fruits of its judgment and should not be denied the same save for very good reasons. Put differently, the court must safeguard the interest of both parties. The

respondent has in his favour and is entitled to the fruits of its judgment. The applicant on the other hand is also entitled to have its interest secured so that in the event of its intended appeal succeeding the over Kshs. 15,000,000/= it is required to pay should not be beyond its recovery. See **ABN Amro Bank, N. V** (Supra).

The judgment was handed down on 23rd March, 2010. However, the instant application was lodged on the 29th April, 2010 a period of about 30 or so days. The applicant was obligated to file the application, without unreasonable and or inordinate delay and if there was such delay, it was obligated again to explain. According to the respondent the delay of 30 days or so before mounting the application was inordinate. The applicant takes a contrary view. I do not think that a delay of 30 days or so in bringing an application can be said to be inordinate or unreasonable. Finally, I note that the applicant is prepared to offer security.

Weighing the conflicting interests herein one against the other, the order that best commends to me on the motion dated 13th April, 2010 is that the applicant shall pay directly to the respondent half of the decretal sum of with Kshs. 7,778,493/35 within the next 30 days from the date of delivery of this ruling. The remaining balance shall be paid into an interest earning account to be opened and operated in the joint names of the advocates of both parties. That too has to be within 30 days from the date of this ruling. Subject to compliance with this order, there shall be stay of execution until the intended appeal is heard and determined. The applicant shall pay the costs of this application in any event.

Ruling dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE