



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 5 of 2010

[From Original Civil Case No. 72 of 2005 of SRMCC Kwale]

HIGHWAY CARRIERS LTD.....APPELLANT

VERSUS

REJE MOHAMMED REJE.....RESPONDENT

RULING

This Chamber Summons has been brought under Order XLI Rules 4 (1) and (6) of the Civil Procedure Rules, sections 1A, 1B,3A and 63 of the Civil Procedure Act and all other enabling provisions of the Law. The application is by **Highway Carriers Limited**, (hereinafter “*the appellant*”) against **Reje Mohamed Reje**, (hereinafter “*the respondent*”). The applicant mainly seeks a stay of execution pending the hearing and determination of this appeal on the principal grounds that unless the stay is granted the respondent will execute the decree in Kwale SRMCCC No. 72 of 2005 (hereinafter “*the Lower Court Case*”) which event shall render any eventual success of this appeal nugatory; that the respondent stands to suffer no prejudice if stay is ordered; that this application has been lodged in good faith and without inordinate delay and that the appeal has high chances of success.

The appellant further relies on an affidavit sworn by one Mohamed Bashir the appellant’s manager in which it is deponed, *inter alia*, that unless the order of stay is granted the respondent will execute the lower court’s judgment in which event the appeal even if it succeeds will be rendered nugatory; that the respondent stands to suffer no prejudice by the grant of stay and that it is in the interests of justice that the order sought be granted.

The application is opposed on the basis of a replying affidavit sworn by the respondent in which it is deponed, *inter alia*, that if the order of stay is granted the respondent will suffer prejudice as the same will keep him from enjoying the fruits of his judgment; that the appeal has no prospects of succeeding given that the appellant offered no evidence at the trial and that the requirements for the grant of a stay of execution have not been satisfied.

When the application came up before me for hearing on 1st July, 2010, counsel agreed to file written submissions which they duly filed by 15th July, 2010. In his submissions, counsel for the appellant argued that unless the stay sought is granted, the appellant would suffer substantial loss because there was real danger that the respondent will execute and the appeal which raises serious issues, if successful will be rendered nugatory. He invoked the case of **Action Aid International Kenya & 2 Others – v – Ndunda Musau & 3 Others [HCCA NO. 356 of 2008 (2008) e KLR** where irreparable loss was considered to be denial of the appellant to be heard on their defence. Counsel further submitted that the appellant was willing to deposit the decretal amount as security and that if the decretal amount is paid to the respondent, it will be difficult to recover it in the event the appeal succeeds.

In his response, counsel for the respondent submitted that the appellant had not addressed the issue of substantial loss in its supporting affidavit and cannot therefore be granted the stay it seeks. He invoked the decisions of **M/S Portreitz Maternity – v – James Karanga Kobia [CA No. 63 of 1997] (UR)** and **Meghji Bhimji Sanhani Builders & Contractors – v – Nairobi Golf Hotels Kenya Limited [CA No. 1900of 1995] (UR)**.

I have considered the application, the affidavits filed and the submissions of counsel. I have further given due consideration to the authorities cited to me. Having done so, I take the following view of the matter. The grounds upon which an application for stay of execution of a decree can be sought are stated in Order XLI Rule 4 of the Civil Procedure Rules. Sub-rule 1 of the said rule requires the

applicant to show sufficient cause and sub-rule 2 requires the applicant to:

- (a) establish that substantial loss may result to him unless stay is granted;**
- (b) show that the application has been made without undue delay;**
- (c) furnish such security as the court may order for the due performance of the decree or order which may ultimately be binding on him.**

In the application before me, the decree giving rise to this appeal was passed on 9th December, 2008. The appeal herein was lodged on 14th January, 2009, and this application was filed on 20th January, 2009. The delay involved is therefore of less than 1 ½ months. It is evident that the application was lodged without undue delay. The appellant has offered to deposit the decretal amount in court as security. In my judgment the condition about security has been satisfied.

With regard to substantial loss, the appellant's manager has deponed that unless restrained the respondent will execute the lower court's judgment and in that event the appeal, even if successful, would be rendered nugatory. The appellant's manager did not explain how execution would render the eventual success of the appeal nugatory. He did not suggest that the respondent is a man of straw from whom it will be almost impossible or very difficult to obtain back the decretal amount in the event the appeal succeeds. It is in counsel's submissions where it is contended that if the decretal amount is paid to the respondent, he will spend it and it will be very difficult to recover it in the event that the appeal succeeds. With all due respect to counsel, that contention must be based on affidavit evidence which must be furnished by the applicant and not counsel. As Ringera J. (as he then was) said in Lalji Bhimji Sanghani Builders & Contractors – v – Nairobi Golf Hotels Kenya Limited (supra) demonstration of substantial loss must spring from affidavit or other evidence on record: **“A bald statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence.....carries no weight.”**

Action Aid International Kenya Case (supra) relied upon by counsel for the appellant, was determined on that basis. There, H. M. Okwengu J., found that the appellants had contended that they would not be able to recover the decretal sum from the respondent once the orders were executed and the respondents were paid. The contention did not come from their counsel.

In the premises, the appellant here has not demonstrated that substantial loss will result to it unless execution is stayed. The appellant has not therefore satisfied one of the requirements of Order XLI Rule 4 (2) of the Civil Procedure Rules. The application dated 19th January, 2010 is therefore without merit and is dismissed with costs.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF SEPTEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ms. Nyamweya holding brief for Mr. Ng'eno for the Applicant.

F. AZANGALALA

JUDGE

13TH SEPTEMBER 2010