



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 229B of 2009

ELECTRICAL AND GENERAL APPLIANCES LTD.....APPELLANT

VERSUS

FILMICO AGENCIES LIMITED.....RESPONDENT

R U L I N G

1. Electrical and General Appliances Ltd, (hereinafter referred to as the applicant), lodged its appeal against the order of the Chief Magistrate in Nairobi CMCC No.2723 of 2008 made on 6th April, 2009. Filed simultaneously with its memorandum of appeal is a notice of motion dated 5th may, 2009 in which the applicant seeks an order for stay of execution of the decree in CMCC No.2723 of 2008 pending the hearing of the appeal.
2. The applicant contends that it will suffer substantial loss if the order of stay is not granted as Filmico Agencies Ltd, the respondent herein will execute against it. The applicant further contends that if the order for stay of execution is not granted its appeal which is meritorious will be rendered nugatory. The applicant explains that the delay in filing the application was caused by the unavailability of the court file which was missing from the court registry between 7th April, 2009 and 15th April, 2009.
3. Shiraz Ramji, the managing director of the applicant has sworn a replying affidavit in which he depones *inter alia*, that the applicant is a small company and the decretal sum of Kshs.197,594/= is a large amount of money which if paid out would cripple the applicant's business. The deponent swears that the applicant is not aware of the respondent's assets and that there is likelihood that the applicant will not be able to recover the decretal sum once paid to the respondent.
4. An affidavit has also been sworn by Terry Mwangi, an advocate in the firm of Hamilton, Harrison & Mathews, who are the applicant's advocates. The counsel retraces the futile efforts made by the firm to trace the court file from the court registry. She depones that this frustrated the applicant's intentions of applying for review of the order of 6th April, 2009.
5. In support of the application, the applicant's counsel has relied on the following authorities:
 - ***Halai & Another vs Thorton & Turpin (1963) Ltd [1990] KLR 365***
 - ***Butt vs Rent Restriction Tribunal [1982] KLR 417***

- ***Civil Appeal No.75 of 1998 Central Bank of Kenya vs Uhuru Highway Development Limited (N0.1)***
- ***HCCC No.253 of 1999 Frank Fernandes vs Murray Wilson***
- ***Board of Governors, Nairobi School vs Getah [1999] 2 EA 56***
- ***Mugambi vs Gatururu [1967] EA 196***
- ***Civil Appeal No.193 of 1999 Kenya Trade Combine Ltd vs Shah***
- ***Giciem Construction Company vs Amalgamated Trades & Services [1983] KLR 156***
- ***Mukuma vs Abuoga [1988] KLR 645***

6. The application was opposed through a replying affidavit sworn by Jitu Patel, a director of the respondent. The deponent swore that the application was brought after inordinate delay and was made in bad faith with an intention of forestalling the execution of the decree and frustrating the respondent from obtaining the fruits of its judgment. The deponent swore that the respondent is a going concern with diverse business interest that makes an annual profit of Kshs.90,000/= and will thus be in a position to refund the decretal sum should that become necessary. The respondent also exhibit a copy of a bank guarantee for Kshs.200,000/= issued by Imperial Bank as further evidence of its ability to repay the decretal sum.

7. Mr. Masese who appeared for the respondent maintained that the applicant had not complied with the conditions for granting an order for stay of execution. Relying on the Case of ***Lalji Bhimji Sanghani Builders & Contactors vs Nairobi Golf Hotels Kenya Ltd HCCC No.1900 of 2005*** and ***Halai & Another vs Thorton & Turpin (1963) Ltd [1990] KLR 365***. Counsel submitted that the applicant had failed to persuade the court that it would be impossible to recover the decretal sum from the respondent. To the contrary, the respondent had annexed sufficient evidence of its ability to repay the decretal sum should that become necessary. It was further contended that the delay by the applicant in coming to court to seek for the order of stay of execution was evidence of its lack of good faith. The court was therefore urged to dismiss the application.

8. I have carefully considered this application, the affidavit in support and reply, the submissions of both counsel as well as the authorities cited. Under Order XLI Rule 4(2) of the Civil Procedure Rules, the conditions upon which an order for stay of execution pending appeal can be granted are clear, i.e. the applicant must satisfy the court that unless an order for stay of execution is granted substantial loss will result to the applicant. The applicant must also show that the application has been brought without undue delay, and finally the applicant must be ready to furnish such security as may be required by the court. These conditions have been restated in several authorities including those cited by the counsel herein.

9. The main issue for determination herein is therefore whether the applicant has demonstrated to this court that unless the order for stay of execution is granted it will suffer substantial loss. In the grounds on the face of the motion, the applicant has stated that it stands to suffer substantial loss if an order of stay of execution is not granted as the respondent will proceed to prosecute against it and that this may render the applicant's meritorious appeal nugatory. This ground is further amplified in the affidavit of Shiraz Ramji who explains that the applicant is a small company and its business will be crippled if it pays out the decretal sum. The appellant also claim that it is not aware of the respondent's assets and the possibility of restitution of the money if paid is doubtful.

10. Nevertheless, the applicant has only made mere assertions which have not been substantiated by any evidence. There is nothing exhibited to demonstrate the turnover of the applicant. There is also nothing availed to show that the respondent will not be able to retribute the decretal sum if paid out to him. On its part, the respondent has effectively rebutted the applicant's contentions by exhibiting a letter from its auditors confirming its yearly turnover for 3 years. The respondent has gone further and availed a

guarantee from a bank for repayment of the decretal sum should that become necessary.

11. In the light of the above, I do find that the applicant has failed to establish that it will suffer substantial loss if the order for stay of execution is not granted. This condition being the cornerstone upon which an application for stay of execution pending appeal is granted, the applicant's motion fails and is accordingly dismissed with costs.

Dated and delivered this 10th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Mwangi for the appellant

Advocate for the respondent absent

Erick – Court clerk