REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL 88 OF 2009

D.T. DOBIE & COMPANY (K) LTD……..APPELLANT

VERSUS

WANYONYI WAFULA CHEBUKATI……
RESPONDENT

RULING

The application before me is dated 29th May 2009 but was filed on 3rd June 2009. It is by the appellant which was the defendant in the Lower Court. It is expressed to be brought under Order XLI Rule 4, Order XXI Rule 18 and 22, and Order L Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The applicant seeks one primary order that there be a stay of execution of the decree in Mombasa CMCCC No. 2171 of 2004 dated 23rd April 2009 pending hearing and determination of the appeal herein. The application is based upon the following primary grounds: - That the applicant has an arguable appeal; that the applicant will suffer substantial loss if the stay of execution is not granted; that the respondent will suffer no prejudice or damage which cannot be compensated by way of costs should the appeal fail and that the applicant is able and willing to offer such security for the due performance of the decree against it should the court so order.

The application is supported by an affidavit sworn by Wilson Musyoka, the applicant's Credit Manager in which affidavit the above grounds are elaborated. The application is opposed and the respondent has filed a replying affidavit in which he avers, among other things, that the applicant has not demonstrated the substantial loss it is likely to suffer; that he has the means and ability to pay back the decretal amount if the same is paid to him and the appeal eventually succeeds; that he will be prejudiced by the resultant delay if the stay is granted and that the application has been filed after an inordinate delay which has not been explained.

The application was canvassed before me on 17th June 2009 by Mr. Kipkorir, Learned Counsel for the applicant and Mr. Jengo, Learned Counsel for the respondent. Counsel took me through the affidavits and urged their client's respective stand points taken in those affidavits.

I have considered the application, the affidavits and the submissions of counsel. I have further considered the various authorities cited to me by counsel. Having done so, I take the following view of the matter. For an applicant to secure an order of stay pending an appeal he is required to establish the conditions set out in Order XLI Rule 4 (1) and (2) of the Civil Procedure Rules which read as follows:-

"**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 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 any 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 of stay of execution shall be made under sub-rule (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."

The above provisions set the following parameters which the applicant must establish:-

(a) That there is sufficient cause to order stay of execution.

(b) That substantial loss may result to the applicant unless the order of stay of execution is made.

(c) That the application has been made without unreasonable delay.

(d) That it has given or offered security for the due performance of the decree as may ultimately be binding on it.

With regard to sufficient cause, I note that the applicant has already lodged its appeal on some 12 grounds including the grounds that the Learned Magistrate erred in Law in granting judgment when the respondent didn't prove loss of user and that there is no nexus between the judgment and the evidence on record.

At this stage, the court is not required to make any definitive findings on the merits or demerits of the appeal. At the same time the court is not precluded from forming a prima facie opinion of the appeal. Having perused the appeal, I cannot state that the same is frivolous. There is therefore basis for lodging this application.

With regard to delay, I note that the decree appealed from was given on 23rd April 2009. The applicant sought stay of execution informally which was allowed for 30 days. No formal application was lodged until 3rd June 2009. The delay involved is of slightly over a month. That delay has not been explained. I do not however, find it inordinate.

How about substantial loss? The onus is on the applicant to satisfy the court that it will suffer substantial loss unless the stay is granted. The applicant has given, as one of the grounds for this application that it will suffer substantial loss if the stay of execution is not granted. In the supporting affidavit there is an averment in paragraph 7 that in the current economic circumstances the court should take judicial notice that paying the decretal sum to the respondent will cause substantial loss to the applicant. That is rather surprising. How is the court supposed to know how the current economic circumstances are causing the applicant substantial loss. These may be hard economic times but the impact of the same upon litigants cannot be a factor the court can take judicial notice of because of the mere say so. The applicant had the onus to demonstrate how payment of the decretal sum by it would cause substantial loss. There is no allegation in the entire supporting affidavit that the respondent will not be able to pay back the said sums if they are paid over to him and eventually the appeal succeeds. The replying affidavit indeed put the issue beyond dispute. The respondent has deponed at paragraph 5 of his affidavit as follows:-

"**5. That no substantial loss can be suffered by the defendant/appellant if the money is paid over**

to me as I have the means and ability of paying back the decretal amount in the very unlikely chance that this flimsy appeal succeeds."

The applicant did not file a further or supplementary affidavit to challenge the respondent's said averment. The applicant must be taken to have accepted, as true, the status of the respondent as given in his replying affidavit. It is therefore not the position that once the decretal sum is paid over to the respondent it will be beyond the reach and control of the applicant.

As the applicant has failed to satisfy one of the conditions set in Order XLI Rule 4 of the Civil Procedure Rules, I have no discretion in the matter.

In the premises, I find no merit in the application. It is hereby dismissed with costs. Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JULY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Muyaa holding brief for Kipkorir for the Applicant.

F. AZANGALALA

JUDGE

23RD JULY 2009