



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

Civil Suit 41 of 2003

ROSSELY OLIVIA ADERO OTINEO & ANOTHER.....PLAINTIFF

VERSUS

DEVSKI STEEL MILLS LTD & ANOTHER.....DEFENDANT

RULING

The brief background information as gathered from the ruling leading to this application briefly are that, the defendant was sued by the plaintiff for defamation. The Defendant after being served with the summons, he entered appearance and filed a defence in which he admitted having written the letter but denied that the contents of the letter were defamatory, of the Plaintiff and in the alternative and without prejudice he pleaded qualified privilege. Subsequently he applied to amend his defence where by he pleaded justification based on the fact that criminal charges had been instituted by the CID against the plaintiff. It is further noted from the said ruling that the defence was successfully challenged by the Plaintiff and was struck out by the Court on 4.6.2004. The defendant who is the current applicant then moved to Court seeking among other, orders of review for the orders made on 4th June 2004 striking out the defendants' defence, leave to defend the suit and leave to further amend the defence to plead that the said allegedly defamation letter was never published or copied to third parties and the defence of justification.

In refusing the said application Osiemo J. had this to say at page 2 of the said ruling "This application coming after the defendants' defence has been struck out is a clear manifestation that failure by the defendant to include defence for lack of publication and more so after leave had been granted to amend was not an oversight but a calculated move by the defendant to litigate by installments. At page 3 "*The applicant intends to move the court to reconsider the law and the evidence introducing facts which were not available before the judge when he arrived at his decision to strike out the defendants defence. This would be tantamount to sitting on appeal on a judgment of a judge of similar jurisdiction*". On that account the learned judge dismissed the application. The current defendant applicant became aggrieved of that decision made on 15th February, 2006 and filed a notice of appeal to the court of appeal firstly dated 15.2.2006 then amended on 27th February, 2006 marked annexure JK3 to the application subject of this ruling. The desire to appeal prompted the current defendant/applicant to file the application dated 1st March 2006 and filed the same date. It seeks stay of proceedings in this suit pending the hearing of the application inter parties and thereafter pending appeal in the court of appeal. The grounds are set out in the body of the application, supporting affidavit, annexures and oral submissions in court. The major ones are the usual ones namely that:-

1. The Applicant is aggrieved by this courts' orders of 15.2.206.

2. They are desirous of appealing against those orders and there is a draft memo of appeal in place annexure JK 4 which raises triable issues on appeal.
3. The main suit is based on defamation and that they were seeking review on the ground of discovery of new and important materials but the learned judge disposed off the application as if the main prayer was leave to further amend the defence.
4. They maintain there was sufficient grounds for seeking review and this is one of the major arguments to be taken up on appeal.
5. That if stay is not granted the plaintiff will proceed to fix the matter for formal proof and should the case be finalized before the appeal is heard and determined the applicant/defendant would have been unjustifiably denied his right of defence of the suit. In this way the intended appeal will be rendered nugatory should the applicant intended appeal succeed.
6. Further should the suit be proceeded with in its present form then important evidence would have been locked out.
7. The replying affidavit supports their stand that there is an arguable appeal.
8. There is no appeal yet because they have not been supplied with record of proceedings. But they are willing to comply with any conditions that this court may set.

The Respondent opposes the said application on the grounds set out in the replying affidavit and oral submissions herein namely:-

1. The pre-requisites for granting stay as set out in order 41 rule 4 have not been satisfied by the applicant.
2. This court is not in a position to determine the arguability of the intended appeal, as in doing so it will be sitting on its own appeal. The right forum for arguing that is the court of appeal.
3. No substantial loss that is likely to be suffered by the applicant has been demonstrated.
4. They contend the notice of appeal is not proper.
5. They contend the memo of appeal exceeds complaints arising from the orders of 15.2.2006.
6. They contend the orders of 15.2.2006 were proper and appeal has no chance of success as the suit was filed in 2003 in 2004 the plaintiff/respondent sought orders to have the defence struck out. In the wake of an application to strike out is when the defendant came in with the idea of leave to amend. When the court went a head to strike out the defence because it is irredeemable, that is when they came up with review on new and important evidence which was not new because it should have been available as at the time of the filing of the defence. They further sought further to amend which is evidence of seeking to litigate in installments.
7. They content that this is just one of the many applications for stay of proceedings which have been fielded by the current applicant which is a deliberate attempt by the applicant purposely to delay the matter. In this way the applicants', have not come to court with clean hands.

In response to the submissions of the respondents' counsel for the applicant countered that by saying that they are within the principles for granting of stay pending appeal

- (2) That the issue of compensation by way of damages does not arise. It is premature as there are no final orders in place.

(3). It is their stand that on the facts presented herein the court can exercise its discretion in their favour as they are not responsible for the delay.

This Court was referred to the case of **AMERICAN LIFE INSURANCE CO. (K) LTD VERSUS OYATTA, NAIROBI HCCC NO.168/04** where in an application for stay of proceedings pending appeal, Visram J. held that where a party succeeds on appeal arising from proceedings which have not been stayed in the lower court, then the proceedings in the lower court will be rendered unnecessary and the court hearing the appeal may make an appropriate order for costs to remedy that situation. The case of **LALJI BHIMJI SANGHANI BULLDERS AND CONTRACTORS VERSUS NAIROBI GOLF HOTELS KENYA LTD NAIROBI HCCC 1900 OF 1995**. It also concerned an application for stay of decree pending appeal. At page 2 of the ruling Ringera J. as he then was echoed the pre-requisites for stay as enunciated in Order 41 rule 4(2) Civil Procedure Rules namely:-

- (i) The applicant may suffer substantial loss unless the order is made and
- (ii) Whether the application has been made without un reasonable delay: and
- (iii) Whether the applicant has given such security as the court may order for the due performance of the decree or order which may ultimately be binding. On substantial loss then learned judge had this to say *“I am of the opinion that for an applicant to satisfy the ingredient for suffering substantial loss he must persuade the court that the decree holder is a man of straw from whom it will be well nigh impossible, or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion 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 un backed by evidence of the matters I have alluded to carries no weight of persuasion in the mind of a judge.

The case of **UAP PROVINCIAL INSURANCE CO. LTD VERSUS MICHAEL JOHN BECKET NAIROBI CA. NAI 204 OF 2004**. It concerned an application for stay pending appeal in the Court of Appeal. The Court of Appeal reiterated the pre-requisite of stay pending appeal which are:-

- (a) Necessity for the court to satisfy itself that there is an arguable appeal which is not frivolous.
- (b) Decide whether or not the pending appeal would be rendered nugatory if the stay applied for was not granted.
- (c) Need for proof that without stay applied for, they will suffer irreparable loss.

Upon hearing both sides and perusing papers relied upon, it is clear that stay sought herein is not for purposes of staying a decree but stay proceedings. It arises from refusal to grant an interlocutory relief to the applicant namely review and set aside an earlier order of this court and for leave to further amend. It is noted by this court that no separate provision exists to govern application for staying of a decree and staying an interlocutory order. Applications for both are required to be brought under Order 41 rule 4 (2)of the Civil Procedure Rules. Both are to be subject to the requirements that they satisfy the ingredients set out therein. Three ingredients are set out in the order namely; the ingredient requiring the establishment of the fact that substantial loss may result to the applicant unless the order is made. As per finding by Ringera J. in the case of **LAIJI BHIMJI BUILDERS AND CONTRACTORS VERSUS NAIROBI GOLF HOTELS, LTD supra**, the establishment of this fact has to be by way of facts in an affidavit on tenable evidence on record. Another requirement is that the application has been presented without undue delay. The 3rd ingredient is an offer for security for the due performance of the decree that may be passed. Lastly since it is stay pending appeal, establishment that the intended appeal will be rendered nugatory should the appeal succeed after the proceedings have been concluded and judgment delivered and satisfied, should also be satisfied

The court has applied the foregoing principles to the facts of the application and makes the following

findings.

- (1) The ingredient for presentation of the application for stay without undue delay has been satisfied by the fact that the grieving orders were made on 15.2.2006. where as the application for stay was presented on 1.3.2006.
- (2) The ingredient for offer of security have also been satisfied by an offer to comply with any order of the Court as regards security. Thus instead of offering what they believe the court should offer as security, they have left it to the court to exercise its discretion as regards the same.
- (3) Being an application for stay pending appeal definitely the requirement of existence of an arguable appeal is also of paramount consideration. There is a draft memo of appeal annexed as JK.4. The orders complained of arise from a court of concurrent jurisdiction. In that regard this is not the right forum to consider the arguability of the appeal. That is the preserve of the Court of Appeal. Along side this, should also be considered the argument that the notice of appeal filed and served is not proper. The notice of appeal was directed to the Court of Appeal. It is therefore the property of the Court of Appeal. Being the property of the Court of Appeal, it is that court which as a mandate to fault that notice of appeal.
- (4) As for the issue of suffering substantial loss there is no way this court can deal with that without dealing with the arguability of the appeal. This is also an issue to be gone into by the court appealed to.

Besides the foregoing there are other considerations namely:-

- (i) The need not to unreasonably withhold from the successful litigant the enjoyment of the fruits of the judgment or order issued in their favour. In this case the right to proceed with formal proof.
- (ii) The need for the court seized of the mater to ensure that the stay order is not used as a shield and sword against the respondent shielding the applicant from being proceeded against and preventing the court process from going on to finality. Especially in a situation like the one prevailing herein where there is no appeal filed yet it is not known when one is going to be filed. There are no proceedings typed and supplied and it is not known when these are going to be typed and supplied. The reason for non-availability of the proceedings was given as presence of the current application which prevented the file from being taken to the typing pool for the typing of the proceedings. Indeed Counsel for applicant has no control over the movement or management of the court. The delay in the finalization of the application is not due to any fault of theirs. What is worrying is when these proceedings will be ready and appeal processed for disposal. This scenario calls for a balancing act on the part of the court to ensure that fairness and justice is done to both parties. When this is done this court finds that the situation herein calls for a temporary stay order pending issuance of stay orders pending appeal to be issued by the Court of Appeal which is the court appeal to. That is the court which will have the authority to consider the validity of the notice of appeal and argue ability of the appeal, as well as whether proceeding with the hearing will seriously prejudice the applicant should he succeed on his appeal.

For the reasons given the application dated 1.3.2006 and filed the same date is allowed on condition that applicant has only 60 days of stay from the date of the reading of this ruling within which to obtain proceedings, file appeal to the court appealed to and then seek stay from the court appealed to.

2). The respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2007.

R. NAMBUYE

JUDGE