REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

CIVIL APPEAL NO. 79 OF 2020

EAST AFRICAN EXCAVATION CO. LTD.....PLAINTIFF

VERSUS.

NUTECH SYSTEM & TRADING CO. LTD.....DEFENDANT

R U L I N G.

From the documents annexed in the application it would appear that the East African Excavation Limited (The Appellant) filed Bungoma CMCC No. 793 of 2011 by Plaint dated 21.11.2020 against the Respondent Nutech System and Trading Company Limited seeking…… Before the Hearing of the suit the court;

(a) The court ordered the respondent to deposit a sum of Kshs.628,760.00 pending the hearing and determination of the suit in order to secure the release of the respondent's chattels that were kept at Malaba Kenya Revenue Authority yard on the instructions of the appellant.

(b) The appellant did not prosecute the case until it was dismissed by the court on 15th December 2016 for want of prosecution.

(c) The appellant then filed a Notice of Motion application dated 29th November, 2019 to reinstate Civil Suit No. 793 of 2011.

(d) The said application was heard and determined and by a ruling delivered on 22nd June 2020, the application was dismissed with costs to the respondent.

(e) The appellant then approached this honourable court and filed a Memorandum of Appeal dated 24th June 2020.

(f) The appellant subsequently on 9th July 2020 filed a Notice of Motion application seeking stay of execution of the purported decree of 22nd June pending the hearing and determination of the application and the pending appeal.

(g) The application is brought under Order 42 rule 6 and Sections 3A and 3B of the Civil Procedure Act.

The applicant then filed this application dated 9.7.2020 brought under Order 42 Rule 6 Civil Procedure Rules and Section 3A, 3B of the Civil Procedure Act seeking the following orders;

(1) THAT this Honourable court do issue an Order of stay of Execution of the decree of 2nd of June 2020 pending the hearing and determination of this Application.

(2) THAT this Honourable Court do issue an Order of stay of Execution pf the decree of 22nd of June 2020 pending the hearing and determination of the Appeal.

The grounds for the application are that the applicant is dissatisfied with the ruling of the trial magistrate and has filed an appeal against the same. That then as a result of the said ruling the security deposit made in the court by the Respondent is likely to be released to them and that the same will prejudice the appeal and finally that the applicant has an arguable appeal with high chances of success.

The application supported by the supporting affidavit of Seth Ojienda Advocate who reiterates the grounds of the application.

In opposing the application, the Respondent filed a Replying Affidavit sworn by Stephen Owino Advocate who is in consent of the matter.

He depones that the suit by the applicant was dismissed for want of prosecution; that the applicant filed application to reinstate the dismissed suit; that by ruling dated 22.6.2020 the trial Magistrate dismissed the application for plaintiff having filed a suit which he did not prosecute and was dismissed for want of prosecution on 15.12.2016, and the order for reinstatement having been denied, there is nothing left to stay except the issue of costs.

By direction of the court, both parties filed respective written submissions. Mr. Ojienda for the applicant submitted that the appeal filed is meritorious, arguable and raises pertinent issues of law and has high chances of success. Counsel submits that the applicant will suffer substantial loss if the order of stay is not granted and that execution of costs if not restrained will render the appeal nugatory if it were to succeed. On the issue of security the applicant submits that the deposit already held in court be retained as security for the purpose of the stay of appeal. Counsel has referred this court or the decision in Chris Munga N. Bichage -Versus- Richard Nyagaka Tongi & 2 others [2013] eKLR and Kenya Commercial Bank -Versus- Sun City Properties Ltd & 5 Others [2012] eKLR in support of their submissions.

Mr. Owino for the Respondent submitted that the order subject of this application is here the trial magistrate dismissed the application to set aside a dismissal of the suit for want of prosecution. This is a negative order which did not require a party to do anything or restrain from doing anything. Counsel submits that there cannot be issued a stay of a negative order. Submits that there are no execution proceedings capable of being stayed. He submits that no substantial loss will be suffered by the applicant if application is not granted and that the applicant has not tendered security as the security deposited in court was by the Respondent not he applicant.

The ruling subject of this application is the one delivered by the trial magistrate dated 22.6.2020 in respect of the applicants' application dated 5.12.2019 seeking an order to reinstate the suit dismissed for want of prosecution on 15.12.2016. The trial magistrate in dismissing the applicants' application stated;

> *(a) At stake now is not just prejudice to the party not applying but also prejudice to the entire judicial system. There is a greater picture to be considered; not just simply the narrow interest of the party before court. Reintroducing this 9 years old matter into the system would prejudice administration of justice by further clogging the wheels of justice. Every actor in the justice delivery system must seriously take cognizance of the part they play in the expeditious disposal of suits. Judicial resources are limited and where a party has already been availed of the opportunity to utilize these and has squandered them they ought not be given second bite at the cherry. This paradigm shift is clear from the amendment to the rules. Now, after two years inactivity a suit stands dismissed. Therefore the case law cited has to be looked at in this new light, a deserving party is one who demonstrates that they have taken critical steps to prosecute their matters. The applicant in this suit has been a slothful plaintiff. There is no evidence that he has written to the court to protest that the file is not available for him to take a step. I find that he is underserving of the exercise of my discretion.*
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> *(b) The last question is whether the applicant will suffer substantial prejudice if the suit is not reinstated. As indicated by the Applicant this is a suit for pecuniary claim. At stake is money. If this claim was so pressing then the applicant would have been more diligent in prosecuting his claim for the last 9 years. There is no guarantee that the applicant would have succeeded if the suit was heard to completion and counterweight with the right of other litigants to have their matters expeditiously determined, I see no pressing need to visit further delay to the new litigants to a party who has been indolent and slothful in the prosecution of his suit in the past. Therefore I find that the applicant will suffer no prejudice if the matter is not reinstated. Litigation must come to an end.*
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> *(c) It is now apparent from my analysis that this motion is for dismissal. I proceed to dismiss it with costs to the respondents.*

From the pleadings and submission, the issues for determination in this application can be summarized to two issues.

1. Whether there is an order capable of being stayed.

2. Whether the applicant has satisfied the conditions for grant of stay as provided in Order 42 Rule 6(2).

As shown from the ruling of the trial magistrate, the order complained of was the refusal to reinstate the suit which had been dismissed for want of prosecution. It was not an order requiring any party to do something or anything or to restrain from doing anything. This was a negative order.

The issue of application for stay of a negative order has been decided in several decisions of the court. In ***Western college of Arts and Applied Sciences -Vs- EP Oranga & 3 Others [1976] eKLR*** where the Court of Appeal for East Africa stated as follows in respect of stay of Execution:

> ***"But what is there to be executed under the Judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson -Vs- Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this court, in an application for a stay, it is so ordered.***

We rely further on the case In ***Kenya Commercial Bank Limited -Vs- Tamarind Meadows Limited & 7 Others [2016] eKLR*** where the Court of Appeal quoted with approval the holding in **Raymond M.** ***Omboga -Vs- Augustine Pyan Maranga Kisii HCCA No. 15 of 2010,*** where the court stated that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say in the matter:

> *"The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of*

execution, there can be no stay of execution of such an order… The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise…"

Similarly, in the case of Kanwal Sarjit Singh Dhiman Vs. Keshavji Jivrah Shah [2008] eKLR, the court held as follows:

> ***"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (See Western College of Arts & Applied Sciences Vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C)."***

The order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and the court cannot order stay of execution of that negative order.

Order 42 rule 6 requires a party who seeks stay orders to demonstrate that first that substantial loss may result to the applicant, that security has been provided and that the applicant has been made without undue delay. It provides;

[2] No order for stay of execution shall be made under subrule [1] unless:-

> **(a) the court is satisfied that substantial loss may result to the applicant unless he 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.**

A party in an application for stay of must persuade the court that he will suffer substantial loss if order is not granted. The applicant submits that he is apprehensive that the sum deposited by the Respondent (Defendant) in court in order to secure his property which were held by the applicant will, with the dismissal of the application seek to be paid the deposit and that if the same is released, the Respondent will not be in a position to refund the same if the appeal is successful.

It is clear from the pleadings and submission that the sum deposited in court was by the Respondent who was the defendant and not the applicant who was the Plaintiff. The money belonged to the Respondent. The applicant cannot claim to suffer irreparable loss if the sum is refunded to the owner. The release of the money to the Respondent who was the defendant cannot claim to suffer irreparable loss if the sum is refunded to the owner. The release of the money to the Respondent who was the defendant cannot be said to cause the applicant substantial loss because in the first place the money was deposited by the Respondent .

The same can also be claimed by the applicant as a form of security by the applicant. The submission by the applicant that the deposit already held in court be retained as the security for the purpose of stay and appeal is misplaced.

After considering the application and submission, I am satisfied that the order dated 22.6.2020 means that the applicant stays in the situation he was before and therefore the issue of substantial loss that is likely to suffer does not arise nor will the appeal be rendered nugatory. This was a negative order incapable of execution save in respect of costs.

I therefore find no merit in this application which is hereby dismissed with costs.

Dated and **Delivered** at **Bungoma** this 4TH **day of** February, **2021**

S.N. RIECHI

JUDGE