



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO 229 OF 2020

ADEEL KHAWAJA T/A MEDINA PHOTOCOPIERS & STATIONERS.....APPLICANT

VERSUS

CONNECT IT LIMITED.....RESPONDENT

RULING

The application dated 27th May 2020 seeks the following orders:-

- 1. THAT pending the hearing of this Application, this Honourable Court be pleased to admit the Appellant's / Applicant's intended Appeal vide the Memorandum of Appeal herein annexed and the same be deemed as duly filed before this Honourable Court.**
- 2. THAT pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to grant an Order of Stay of Execution of the Decree obtained from the Judgment delivered on 13th March 2020 and all the consequential orders of the Chief Magistrate's Court in NAIROBI CMCC NO. 3478 OF 2018.**

The application is supported by the affidavit of Adeel Khawaja sworn on the same date, and a further affidavit sworn on 22nd September, 2020. The respondent filed a replying affidavit sworn on 15th September, 2020 by Eunice Akelo Advocate.

Mr. Anyoka appeared for the applicant. Counsel submitted that after delivering its judgment, the trial court granted 30 days stay of execution. Three days after the delivery of the judgment the Chief Justice issued directions on containment of the Covid-19 pandemic. This made it difficult to obtain a copy of the judgment. They managed to get a copy of the judgment on 27/5/2020 and this enabled them to file the application. The application was filed without undue delay.

Counsel further submitted that the respondent is a man of straw and will not be able to refund the money should the appeal succeed. The applicant has offered security in form of logbooks for two vehicles. The two vehicles can satisfy the decree. The appeal has high chances of success.

Miss Akello appeared for the respondent. Counsel relied on the replying affidavit. It is submitted that issues of Covid-19 affects everyone. The respondent supplied goods to the applicant. The case before the trial court was fully heard. The application is intended to delay the respondent from enjoying the fruits of his judgment. Counsel is of the view that any security provided be in form of cash and not property. According to counsel, the matter involves family members.

The issue for determination is whether the court should enlarge time to file the Memorandum of Appeal and whether execution of the trial court's decree should be stayed. In the case of **Re Muge (1991) KLR 51**, the court of appeal made reference to its own decision in the case of **GITHUNGURI –V- JIMBA CREDIT CORPORATION LTD (NO.2) (1988) KLR 838** where it was stated:-

“The guiding principles which emerge and are discernible from case law on this subject, are first the appeal should not be frivolous or as is otherwise put, the applicant must show that he has an arguable appeal and second, this Court should ensure that the appeal, if successful should not be nugatory. Accordingly, we put to ourselves these two questions namely, first, on the material made available to us, is the intended appeal frivolous or has the applicant shown, prima facie, that he has substantial points to present to the Court on this appeal, and second, if he has, would his appeal be nugatory if we denied him the interim relief sought?”

The dispute between the parties emanate from supply of goods by the respondent. I have read the judgment of the trial court and there is no dispute that goods were supplied but the applicant failed to pay for them. The applicant's defence is that he agreed to pass over his

customers to the applicant at an orally agreed sum of Kshs.1,500,000. It was his evidence before the trial court that the sum of Kshs.1.5million could set off the claimed amount of 783,892.

Judgment was delivered on 13th march, 2020 and soon thereafter the operations of the court were affected due to the Chief Justice's directions on management of the Covid-19 pandemic in courts. The application was filed on 2/6/2020 after the applicants were supplied with the judgment on 27/5/2020. I do find that the application has been filed without undue delay.

Order 42 rule (2) of the Civil Procedure Act states as follows:-

(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 applicant contends that he will suffer loss since the respondent will not be able to refund the money in the event that the appeal succeed. It should not be lost that it is the respondent who supplied the goods and is now seeking his payment. The applicant has provided two logbooks as security. Photographs of the two vehicles have been provided. In view of the fact that this is a money decree arising from a commercial transaction. I do agree with counsel for the respondent that the two logbooks may not be the ideal security taking into consideration the circumstances of this case. The applicant is entitled to pursue his appeal but the respondent is equally entitled to know that he will quickly realize the fruits of his judgment once the appeal fails. The respondent used his resources to supply the goods.

In order to balance the interest of both parties, I do find that the application dated 27th may, 2020 is merited and is granted in the following terms:-

- 1. The applicant to file and serve his memorandum of appeal within fourteen (14) days hereof.**
- 2. The applicant to deposit in court a sum of Kshs. Five Hundred Thousand (Kshs.500,000) within sixty (60) days hereof.**
- 3. Costs shall follow the outcome of the appeal.**

Dated and Signed at Nairobi this 10th day of March, 2021

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S. CHITEMBWE

JUDGE