



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO.122 OF 2020**

**VEGPRO (K) LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**TUMPES OLE REPES NAADOKILA.....RESPONDENT**

**RULING**

1. The Applicants Notice of Motion dated **16<sup>th</sup> July 2020** prays that there be stay of proceedings in **NAKURU CMCC NO.1191 OF 2010** pending the hearing of this application and the main appeal.
2. The application is supported by the grounds thereof as well as the affidavit of **Adams Maiyo** counsel for the applicant sworn on the same date.
3. The substance of the application is clear and straight forward. The applicant who is the defendant in the above cited lower court case after the respondent closed his case sought to reopen afresh by filing new statements and introducing new evidence. The trial court in its ruling dated **4<sup>th</sup> June 2020** refused the same arguing that it had not been made in good faith.
4. The said court further stated that the applicant had not come to court with clean hands and it only desired to delay the expeditious disposal of the matter. The court went on to accuse the applicant of failing to meet the datelines which the it had given for it to make a formal application so as to introduce new pieces of evidence. The court thus declined to grant the application and this forced the applicant to file this appeal and the current application.
5. The respondent through the lengthy replying affidavit dated **16<sup>th</sup> September 2020** of his advocate **JEPHER KERE** has opposed the same agreeing with the trial court that the applicant was granted all the chance to file the application but it squandered the same. He urged the court to exercise the discretion granted to it by disallowing the application.
6. He went on to state that the applicant has failed to show how it stands to suffer if the matter proceeds to its logical conclusion. He accused the applicant of dragging the proceedings at the lower court for over two years and failing to comply with the provisions of **Order 11 of the Civil Procedure Rules**.
7. The court has perused the application as well as the submissions by the parties and it does not wish to reproduce them here save to state that they are all gravitating towards the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**. In a nutshell the same provides that for a stay to be granted and that;

***“No appeal or a 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 appealed from 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”***

***“No order for 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”.***

8. The classic case of **BUTT VS. RENT RESTRICTION TRIBUNAL (1982) KLR 417** summarises the above rules. The learned judges stated on the discretion of the court that ;

*1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

*2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

*3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.*

*4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

9. In this case the affidavit in support of the application by the counsel for the applicant does not in my considered view explain what the applicant stands to suffer. The same merely restates the above provisions of **Order 42 Rule 6 of the Civil Procedure Rules**. How for instance shall the applicant suffer loss unless grant of stay is allowed?

10. There is no evidence at least *prima facie* exhibited that clearly points out the suffering the applicant shall incur. At any rate this court at this juncture cannot inquire on the grounds of appeal. It's too early in the day. Suffice to state that a party must clearly demonstrate what it stands to suffer at least from the available affidavits and should not leave it to the court to decipher.

11. Whether the appeal has a high chance of success cannot be decided at this interlocutory stage. It must be noted that the applicant has not offered in fact any form of mitigation to cushion the respondent in the event that the application is granted.

12. For the foregoing reasons this court is not convinced that it should exercise its discretion as prayed by the applicant. The matter should be allowed to run its full course. At any rate the applicant still has a second chance if need be depending on the outcome of the matter.

13. Finally, it must be noted that the courts now frown at such interlocutory applications which derails the smooth flow of primary proceedings. It is always, as much as possible, allow the matter to proceed to its logical conclusion.

14. For the above reasons the application is hereby disallowed. Costs shall await the outcome of the appeal.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 11TH DAY OF MARCH 2021.**

**H. K. CHEMITEI**

**JUDGE**