



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

COMMERCIAL APPEAL NO. E014 OF 2021

CARTRIDGE PRINT .....APPELLANT/APPLICANT

SERVICES(K) LIMITED

VERSUS

TECHNO SERVICE LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the Appellant's Notice of Motion dated 3<sup>rd</sup> March, 2021. It is brought under **Order 42 Rule 6, 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B 3(A)** of the **Civil Procedure Act** and **Article 159(2)(a) & (d) of the Constitution** and all other enabling provisions of the law. The application seeks the following orders:

*a) That the court be pleased to stay the proceedings in Nairobi CMCC No. 83 of 2020- TECHNO Services Limited Vs Cartridge & Print Services (K) Limited pending the hearing and determination of the appeal herein.*

*b) That costs of the application be in the cause.*

2. The application is premised on the grounds on the face of it and the supporting Affidavit of Rajesh Gaurishanker Pandya, the Appellant's director on 3<sup>rd</sup> March, 2021.

3. The background to the application is that on 29<sup>th</sup> January, 2021, Hon. D.O. Mbeja (Mr.), Principal Magistrate delivered a ruling in **Nairobi CMCC No. 83 of 2020 –Techno Services Limited Vs Cartridge & Print Services (K) Limited** (hereafter the suit) and dismissed the Appellant's application to set aside the default judgment which was entered on 20<sup>th</sup> August, 2020. The suit thus proceeded by way of formal proof on 22<sup>nd</sup> October, 2020 and a judgment was scheduled for 9<sup>th</sup> April, 2021.

4. The Appellant has thus appealed against the entry of the default judgment arguing that the Appellant's defence was arguable premised on the Memorandum of Appeal filed in the instant appeal.

5. In the Appeal, the Appellant contests the jurisdiction of the trial magistrate to deal with matters Trade Mark which it is asserted are a reserve of the Registrar of Trademarks and the High Court. Further, that the Respondent cannot prosecute alleged infringement of trademarks as the same are not registered in its favour. In support thereof, the Appellant's cites Clause 10.15 and 10.16 of the terminated Sub-Franchise Agreement wherein such Franchise is vested in the Master Franchisor. That accordingly, the Appellant has a valid subsisting Sub-Franchise Agreement with the Master Franchisee, under which the Appellant is able to operate using the name "Cartridge World". That since the Master Franchisee is not a party in the suit, deciding the validity of the contract without its involvement would be unduly prejudicial.

6. The Appellant further alludes that the trial court, in dismissing the application to set aside the default judgment stated that the Respondent would suffer prejudice but failed to disclose the nature of the prejudice and as such, the court abdicated its role as an independent arbiter.

7. That in view of the foregoing, if the judgment was delivered as scheduled, the Appellant would be condemned unheard, more so because the money claimed by the Respondent is substantial and because the other reliefs sought by the Respondent such as the closure of the Appellant company are drastic and the Appellant will not be in a position to recover.

8. It is also averred that the Respondent will not suffer any prejudice if the prayer sought is granted, and in any event it is in the interest of justice that the application is allowed.

9. Finally, the Appellant avers that the application was brought to court without undue delay and is therefore merited.
10. It suffices to note that the Appellant approached the court by way of a Certificate of Urgency. On 18/3/2021 the court directed that the application be served and the parties return to court for directions on the hearing on 19/3/2021. On the latter date, the court granted an early hearing date which was 23/3/2021 in view of the nature of the orders sought in the application and by virtue that the suit judgment was pending delivery on 9<sup>th</sup> April, 2021. Both parties were represented in court by respective counsel.
11. Come the 23/3/2021, learned counsel, Ms. Wangui was on record for the Applicant and Mr. Ataka for the Respondent. Earlier, a Mr. Mundia held brief for Mr. Ataka and requested for adjournment seeking time to file a Replying Affidavit. The court declined the request for adjournment in view of the urgency of the matter and granted the Respondent's counsel leave to submit on matters law.
12. The court immediately delivered an extemporal ruling, dismissing the application but reserved the order for costs in the main ruling.
13. Ms. Wangui basically reiterated the grounds on which the application is premised as well averments of the Supporting Affidavit, which again, are by and large a replica of the grounds supporting the application. She emphasized that the appeal arises from the trial court's refusal to allow that Applicant to file a defence out of time. She urged the court to exercise its inherent jurisdiction and stay the trial court's proceedings, which is stay the delivery of the judgment and consequently allow the Applicant to file a defence. She relied on the assertion that, if the proceedings are not stayed and the appeal is successful, then the suit would proceed as an academic exercise. Thus, the court would be avoiding multiplicity of suits and of course stop imminent execution of a decree that may be faulted in the appeal.
14. In stressing that the appeal has high chances of success, counsel submitted that, should the judgment in the suit be delivered, the Appellant will be stopped from trading in the name of Cartridge World as well as selling products labelled as such which is the entire Appellant's line of work. Thus, it was argued, the sum total of the application is to avoid the Applicant being condemned unheard.
15. Ms. Wangui added that there has been no undue delay in filing the application whilst invoking Order 42 Rule 6 of the Civil Procedure Rules.
16. Mr. Ataka on his part submitted that although the court was moved under Order 42 Rule 6 of the Civil Procedure Rules, there are clear guidelines on when a court can issue stay of proceedings. He referred the court to the case of **Nation Media Group v William Kimutai (2017) eKLR** arguing that the Applicant must first demonstrate the arguability of the appeal. On this he submitted that regarding locus of the Respondent to file the suit, the validity of the contract agreement between the parties and the jurisdiction of the trial court to try the suit amongst other grounds of appeal are matters pending for determination in the suit judgment. Hence, they are issues that cannot be subject of an appeal to the High Court before the trial court pronounces itself on them. After all, counsel argued, the judgment may as well be delivered in favour of the Appellant.
17. Counsel submitted that the Ruling by the trial court of 29<sup>th</sup> January, 2020 was on an application to set aside the ex-parte judgment and to admit a defence out of time. That this court has not been told how the magistrate was wrong in applying the principles for setting aside an ex-parte judgment. That as such, the appeal herein is pre mature and not arguable.
18. As regards the prejudice principle, counsel submitted that the suit judgment was due in two weeks and the Applicant had his day in court, having been allowed to cross examine the Respondent's witnesses. Hence, the question of unfairness does not at all arise.
19. In this regard, Mr. Ataka was of the view that, in contrast, it was the Respondent who would suffer prejudice as it allowed the Applicant to participate in the hearing whereas it did not have to. That in that case, the Applicant was asking the court to re-open the case. On the issue of delay, counsel submitted that the same was relative and required to be explained. He submitted that the decision appealed was rendered on 29<sup>th</sup> January, 2021. The appeal was filed on 23<sup>rd</sup> February, 2021 and the instant application on 3<sup>rd</sup> March, 2021 and served on 23<sup>rd</sup> March, 2021. He argued that that chronology demonstrated laches which were not explained.
20. Finally, counsel submitted that in the unlikely event that the application was allowed, he urged the court to consider that Order 42 Rule 6 of the Civil Procedure Rules requires that an Applicant deposits security in due performance of the decree. He urged that, although no judgment had been delivered, the court orders that a security for USD 50,000 be deposited. Counsel was however emphatic that, the trial court should be accorded an opportunity to write its judgment because even if the Applicant does not succeed, it shall have an opportunity to appeal. That way, no opportunity available to it to ventilate its case had been lost.
21. In rejoinder, Ms. Wangui emphasized that the Applicant was not pre-empting the decision of the trial court. Rather, it was just demonstrating the merit of the defence, should the Applicant be accorded an opportunity to file one. She added that although the Applicant was allowed to participate in the formal proof, the same was under protest. On the requirement for deposit of security she submitted that that only applies in instances of stay of execution and not stay of proceedings. Finally, that it was injudicious to allow the suit judgment be delivered for the likelihood of having two appeals running concurrently. After all, since the judgment has not been delivered, the Respondent will get a judgment at some point, anyway. And that if the Appellant does not succeed in the appeal, the Respondent shall be entitled to costs.

#### ***Analysis and determination***

22. I have carefully considered the application, the Supporting Affidavit and the respective oral submissions of the rival parties herein. I have deduced that the only issue for determination is whether the Appellant has satisfied the conditions necessary for the grant of stay of proceedings in the trial court pending the hearing and determination of the appeal herein.
23. This Court has powers to stay proceedings pending appeal, which jurisdiction is derived from both **Order 42 Rule 6** of the **Civil**

**Procedure Rules** as well the inherent jurisdiction reserved in **Section 3A** of the **Civil Procedure Act**. (See **Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR**).

24. It suffices to add that stay of proceedings should not be confused with stay of execution pending appeal. It is a serious judicial action as it seriously interferes with the right of a litigant to conduct his litigation. It affects a party's right of access to justice, right to be heard without delay and overall, right to fair trial. It should only be granted in the clearest of cases or where there is abuse of process of court, that is, where the likelihood of embarrassment of the court will occur as in two courts of similar jurisdiction arriving at different results on same facts and law. Therefore, the test for stay of proceedings is very high and should be exercised reservedly.

25. In **Halsbury's Law of England, 4<sup>th</sup> Edition. Vol. 37 page 330 and 332**, it is stated that:

*“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”*

*“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”*

*“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”*

26. Under our home-grown jurisprudence, Ringera, J (as he then was) in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** stated as follows;

*“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added).*

27. In the instant case, it is my considered view that the interests of justice do not lean towards exercising this court's discretion to grant a stay of proceedings in the trial court. Without saying more, I do not think that the Appellant has demonstrated that he has an arguable appeal because the setting aside of an interlocutory judgment was well within the trial court's jurisdiction and is also sanctioned by law.

28. In that regard, the learned magistrate in his wisdom declined to set aside the interlocutory judgment as a result of which the matter proceeded to formal proof. Although the Appellant purports to hinge the appeal on that dismissal, a cursory analysis of the grounds on which the application is premised and the submissions made in this court are a clear testament that the Appellant is changeling what would be the outcome of the suit judgment. That in my view, is the wrong approach to this application. The Appellant should instead await the outcome of the suit judgment after which it can appeal.

29. That then drives me to conclude I do not find that the Appellant has an arguable appeal. And as rightly submitted by Mr. Ataka, counsel for the Respondent, the Appellant should await the judgment of the trial court and if it is not delivered in his favour he can appeal. It is thus cut out that a stay of proceedings will only delay the matter pending in the trial court whereas what is pending is only the delivery of the judgment.

30. Further and in any event, the Appellant has failed to articulate what prejudice it stands to suffer should the orders not be granted. In fact, it is in the interest of both parties that the judgment is delivered and the party dissatisfied with the outcome moves on to the next step. Consequently, the only apt thing the Appellant shall do should it lose is to withdraw the instant appeal. That cannot be deemed a grave prejudice that outweighs the demand to do justice in the circumstances of this case.

31. In sum, I find that the Appellant's application is devoid of merits and I dismiss it with costs to the Respondent. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>th</sup> April, 2021.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *No appearance for the Appellant/ Applicant.*
2. *No appearance for the Respondent.*