



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO 254 OF 2016

TARMAL WIRE PRODUCTS LTD.....PLAINTIFF/RESPONDENT

VERSUS

ABERDARE STEEL & HARDWARE LTD.....DEFENDANT/APPLICANT

RULING

1. The application for consideration is the Defendant/Applicant's Notice of Motion dated 11th August 2020 brought under **Orders 42, 51** of the **Civil Procedure Rules, Sections 1A,1B, 3A** and **63 (e)** of the **Civil Procedure Act, Article 159** of the **Constitution of Kenya 2010** and all other enabling provisions of the law. The Application seeks the following orders:

a) THAT pending the hearing and determination of the appeal against the Ruling and Order in Nairobi HCCC No. 254 of 2016 made by the Hon. Lady Justice G.L. Nzioka on 11th December 2019, this Honourable Court be pleased to issue an Order of stay of execution against the Defendant/Applicant.

b) The costs of this application be provided for.

c) Any other orders that meets the ends of justice.

2. The application is based on the grounds on the face of it and supported by the Affidavit of **SOLOMON NGECHU**, a director of the Defendant herein, sworn on even date. He averred that the Defendant is dissatisfied with the entire Ruling of the Court and is therefore desirous of appealing against the said decision before the Court of Appeal. He stated that the Defendant is apprehensive that the Respondent will proceed and execute the Order of this Honourable Court to recover Kshs. 21,221,177.00 plus interests as awarded by the Court, while the appeal will still be pending. He noted that vide a letter dated 5th August 2020, the Plaintiff's advocate sent a draft decree to the Defendant's advocate on record requiring an approval of the same within seven (7) days failure to which an approval was to be sought from the Deputy Registrar. In the Defendant's view therefore, it is evident that it faces eminent danger of execution.

3. Further, it was averred that the grant of a stay of the Ruling and Order delivered on the 11th December 2019 will ensure that the appeal is preserved and not rendered nugatory. The Defendant argued that in case the stay sought is not issued and the Appeal succeeds, it will be chaotic and laborious to retrieve/execute from the Plaintiff the amount of money awarded in the Ruling of 11th December 2019. It contended that it is thus in the interest of justice if the status quo remains. In addition, it was averred that the Defendant is willing and ready to deposit a title document before this Honourable Court as security and a condition for grant of stay of execution pending hearing and determination of the intended appeal.

4. In response, the Plaintiff filed a Replying Affidavit sworn on 21st January 2021 by the Plaintiff's accountant **EBRAHIM ALI OMAR** as well as Grounds of Opposition of even date. The Plaintiff averred that apart from making unsubstantiated allegations to the effect that it would suffer loss in the event that the decree is executed against it, the Defendant has not sufficiently demonstrated the nature and particulars, if any of the losses, whether substantial or otherwise, which would be occasioned by its settlement of the decretal sum prior to the determination of the intended appeal.

5. The Plaintiff also contended that whereas **Order 42 Rule 6 (2) (a)** of the **Civil Procedure Rules** stipulates that such an application must be made without unreasonable delay, the Defendant's application was made after an inordinate delay of more than 8 months, that is, from 17th December 2019 to 11th August 2020. It noted that no explanation whatsoever has been offered for that delay, apart from the averment that the Plaintiff's advocates had sent the Defendant's advocates a draft decree for their approval.

6. Further, it was averred that the Defendant has not offered any tangible form of security as contemplated by order **42 Rule 6 (2) (b)** of the Rules for due performance of the decree either by way of partial settlement of the decretal amount, deposit of the decretal amount in an interest earning account or financial guarantee. The Plaintiff noted that the Defendant has simply stated that it is willing to deposit in court some unvalued, unauthenticated and unverified document of title, whose particulars have not been availed to the Honourable Court. In its view, the aforesaid averment by the Plaintiff demonstrates its contempt for the process of the Honourable Court. The Plaintiff asserted that being the successful litigant, it should not be denied enjoyment of the fruits of its litigation merely because the Defendant has expressed an intention to appeal the decision of the Honourable Court by filing a Notice of Appeal.

7. Further, the deponent averred that being the Plaintiffs accountant, he is fully aware of its financial status and confirms that the Plaintiff will be able to refund the Defendant whatever amount may be paid to it by the Defendant in the intervening period, in the event that the Defendant's intended appeal is successful. It was further contended that the averments by the Defendant that recovery of the decretal amount would be difficult in the event that the intended appeal is successful means that it is capable of settling the decretal amount, but is only worried of the Plaintiff's ability to refund the same. In the premises, the Plaintiff argued that should the Honourable court agree with the Defendant's position, then it should order that the decretal amount together with costs and interest be deposited in an interest earning account in the joint names of the advocates for the parties.

Submissions

8. The Application was canvassed by way of written submissions.

9. In its written submissions dated 26th April 2021, the Defendant submitted that the only issue arising for determination is whether the present application is merited? The Defendant reiterated that the Application is indeed merited firstly because its Appeal is arguable and likely to succeed; secondly because the Application was timeously filed; and thirdly because judicial discretion militates in favour of granting the stay of execution in its favour so that the Appeal is not rendered nugatory.

10. It contended that the arguability of its Appeal is evident from the grounds raised in its Memorandum of Appeal dated 29th March 2021 namely: that the learned Judge erred in fact and law by finding that the Appellant's Defence did not raise bona fide triable issues; that the learned Judge erred in law by failing to consider the damage/inconvenience caused to the Appellant by denying the Appellant the right to a fair hearing and Access to justice under **Articles 25(c), 48 and 50 of the Constitution of Kenya** as read together with **Order 11 of the Civil Procedure Rules**; and that the learned Judge erred in law by delving into the merits and facts of the case before the matter was set down for trial thereby denying the Appellant unconditional right to defend its case and or adduce evidence in support of its case.

11. The Defendant relied on the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** where the Court of Appeal while quoted the case of **Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** in which it was stated as follows:

"He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision"

12. The Defendant further submitted that the power to grant or refuse an application for stay is a discretionary one and the same should be exercised in a manner that does not prevent an appeal. It relied on the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** in which the Court cited the decision of the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** where the Court of Appeal held that:

4. "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. b. 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. 6. 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. d. 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. e. 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."

13. Additionally, the Defendant urged the Court to be guided by the sentiments of the Court in **Amal Hauliers Limited (supra)** to buttress the position that in an application involving a money decree, a stay of execution pending appeal may be granted so as to alleviate any undue hardship that the applicant would suffer if stay is refused.

14. On the issue of the alleged delay in filing the application, the Defendant asserted that the delay is not unreasonable and relied on the case of **Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another [2014] eKLR** where the court allowed a similar application which was filed almost a year after the delivery of judgment by the trial court. It thus urged that the stay sought in the instant application be allowed.

15. On the other hand the Plaintiff in its written submissions dated 3rd May 2021 submitted that stay of execution can only be sought under the provisions of Order of **Order 42 Rule, 6 (2) of the Civil Procedure Rules**. It submitted that brought its application under irrelevant provisions of the law because it was aware that it did not satisfy the conditions necessary for the grant of stay of execution. The Plaintiff reiterated the averments in its responses on why the instant application is not merited.

16. The Plaintiff relied on the case of **Mufi & 2 Others v Ho/a Mkando Omar & Another (Both suing as representatives of the Estate of**

Francis Mwatembo Mulonza) [2019] eKLR, where Odunga J reviewed several decisions of courts on the subject matter and concluded by directing that half the decretal amount be paid to the Plaintiff therein and the other half be deposited in an interest account in the joint names of the advocates for the parties. In the premises, the Plaintiff reiterated that the Application should be dismissed but should the Honourable Court be magnanimous with the Defendant, and opt not to do so, the stay sought should be granted on condition that the Defendant pays half the decretal amount to the Plaintiff and deposits the other half in a joint account in the names of advocates for the parties, within such reasonable period of time, as shall be determined by the Honourable Court in its sole discretion.

Analysis and Determination

17. I have carefully considered the Defendant's application, the Replying Affidavit and Grounds of Opposition filed by the Plaintiff as well as the parties' respective submissions. The main issue for determination is whether the application meets the threshold for the grant of an order for stay of execution pending appeal as envisaged by the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**.

18. **Rule 6 (1) and (2)** of the said provision stipulates as follows regarding the grant of stay in case of appeal:

“(1) No appeal or 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside.

(2) 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”

19. As to whether the application has been filed without unreasonable delay, I note that there was a time lapse of exactly eight (8) months from the date of the delivery of the Ruling appealed against being 11th December 2019, to the time of filing the instant application which was 11th August, 2020. The Defendant has not proffered any explanation whatsoever for the inordinate delay in filing the application for stay pending appeal save to argue that the delay was not unreasonable. Indeed, it beats me why the Defendant decided to go into deep slumber after filing an appeal only to wake up and spring into action eight months later upon being served with a draft decree by the Plaintiff's Advocates for its approval. In my view, this only shows that the instant application was an afterthought.

20. Suffice it to note, the case of **Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another [supra]** relied on by the Defendant to justify the delay herein is clearly distinguishable from this one. In the said case, the Applicant established special circumstances which were clearly explained and evidence was presented to prove the same to the court.

21. As regards the question of whether substantial loss may result, the court is obligated to strike a balance between two competing interests. On the one hand, the Plaintiff as the successful party is entitled to the fruits of a favourable decision of the court while on the other hand; the Defendant being aggrieved by the same is entitled to exercise his right of appeal and to have that right protected by avoiding a situation where his appeal may be rendered nugatory. An applicant must therefore satisfactorily demonstrate the substantial loss that he stands to suffer in the event that stay is not granted.

22. In **Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR**, the court stated thus:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage....In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal).”

23. Further, it is well settled that where a money decree is involved such as the instant case, substantial loss lies in the Respondent's inability to reimburse the decretal sum in the event that the appeal succeeds. However, the legal burden of proving such inability lies with the Applicant and it does not shift to the Respondent merely because the Applicant stated that it cannot refund the sum if paid. There must be cogent evidence which show the inability or financial limitation on the part of the Respondent to refund the decretal sum and it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent. (See Gikonyo J. in **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR**)

24. In the present case, the Defendant's only contention is that the appeal will be rendered nugatory if successful as it may be laborious to

recover the decretal sum of Kshs. 21,221,177.00 plus interest from the Plaintiff. The Defendant did not bother to elaborate why it thinks that the Plaintiff will be unable to refund the sums if paid. Further and contrary to the well-known legal principle that he who alleges must prove, the Defendant did not tender any evidence whatsoever regarding the Plaintiff's purported financial limitation.

25. In Winfred Nyawira Maina v Peterson Onyiego Gichana (supra) Gikonyo J. stated as follows regarding a similar situation:

“Following the case of Amro Bank (supra) and what the Court of Appeal said in the case of Kenya Shell, the Applicant should place cogent evidence before the court which show that the Respondent cannot refund the money, and it is in face of such limitation that the Respondent should discharge the evidential burden that she is of sufficient means to make a refund of the decretal sum. If it were to be otherwise, what Applicants will do, is to merely state that the Respondent is not able to refund the decretal sum in the event the appeal succeeds. And that would be shifting of the legal burden from the Applicant to the Respondent, which I have already stated never shifts from the Applicant for as long as it is him who is asserting the particular fact. The law never intended to be and will never go that way.” (Emphasis Added)

26. All that the Defendant did was to explain why its appeal is arguable in an attempt to show that substantial loss will occur. Indeed, I find it necessary to note that the same only applies in the case of an application for stay in the Court of Appeal under **Rule 5 (2) (b)** of the **Court of Appeal Rules** and not under **Order 42 Rule 6** of the **Civil Procedure Rules**. In an application filed in the High Court, a party is only required to show, to the required standard, that substantial loss will result to it unless stay is granted. In the premises, I find that the Defendant has not demonstrated any substantial loss that it stands to suffer absence the order of stay sought.

27. On the question of the security for due performance of the decree, the Defendant stated that it is willing and ready to deposit a Title document in this Court in that regard. I have perused the annexed Title Deed in respect to a property known as **NYANDARUA/WANJOHI/1240** measuring approximately 2.02Ha. The same is registered in the name of SOLOMON NDIBUI NGECHU who is in law a distinct and separate legal entity from the Defendant herein despite being its Director. In any event, there is no search produced to confirm that the said Solomon is the current registered owner of the property. Further, no current valuation report of the land has been tendered in evidence to enable the Plaintiff and the court to know whether the property can be used as sufficient security for the decretal sum of Kshs. 21,221,177.00 plus interest thereon. This court cannot therefore accept the same as security for due performance of the decree by the Defendant.

28. In view of the foregoing, I find that the lackadaisical manner in which the Defendant has approached the court has made it unworthy of this court's discretionary order of stay of execution. It only shows that the application was made with the intention of averting the course of justice

Disposition

29. The upshot is that the Defendant's Notice of Motion dated 15th August, 2020 lacks merit and the same is dismissed. Each party to bear its own costs of the application. It is so ordered.

DATED AND DELIVERED IN NAIROBI AT NAIROBI THIS 10TH JUNE, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of :

1. Mr. Mwenda h/b for Ms. Mwai for the Defendant/ Applicant.

2. Mr. Omuga for the Plaintiff/Respondent.