



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 129 OF 2020**

**CLASSIC BUILDING WORKS LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**PANSONS CONSTRUCTION CO. LIMITED.....RESPONDENT**

**RULING**

1. This Ruling is in respect of the **Notice of Motion** application dated **22<sup>nd</sup> March, 2021** and filed on **25<sup>th</sup> March, 2021** by the Appellant/Applicant. The Application is brought under **Sections 1A, 1B, 3A, and 195** all of the **Civil Procedure Act** and **Order 42 Rule 6** and **Order 51 Rule 1** both of the **Civil Procedure Rules 2010**. The Application seeks the following orders: -

**1) Spent;**

**2) Spent;**

**3) THAT the status quo in terms that this Honourable Court deems necessary be maintained pending the hearing and determination of the Applicant's/Appellant's Appeal herein against the Ruling of Honourable E. Makori delivered on 10<sup>th</sup> December, 2020 on such terms as appear just and proper;**

**4) THAT the costs of this Application be awarded to the Applicant.**

2. The **Motion** is supported by the grounds presented on its body and the **affidavit** sworn on **22<sup>nd</sup> March, 2021** by **Hamza T. Saifuddin**, the Applicant's Director.

3. **Mr. Hamza** has deponed that on **10<sup>th</sup> December, 2020** Hon. E. Makori delivered a Ruling in **Mombasa CMCC No.1449 of 2016** dismissing the Applicant's application to lift attachment orders with costs.

4. It has been deponed that being dissatisfied with the Ruling, the Applicant through his Advocates lodged a **Memorandum of Appeal** to appeal as against the said Ruling. The Applicant has stated that it has an arguable Appeal with high prospects of success as it is a cardinal principle that a court cannot rewrite contracts of buying goods.

5. According to the Applicant, if stay of execution is not granted, the Applicant's Appeal to this Honourable Court will be rendered nugatory and the Applicant will suffer loss and prejudice which will be irreparable. The Applicant goes on to state that there is a risk that the suit properties will be alienated and/or sold during the pendency of the Appeal unless stay is granted.

6. It is deponed that no prejudice will be occasioned to the Respondents should this application be allowed and *status quo* maintained.

7. The Respondent has opposed the application vide a **Replying Affidavit** sworn on **23<sup>rd</sup> April, 2021** by **Kioko Maundu**, the Respondent's Counsel. He has stated that a stay of execution cannot issue against the decree in **Mombasa CMCC No.1449 of 2016**.

8. It is deponed that the Ruling of the Court dated **10<sup>th</sup> December, 2020** only allowed the attachment as against **items No.1-12** in the **Proclamation Notice** dated **6<sup>th</sup> November, 2019** whose value is indicated as **Kshs.219,000/=** a known value which has not been disputed by the Applicant.

9. Counsel depones that the amount of **Kshs.219,000/=** is not excessive and the Decree-Holder is capable of refunding the same to the

Appellant without any difficulties should the Appeal filed by the Applicant succeed, hence the Appeal cannot be rendered nugatory.

10. It is also stated that the Applicant has not shown what difficulties it will face if the attached furniture is sold off and that they will not suffer any irreparable loss and damage as the value of the goods is known and is refundable.

11. The Respondent avers that its stands to suffer immensely if the orders are granted as they will be unable to execute the decree herein which now stands at **Kshs.4,136,060.00/=**.

12. According to the Respondent, the grant of a stay will affect the attachment of goods that have not been claimed by the Applicant which are *two computers, television set, beds and mattresses, music system, gas cooker and cylinder and fridge*.

13. The Respondent urges this court to disallow the Applicant's application dated **23<sup>rd</sup> March, 2021**, as no sufficient cause has been shown to warrant the grant of the orders as sought.

14. Following the directions given by the court, the matter was disposed of by way of written submissions. The Applicant's submissions are dated the **21<sup>st</sup> May, 2021** and filed on **25<sup>th</sup> May, 2021** whilst the Respondent's submissions are dated the **26<sup>th</sup> May, 2021** and filed on **28<sup>th</sup> May, 2021**.

15. Parties relied on their submissions in their entirety.

### **Analysis and determination**

16. Having considered all the pleadings and written submissions by the parties, the only issue for determination arising from the application is *whether status quo can be maintained pending the hearing and determination of the Appeal against the Ruling of Hon. E. Makori delivered on 10<sup>th</sup> December, 2020*

17. In the case of **Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered for the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus: -

***“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”***

18. On whether the application was timely, the decision of the trial court was delivered on **10<sup>th</sup> December, 2020** and the instant application filed on **25<sup>th</sup> March, 2021**. The Applicant has explained that the two months delay was due to an application that was pending before the lower court and a Ruling that dismissed the Applicant's plea to lift the attachment delivered on the **17<sup>th</sup> March 2021**. They were granted a stay of execution until the **30<sup>th</sup> March 2021** and thus they filed the instant application on the **25<sup>th</sup> March, 2021**. I find that the delay has been sufficiently explained by the Applicant.

19. The Applicant has stated that the substantial loss that they are likely to suffer if stay of execution is not granted, is that the goods proclaimed by the Respondent vide the **Proclamation Notice** dated **6<sup>th</sup> November, 2019** are goods that are within the business premises of the Applicant, which are its tool of trade and are at risk of damage that may cause the business to go under and cause untold embarrassment.

20. Further, that they will suffer loss as the Decree of the Magistrate Court in the primary suit is enforceable as against **Classic Timber Works** and not **Classic Building Works Limited**. The Applicant states that the Respondent has proclaimed goods as against the wrong party and it is on this ground that they have lodged the instant Appeal. The Applicant has stated that it will be forced to fulfill a decree or order of the court that was made as against another party. The Applicant contends that they have already filed a Memorandum of Appeal dated **15<sup>th</sup> December, 2020** and there is a risk the same being rendered nugatory if the stay is not granted.

21. In its submissions, the Respondent has agreed that the Applicant has no interest in the decree issued in **Mombasa CMCC No.1449 of 2016, Pansons Construction and Taher Saifudin Shura T/A as Classic Timber Works**. The Respondent claims its only interest in the proceedings is its purported goods attached in the Proclamation Notice dated the **6<sup>th</sup> November, 2019**. It was stated that if an order of stay of execution is issued it will affect the decree in which the objector/appellant herein is not a party and that the decree in **Mombasa CMCC No.1449 of 2016** is also not subject of the Appeal herein.

22. In the case of **Siegfried Busch –vs- MCSK [2013] eKLR**,

***“...A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his Judgment...”***

23. I find that the Applicant having been condemned to pay a decree to a suit that it claims it was not a party to, amounts to substantial loss and it is necessary that the *status quo* be maintained so as to preserve the Appeal.

24. On the issue of security for costs, the Applicant has stated that the court should not make any order as to costs as it is a dispute that

involves a wrongful and unlawful attachment of property of an entity that is a stranger to the suit that gave rise to the execution process herein.

25. I find that it would be unfair to condemn the Applicant to fulfill any part of the decree when it claims not to have been a party to the suit as was before the subordinate court.

26. In the interest of justice, the application dated **22<sup>nd</sup> March, 2021** is allowed, *status quo* be maintained and there be a stay of execution on the Proclamation Notice dated **6<sup>th</sup> November, 2019** pending the hearing and determination of the Appeal herein.

It is hereby so ordered.

**DATED AND SIGNED AT MOMBASA THIS 14<sup>th</sup> DAY OF JULY , 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**DELIVERED VIRTUALLY AT MOMBASA THIS 14<sup>th</sup> DAY OF JULY, 2021.**

**A. ONG'INJO**

**JUDGE**