



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. E004 OF 2020

MOMBASA HIGHWAY TRANSPORT CO. LTD.....APPELLANT

VERSUS

SPRINGTECH (K) LIMITED.....RESPONDENT

RULING

1. The subject of this **Ruling** is a **Notice of Motion** application dated **29th September, 2020** and filed on **30th September, 2020** by the Appellant (hereinafter the Applicant). In the application, the Applicant seeks for the following orders:

1. Spent;

2. Spent;

3. That the Honourable Court do grant a temporary Stay of Execution pending hearing and determination of the substantive Appeal lodged herein;

4. That the costs of this Application be borne in the course.

2. The Application is brought under **Sections 1A, 1B, 3A** and **Section 65** all of the **Civil Procedure Act, Order 42 Rule 6** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law.

3. The Application is supported by an **Affidavit** sworn by **Seif Mohamed Seif** on **29th September, 2020**, wherein among other grounds, that the Respondent lodged an application dated **31st August, 2020** before the trial court seeking to strike out the Appellant's Defence. The application dated **31st August, 2020** was slated to be heard on **14th September, 2020**, the Appellant/Applicant having been granted 7 days to put in a response to the said Application.

4. The Appellant/Applicant avers that on **25th September, 2020**, when the matter was slated for mention, they notified the court that they were unable to respond to the Respondent's application dated **31st August, 2020** as it had no **Supporting Affidavit** as required by law.

5. The Applicant contends that the trial Magistrate asserted that the application was not strange and that similar applications have been lodged without annexing a sworn affidavit and proceeded to allow the Respondent's application unopposed despite the Applicant's plea on the discrepancy.

6. The Appellant/Applicant states that the articulation of **Order 2 Rule 15** of the **Civil Procedure Rules** is the provision of the law used to support such an application. The Appellant/Applicant avers that the trial court was wrong in striking out their Defence without according them an opportunity to be heard.

7. The Applicant is thus apprehensive that if Stay of Execution is not granted, the Respondents will proceed to extract the Decree and execute, to the Applicant's detriment.

8. In response, the Respondent filed **Grounds of Oppositions** dated **7th October, 2020** in which he has stated that the application by the Applicants does not meet the requisite conditions set under **Order 42 Rule 6** of the **Civil Procedure Rules 2010**, and that it ought to be dismissed.

Directions of the Court

9. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they would be relying on their said written submissions as presented in their entirety. The Applicant's submissions were filed on **4th February, 2021** while those of the Respondent were filed on **5th November, 2020**.

10. I have had the benefit of reading the written submissions. They replicate much on the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein. None of the parties herein relied on any case law.

Analysis and Determination

11. After perusing all the pleadings filed in this case and the written submissions by the parties herein, I find that the issue for determination is *whether this court can grant an order for Stay of Execution pending Appeal*.

12. The conditions to be met before a stay of execution pending the hearing and determination of appeal is granted are provided by **Order 42 Rule 6(2)** of the **Civil Procedure Rules** as follows: -

Stay in case of appeal [Order 42, rule 6.]

“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 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.”

13. On the issue of whether the instant application was timely, a perusal of the records show that the decision of the trial court is indicated having been delivered on **25th September, 2020**. The instant application was made on **29th September, 2020**. It is therefore clear that the application was made without undue delay.

14. As for substantial loss being occasioned, the Applicant has stated that the substantial loss that they stand to suffer if stay of execution is not granted is that they will have been condemned unheard as they were not given an

opportunity to respond to the Respondent's application to have their Statement of Defence struck out. The Applicant's claim is that the Application by the Respondent to have their Defence struck out was based on **Order 2 Rule 15**, of the **Civil Procedure Rules** which is not the proper provision of law to warrant the striking out of a Defence.

15. The Applicant claims they were further condemned unheard when they raised a concern to the trial court that the Respondent's application was based on the wrong provisions of law that it was not supported by an Affidavit as required by law.

16. The Applicant contends that they have already filed a **Memorandum of Appeal** dated **29th September, 2019** and there is a risk that the same will be rendered nugatory if the stay is not granted. On the other hand, the Respondent maintains that the Applicant has not shown any substantial loss that they will suffer to warrant a grant of Stay of Execution.

17. In consideration of their contentions, Article 50(1) of the Constitution of Kenya provides the guiding principle that every party in a litigation is entitled to a fair hearing. Therefore, having been denied an opportunity to respond to the Respondent's application that sought to have its statement of defence struck out, is a clear that the Applicant was not availed an opportunity to present its/his/her case.

18. On the issue of security for costs, the Applicant has stated that this case does not fall under one that the Applicant should be ordered to pay security, as the case is one based on a wrong misinterpretation of the law. The Respondent contends that Stay of Execution should not be granted as the Applicant has not offered security for due performance of the Decree.

19. I wish to point out that neither the Applicant nor the Respondent has attached a copy of the Decree and this court is thus unable to determine the amount awarded by the trial court, so as to make any order on security for costs as required under **Order 42 Rule 6(2)(b)**.

25. I have looked at the Applicant's application and find that two of the requirements for grant of Stay of Execution Order, being that the application was brought without undue delay and that the Applicants stand to suffer substantial loss have been satisfied.

26. In the interest of justice, the application dated **29th September, 2020** and grant a Stay of Execution pending the hearing of the Appeal is hereby allowed. Costs to abide the outcome of the appeal.

It is hereby so ordered.

DATED AND SIGNED AT MOMBASA THIS ...12TH ... DAY OF ...JULY..., 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS ...13TH DAY OF ...JULY.... 2021.

A. ONG'INJO

JUDGE