



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAIROBI**

**ELC NO. 738 OF 2017**

**PARAGON ELECTRONICS LIMITED....PLAINTIFF/APPLICANT**

**-VERSUS-**

**VELOS ENTERPRISES LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated the 19<sup>th</sup> of May 2021, the Plaintiff/Applicant has sought for the following Reliefs;

- i. ....(Spent)
- ii. Pending the hearing and determination of this Application there be a stay of further proceedings in this matter.
- iii. There be a stay of further proceedings in this matter pending the hearing and determination of the Appeal filed against the Ruling and Order issued on the 14<sup>th</sup> of April 2021.
- iv. Cost of this Application be provided for.

2. The Subject Application is anchored on the grounds contained at the foot thereof, and same is further supported by the Affidavit of one, Washiba Abdul, sworn on the 19<sup>th</sup> of May 2021 and to which the Deponent has attached a bundle of documents in support thereof.

3. Upon being served with the said Application, the Defendant/Respondent herein filed Grounds of Opposition dated the 16<sup>th</sup> of July 2021, to which the Defendant/Respondent has opposed the entire Application herein.

**DEPOSITIONS BY THE PARTIES**

**THE PLAINTIFF/APPLICANT'S CASE**

4. Vide the Supporting Affidavit sworn on the 19<sup>th</sup> of May 2021, the Deponent has averred that the Plaintiff/Applicant herein filed and/or lodged an Application dated the 21<sup>st</sup> of September 2020, in respect of which, same sought two principal Reliefs, namely: -

- i. The Honorable Court be pleased to grant leave to the plaintiff to file a further document being an Affidavit by a director of the Defendant admitting rental earning for the suit property.
- ii. The Honorable Court be pleased to grant leave to the Plaintiff's witness, Mr. Bulent Gulbahar, to testify via live video link.

5. It is further averred by the Deponent that the said Application dated 21<sup>st</sup> September 2020, was canvassed before Lady K. Bor, Judge, who thereafter reserved her Ruling and which was delivered on the 14<sup>th</sup> of April 2021. For clarity, the Application dated 21<sup>st</sup> September 2020 was dismissed.

6. The Deponent has further averred that following the dismissal of the said Application, the Honorable Court has since denied the Plaintiff/Applicant an opportunity to file an additional document which is said to be critical, albeit essential in proving the Plaintiff's case.

7. It is further averred that as a result of the refusal by the Court to allow the Application, the Plaintiff/Applicant's witness has therefore been exposed to the risk of travelling to Kenya despite the prevalence of Covid-19 pandemic. Consequently, the Deponent therefore contends that the Plaintiff/Applicant is likely to suffer undue prejudice, as a result of the impugned Ruling and/or decision of the Court.

8. Owing to the foregoing, the Deponent has therefore averred that upon the rendition of the Ruling, the Plaintiff felt aggrieved and has thus filed a Notice of Appeal to the Court of Appeal whereby same is seeking that the Ruling rendered on 14<sup>th</sup> April 2021, be vacated, rescinded and/or quashed.

9. In view of the foregoing, the Plaintiff/Applicant has therefore sought to have the subject proceedings stayed pending the hearing and determination of the intended Appeal to the Court of Appeal.

#### **RESPONSE BY THE DEFENDANT/RESPONDENT**

10. The Defendant/Respondent herein filed Grounds of opposition dated the 16<sup>th</sup> of July 2021, whereby same has contended as hereunder;

i. The Intended Appeal arises from the exercise of discretionary powers by the Honorable Court which will not be ordinarily set aside on Appeal. Consequently, the Plaintiff has failed to demonstrate that it has an arguable Appeal.

ii. The Orders sought should not be granted unless the Plaintiff provides security for costs of its intended Appeal as the Plaintiff is a foreign company, whose main director and its sole witness herein, Mr. Bulent Gulbahar, is a foreign national and is currently based out of this Honorable Court's jurisdiction having fled Kenya due to a warrant of arrest issued against him arising of an assault complaint made by the Defendant herein.

iii. The Application is brought in bad faith and is an abuse of the due process of the Court.

#### **SUBMISSIONS BY THE PARTIES**

11. The Notice of Motion Application herein came up for hearing on the 19<sup>th</sup> of October 2021, on which date the Honorable Court gave directions that the Application be canvassed and/or disposed of by way of written submissions, which were to be filed and exchanged by the parties within a set timeline.

12. Pursuant to and in line with the directions of the Court, the parties herein proceeded to and filed their respective written submissions which are now on record.

13. For the avoidance of doubt, the Plaintiff/Applicant filed her written submissions on the 15<sup>th</sup> of June 2021, whereas the Defendant/Respondent filed her submissions on the 5<sup>th</sup> of November 2021.

#### **ISSUES FOR DETERMINATION**

14. Having considered the Notice of Motion Application dated the 19<sup>th</sup> of May 2021, the Supporting Affidavit thereto, as well as the written submissions filed by and/or on behalf of the Plaintiff/Applicant and similarly having considered the Grounds of Opposition and the written submissions filed by the Defendant/Respondent, I am of the considered view that only two issues arise for determination as hereunder;

i. Whether the Plaintiff/Applicant has established a sufficient cause and/or basis.

ii. Whether the Plaintiff/Applicant is disposed to suffer prejudice if the proceedings herein are continued with during the pendency of the Appeal, and if so, whether it is in the interest of justice to grant the Relief sought.

#### **ANALYSIS AND DETERMINATION**

##### **Issue Number One**

##### **Whether the Plaintiff/Applicant has established a sufficient cause and/or basis.**

15. The Plaintiff/Applicant has averred that following the delivery of the Ruling dated the 14<sup>th</sup> of April 2021, same proceeded to and filed a Notice of Appeal and thereby exhibited her keenness and/or intention to Appeal to the Honorable Court of Appeal. For clarity, the fact that a Notice of Appeal was duly filed and served, has not been contested and/or otherwise disputed.

16. In any event, it is imperative to note that the filing and/or lodgment of a Notice of Appeal constitutes an Appeal for purposes of proceedings under the provisions of **Order 42 Rule 6(4) of the Civil Procedure Rules, 2010**, which provide as hereunder;

**“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”**

17. On the other hand, the Plaintiff/Applicant herein has also exhibited a draft Memorandum of Appeal, which itemizes the various grounds of Appeal, which same is keen to ventilate and/or canvass before the Honorable Court of Appeal.

18. I have appraised myself of the grounds of Appeal, which are contained at the foot of the draft Memorandum of Appeal, and I have also considered the issues which were raised before this Honorable Court, relating to the Application dated the 21<sup>st</sup> of September 2020 and I can confirm that there exists some arguable issues, that deserve being interrogated and/or addressed by the honorable Court of Appeal.

19. First and foremost, the Plaintiff/Applicant herein sought leave of the Honorable Court to file a Further document, which according to the Plaintiff/Applicant, showed admission of rent earnings by the Defendant/Respondent from the suit property. According to the Plaintiff/Applicant, this said document had not been discovered and/or disclosed in the previous list and bundle of documents.

20. Essentially, the Plaintiff/Applicant contends that the said Document is critical and/or integral to the just and fair determination of the Plaintiff/Applicant's case.

21. In the premises, what I hear the Plaintiff/Applicant to be saying is that the Ruling of the Court has denied and/or deprived same of the opportunity to file the further document and in this regard, the said further document has been excluded and shall thus not be relied upon by the Plaintiff/Applicant.

22. It is also imperative to note, that at the time when the Application under reference, namely the Application of 21<sup>st</sup> September 2020 was filed, the subject matter herein had not proceeded for hearing. Indeed, hearing in respect of the matter was anticipated to commence on the 30<sup>th</sup> of September 2020.

23. Owing to the foregoing, a question thus arises, as to whether the Ruling of this Court, which is sought to be appealed against, has compromised and/or otherwise impaired the Plaintiff/Applicant's Right of Access to Justice and/or has elevated procedural technicalities to a fetish and thereby defeated substantive justice.

24. Secondly, there was also the issue where the Plaintiff/Applicant's witness, who is resident outside the jurisdiction of this Court, was seeking to testify vide video conference.

25. It is worthy to be noted that the issue of the use and application of appropriate technology in the hearing and disposal of Court cases, has now been codified into law. In this regard, the provisions of **Section 1B, sub-paragraph (e) of the Civil Procedure Act** provides as hereunder;

**"1B. Duty of Court**

**(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—**

**(e) the use of suitable technology."**

26. From what I have enumerated herein before, it is imperative to note that there exists some bonafide arguable issues, that would merit ventilation before the Honorable Court of Appeal.

27. Suffice it to say, that an arguable ground of Appeal, must not necessarily be one that will ultimately succeed. However, so long as it raises a bonafide triable issue, for which the Court of Appeal can be able to interrogate, such a ground needs to be fully canvassed and/or ventilated before the Court of Appeal.

28. In support of the foregoing position, I am guided by the decision in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** where the court held that:

**"...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous..."**

29. Based on the foregoing, I am constrained to answer issue number one herein in the affirmative. For clarity, I find and hold that the Plaintiff/Applicant has shown a sufficient cause and/or basis, which is an essential stepping stone to benefitting from and/or partaking of the discretion of the Court.

**Issue Number Two**

**Whether the Plaintiff/Applicant is disposed to suffer prejudice if the proceedings herein are continued with during the pendency of the Appeal, and if so, whether it is in the interest of justice to grant the Relief sought.**

30. Having found and held that the intended Appeal to the Honorable Court of Appeal raises arguable points, that ought to be ventilated before the Court of Appeal, the critical question which thus remains to be answered is whether the intended Appeal will be rendered nugatory, if the proceedings herein were continued with.

31. Whereas one can easily argue that the Plaintiff's witness can very well travel to Kenya and tender evidence physically before the Court, the issue that requires interrogation is the one relating to the exclusion of further documents which the Plaintiff/Applicant seeks to rely on.

32. If the proceedings herein were to be continued with, it then means that the hearing will take off, the Plaintiff's witnesses will testify in whichever way, but the excluded documents would not be tendered and/or be admitted before the Court.

33. It is also imperative to note that this Honorable Court may very well proceed to render a determination, one way or the other, without taking into account the excluded documents.

34. Be that as it may, if the intended Appeal were to succeed and the Honorable Court of Appeal was to decree that the excluded document ought to be admitted and considered, then it means that the entire of the proceedings that shall have been taken before this Honorable Court will be set aside and the hearing will have to commence *De-novo*.

35. In such eventuality, it would then mean that the entire precious judicial time that would have been taken to conduct the trial and hearing in respect of the subject matter, during the pendency of the Appeal would have been wasted. Such a scenario which is likely, ought to be averted, in the interest of justice and for purposes of efficient and efficacious utilization of Court time.

36. It is also my finding and holding that in the event that the proceedings herein were to be continued with and thereafter the Appeal succeeds, the Plaintiff/Applicant would have been prejudiced. Consequently, such imminent prejudice, ought to be prevented.

37. In support of the foregoing position, I am guided by the decision in the case of MWK vs JDK [2020] eKLR where the Court referred to and adopted Honourable Justice Ringera's decision in the case of Global Tours & Travel limited (Nairobi) H.C. Winding up Cause No. 43 of 2000 stating;

**“The court stated; 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 to order a stay of proceedings, and if it is on what terms it should be granted.**

**In deciding whether to order a stay, a 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 or whether it is an arguable one.**

**The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”**

38. On the other hand, it is also important to note that where a party is exercising his/her undoubted Right of Appeal, in the manner the Plaintiff/Applicant is doing, such a party ought to be afforded the reasonable facilities to pursue and/or ventilate the Appeal without fear of same being rendered nugatory.

39. In the premises, I find and hold that in this particular matter, the intended Appeal by the Plaintiff/Applicant would be negated, affected and/or otherwise substantially defeated, if the order of stay of proceedings sought is not granted.

40. To fortify the foregoing observation, I adopt and apply the holding of the Court of Appeal in the case of Butt vs Rent Restriction Tribunal (1979) e KLR, where Madan JA stated that:

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”**

41. In a nutshell, I find and hold that it is in the interest of justice and optimum utilization of precious judicial time that the orders sought herein be granted.

#### **FINAL DISPOSITION**

42. Having addressed the issues enumerated herein before, I come to the conclusion that the Plaintiff/Applicant has met and/or satisfied the prerequisite conditions under **Order 42 Rule 6(1) of the Civil Procedure Rules**, to warrant the grant of the orders of stay of proceedings sought.

43. Consequently, the Application dated 19<sup>th</sup> May 2021, be and is hereby allowed in terms of prayer 3 thereof.

44. Cost of the Application shall abide the intended Appeal.

45. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula Court Assistant**

Mr. Valentine Ataka for the Plaintiff/ Applicant.

Mr.Rabut h/ b for Mr. Okoth for the Defendant/ Respondent.