



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL APPLICATION NO. E130 OF 2021

ROYAL GROUP INDUSTRIES LIMITED.....APPELLANT/APPLICANT

VERSUS

GODFREY MWENDA KITHINJI T/A AERINGO TRADERS.....RESPONDENT

RULING

The Application

1. Before the Court is an application dated 28th September 2021 seeking stay of execution of the Judgment delivered on 21st September 2021 in Meru CMCC No. 182 of 2019. The subject matter of the suit at the trial Court was a claim for the refund of Ksh 2,090,380/= being the agreed purchase price for pressure pipes some of which, the Court found were either not delivered or were of an inferior quality. In the Judgment, the trial Court (Hon. T. M. Mwangi, SPM) found in favour of the Respondent and ordered the Applicant to refund him the sum of Ksh 2,090,380/=.

Applicant's Case

2. The application is supported by the supporting affidavit of Zoher Taherali Dawoodbhai, the Appellant's Director, sworn on 28th September 2021. It is majorly premised on the grounds that the appeal has high chances of success and that unless stay is granted, he will suffer irreparable loss and damage and the intended appeal will be rendered nugatory. The Applicant has indicated willingness to offer security in the form of a bank guarantee as he is involved in the manufacturing industry whose operations are heavily dependent on their liquidity.

3. The Applicant also filed written submissions dated 2nd November 2021. In urging for grant of stay, he cites the Court of Appeal in **Butt vs Rent Restriction Tribunal** (1982) KLR and **Masisi Mwita vs Damaris Wanjiku Njeri** (2016) eKLR. He cites **Silverstein vs Chesoni** (2002) 1 KLR 867 for the definition of substantial loss which he urges means 'what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. He urges that since the Respondent's resources are unknown, he will not be in a position to refund the monies if paid to him. He further cites **Reliance Bank Limited vs Norlake Investments Limited** (2002) 1 E.A 227 and **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another** [2006] eKLR and **Stanley Karanja Wainaina & Another vs Ridon Ayangu Mutubwa** (2016) eKLR.

4. He further urges that the application was filed timeously, on 30th September 2021 after delivery of Judgment on 21st September 2021. He also urges that the Applicant is willing to provide security. He cites **Gitahi & Another vs Warugongo** (1988) KLR 621 and **Khalsa Schools & 2 Others vs Samuel Odhiambo Otieno** (2021) eKLR for the importance of security which includes security in the form of a bank guarantee.

5. He finally urges that the appeal is arguable and it raises weighty issues of law and fact. He cites **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi** (2014) eKLR for the proposition that an arguable appeal is not one that will necessarily succeed but one which raises triable issues.

Respondent's Case

6. The Respondent has opposed the application by his replying affidavit sworn on 24th October 2021. He urges that the intended appeal does not raise any serious legal issues for consideration by the Court since the Respondent did not deny owing him the decretal sum. He urges that the application does not meet the legal threshold for grant of stay as no substantial loss has been demonstrated. He urges that from the time of delivery of judgment, the Applicant has been engaging him on the modalities of payment. He further urges that the Applicant has not demonstrated to the Court that he has commenced execution. She urges that in the unlikely event that the Court grants stay, the Applicant should be ordered to pay him half of the decretal amount and deposit the other half in a joint interest earning account and deposit security for costs in Court.

7. The Respondent also filed submissions dated 8th November 2021. He urges that the Applicant's allegation that he, the Respondent will be unable to refund the decretal sum if the appeal is successful was not proved. He however urges that he is able to refund the decretal sum. He cites ***Congress Rent South Africa vs Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited & Another (Garnishee)*** (2019) eKLR, ***Kenya Shell Limited vs Benjamin Karuga Kibiru & Another*** (1986) eKLR and ***Machira T/A Machirs & Co. Advocates vs East African Standard (No. 2)*** (2002) 2 KLR 63.

8. He further urges that no sufficient cause has been shown to warrant grant of the orders sought. He cites ***Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat*** (2013) eKLR for the proposition that the right to appeal must be balanced with the right to enjoy the fruits of a judgment.

9. He urges that in the event the Court grants stay, the Applicant should be ordered to pay him of the decretal amount and to deposit the other half in a joint interest earning account.

Determination

Stay of Execution

10. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

a) *substantial loss will result to applicant if stay is not granted; and*

b) *security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and*

c) *the application has been brought without unreasonable delay.*

Substantial Loss

11. To urge his claim for substantial loss, the Applicant claims that the Respondent will not be in a position to refund the monies if the appeal is successful. In such applications, once an Applicant expresses fears that the Respondent may not be in a position to settle the decretal amount, the burden of proof shifts to the Respondent to show that he has the means to pay since that is a matter which is peculiarly within his knowledge in accordance with Section 112 of the Evidence Act. See ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR*** and ***Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020.***

12. The Court thus finds that the moment the Applicant expressed his fears, the burden of proof shifted to the Respondent to confirm her ability to pay. The Respondent failed to do so. In her submissions, she states that the Applicant did not give evidence to prove that she will be unable to pay. The Court has already found that the burden already shifted to the Respondent and the Court considers that in her replying affidavit, she failed to discharge this burden.

13. This Court thus finds that the Applicant has demonstrated the likelihood of suffering substantial loss.

Security

14. The Applicant has indicated his willingness to offer security for the due performance of the decree, which he urges should be in the form of a bank guarantee since their operations are dependent on their liquidity. The Court considers that the fact of the Respondent being a private company, largely unknown makes it necessary for the Court to order for security in the form of cash. Had the Respondent been a well renowned financial institution such as a bank, the Court would have ordered for a bank guarantee. The Court considers that the circumstances of the case call for cash security. The Court considers that despite the demonstration of a likelihood of suffering substantial loss, bearing in mind the substantial amount in question and the fact that the Respondent and the Applicant indeed had a contractual agreement, the Court finds that the interests of justice would call for grant of stay on condition that some amount is paid to the Respondent and the balance is deposited in a joint account.

Undue Delay

15. Judgment in the trial Court was delivered on 21st September 2021 and the instant application was brought on 28th September 2021, seven days later. This Court does not find that there was any undue delay on the part of the Applicant.

ORDERS

16. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) ***The court grants an order for stay of execution of the Judgment and/or Decree delivered on 21st September 2021 by Hon. D. W. Nyambu (CM) in Meru CMCC No. 182 of 2019 pending the hearing and determination of the appeal.***

ii) ***The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 700,000/= being approximately 1/3 of the decretal sum.***

iii) Within the said thirty (30) days in ii) above, the Applicant shall deposit the balance of the decretal sum being Ksh 1,390,380/= in a joint interest earning account in names of the respective Advocates for the parties.

iv) In default of the payment and deposit as per orders ii) and iii) above, the stay of execution herein granted shall lapse and be of no effect.

v) The costs of this application shall abide the outcome of the appeal.

Order accordingly

DATED AND DELIVERED ON THIS 15TH DAY OF DECEMBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kagwe, Kamau, Karanja & Co. Advocates for the Applicant

M/S M.D Maranya & Co. Advocates for the Respondent