



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 439 OF 2017

NOVA HOLDING LIMITED.....PLAINTIFF

-VS-

NAKUMATT HOLDINGS LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion dated 20th September, 2019 brought under Sections 1A, 1B, 3A, 63(e), 75, 78 of the Civil Procedure Act, Sections 27 and 28 of the Limitation of Actions Act, Order 22 Rule 22, Order 40 Rules 1, 2 & 4, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258 and 259 of the Constitution of Kenya, the Defendant/Applicant is seeking for orders.

1. That this matter be certified urgent and service thereof be dispensed with in the first instance.

2. That pending inter parties hearing of this application:

a. There be unconditional stay of execution of the ruling of the Honourable court delivered on 30/5/2018 as well as any/all process and orders consequential thereto.

b. An order of temporary injunction do issue restraining the plaintiff, whether by herself, her agents, servants, employees, assigns or anyone howsoever claiming through her from levying execution, attachment, sequestration and/or distress against any assets of the defendant and/or in any manner whatsoever, interfering with the defendant's open, peaceful, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and/or derivative use of any of her assets.

3. That the orders subject of prayer/item No.2 hereinabove do persist until the hearing and determination of this application.

4. That the Honourable Court to unconditionally raise the attachment levied on the defendant assets vide proclamation notices issued by M/s Legacy Auctioneering Services dated 18/9/2019 and 19/09/2019, respectively.

5. That the Honourable Court be pleased to enlarge time for lodging Appeal against the ruling delivered by the Honourable Court on 30/5/2018.

6. That consequently, the Notice of Appeal lodged herewith be admitted as properly lodged upon payment of requisite charges.

7. That consequently, the orders subject of prayers/items Nos. 2 and 3 hereinabove do persist until the hearing and determination of the Appeal subject hereof.

8. That costs of this application be provided for.

2. The application is based on the grounds on the face of the notice of motion and is supported by the affidavit of Peter Obondo Kahi sworn on 19th September 2019. It is deposed inter alia that the defendant whilst aggrieved by the ruling delivered on 30/5/18, opted to engage the plaintiff with a view to amicably resolving the matter herein, but the plaintiff intends to proceed with execution process thereby necessitating the defendant to lodge the instant proceedings. The defendant states that the inadvertent delay in lodging appeal has been occasioned by the attempts to resolve the impasse herein amicably. That the attached assets are and remain the defendant's stock-in-trade and subject of proceedings in Nairobi High Court Insolvency Cause No.10 of 2017. It is the defendant's contention that it has a substantially credible appeal against the impugned decision which appeal ought to be ventilated prior to execution of the impugned decree. It is averred that the

application has been lodged without any delay and that the defendant is prepared to abide by any conditions the court may impose.

3. The application is opposed by the Plaintiff/Respondent through a replying affidavit sworn by Amit Doshi on 4th October 2019 in which it is deposed inter alia, that the application is a Sham and devoid of any legal and factual basis. That the appeal will not be rendered nugatory because the defendant has already been evicted from the suit properties and if stay is not granted, the applicant would not suffer irreparable harm which cannot be compensated by an award of damages as the plaintiff is a company of good means capable of refunding the money to the defendant should the intended appeal succeed. The plaintiff avers that the reason given by the defendant for the delay, to wit, that parties had been engaged in talks is not true and the delay of over one year is grossly inordinate.

4. The application was prosecuted by way of written submissions which were duly filed by the advocates for the parties. Counsel for the applicant submitted that the defendant has made out a sufficient case on the merits to warrant grant of the orders sought in the application. Counsel for applicant relied on the case of **Butt-v- Rent Restriction Tribunal (1979) KLR** and the case of **Oraro & Rachier Advocates – v- Co-operative Bank of Kenya Limited (2000)KLR**.

5. On its part, the Respondent through their counsel submitted that the delay has not been explained and denied that there were any negotiations between the parties. It was further submitted that there is no notice or draft memorandum of appeal against the ruling of 30/5/18 as the application refers to a ruling of 30/5/19 which is no-existent. It was further submitted that if stay is not granted, the defendant will not suffer any substantial loss, because the plaintiff has demonstrated that it is a company with stable financial position capable of refunding the decretal amount in the event the appeal is successful. Counsel submitted that only natural persons are insulated against execution under Section 44 of the Civil Procedure Act as far as tools of trade are concerned, adding that the defendant has not demonstrated that the goods attached are tools of trade as they are stocks. The Respondent's counsel further submitted that the documents attached to the supporting affidavit are not marked as required by rule 9 of the Oaths and Statutory Declaration Rules and urged the court to strike them out. Counsel relied on the cases of **G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home –v- Miriam Maalim Bishar & Another (2018)eKLR**; **Blackhood Hodge (Kenya) Ltd –v- Lead Gasoline Tank Clearing Sam and Chase (K) Ltd (1986)KLR**; **Josephat Nderitu Kariuki –v – Pinebreeze Hospital Ltd (2007)eKLR**; **Master Fabricator Limited –v – Patrick Omondi Ndonga (2014) eKLR**, and **Francis A. Mbalanya –v- Cecilia N. Waema (2017)eKLR**, and submitted that the applicant has not met the threshold for granting the orders sought and urged the court to dismiss the application with costs. Counsel further submitted that in the event that the court is inclined to granting an order of stay, then the same should be granted on condition that the defendant deposits the entire decretal amount in a joint interest earning account within 14 days in default of which the stay lapses.

6. I have carefully considered the arguments advanced by both parties in this case and the relevant law as well as the authorities cited. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

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.

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.

7. It is clear from the provisions of Order 42 Rule 6(1) that the applicant must satisfy the following conditions, namely; a) that substantial loss may result to it unless the order is made, (b) the Application has been made without undue delay and (c) security has been given by the applicant.

8. In the present case, the order appealed against was made on 30th May 2018, though in the application it is stated to be on 30th May, 2019. In my considered view, this must have been a clerical error which can be cured by the provisions of Article 159 (2) (d) of the Constitution and Section 100 of the Civil Procedure Act. This application was filed on 20th September, 2019, which is a period of about one year and four months. On whether or not the application was brought without undue delay, I am not satisfied that the same was made timeously. The applicant has stated that the delay was occasioned by negotiations between the parties. However, no evidence to support such assertion has been exhibited by the applicant. The respondent has denied that there were no such discussions. It was incumbent upon the applicant to show the court that indeed there were such negotiations which caused the delay in filing the application. I therefore find that there was delay on the part of the applicant in bringing this application.

9. The other issue to consider is whether the applicant will suffer substantial loss if the stay is not granted. It is not disputed that the applicant owes the respondent substantial amount of outstanding rent arrears. It is not shown or alleged that the respondent is unable to repay the decretal amount if it loses the appeal. The onus is on the applicant to show that the money would not be recoverable. Stay of execution can only be granted where sufficient cause has been shown by the applicant. In this case, the applicant has not shown any sufficient cause.

10. The applicant has stated that it is prepared to abide by any conditions that court may impose are granted of the orders sought herein. I reckon that the applicant is alive to the fact that even where stay is granted; it must be on terms in the form of the security for the due performance of the decree. However, I do not find it necessary to order for any security from the applicant as the stay orders have been refused.

11. On the prayer for a temporary injunction, it should be noted that from the provisions of the law, and in particular Order 42 Rule 6 (6) that this court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the court has already rendered its decision and the applicant has stated that is intends to appeal to the court of appeal against the decision of the court given on 30/5/18. On that basis alone, I find that the court does not have jurisdiction to entertain the present application and grant the order of injunction.

12. On the issue of leave to enlarge time for lodging appeal against the decisions of the court made on 18/5/18, I am not satisfied that there sufficient material on record to enable me exercise my discretion in favour of the applicant. The applicant has deposed that the reason for the delay was the discussion between the parties. However, the court has already found that there was no evidence to support that assertion. In my view, there is no reason or sufficient reason that has been given for me to grant the leave to file appeal out of time and as far as that prayer is concerned, I reject it.

13. In the result, I find that the Notice of Motion dated 20th September, 2019 lacks merit and the same is hereby dismiss with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2020

.....

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Okuna holding brief for Ngonze for Defendant/Applicant

Ojwang holding brief for Oluga for Plaintiff/Respondent

Yumna Court Assistant

C.K. YANO

JUDGE