



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC. NO. 329 OF 2015

THATCHMANZ LIMITED....PLAINTIFF

VS.

PRIDE INN LIMITED.....DEFENDANT

RULING

1. Pride Inn Limited (Pride Inn) seeks a stay of execution of the Judgment of this Court delivered on 15th February 2019 pending the hearing and determination of Civil Appeal No. 167 of 2019 Pride Inn Ltd –vs- Thatchmanz limited.

2. The application is brought under the auspices of Order 42 Rule 6 of the Civil Procedure Rules which reads:-

[Order 42 rule 6] (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (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; 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

3. The principles upon which an application for stay of execution can be granted by the High Court of its own judgment are well known:-

a. That the Applicant is likely to suffer substantial loss unless stay is granted.

b. The Application is brought without unreasonable delay.

c. The Applicant is able to furnish such security as the Court orders for performance of the decree that may ultimately bind him.

All these three must be satisfied. None is less worthy than the other.

4. The Judgment herein was delivered on 15th February 2019 and at that time a 14 day stay granted to enable Pride Inn file a formal application. That application was filed on 9th May 2019, about three months later. The reasons why the application was not brought more promptly is not proffered in the supporting affidavit of Mr. Nicholas Ochieng. But from the affidavit, it can be seen that the Appeal was lodged on 26th April, 2019, just about 14 days before the application. Although the application could have been brought more promptly, I do not think the delay to be unduly long. The Court will excuse it.

5. In his affidavit Mr. Ochieng depones;

“ . . . I wish to state that neither the Plaintiff’s physical address nor its financial means is known to the Defendant”.

To this Mr. Edward Ahn a director of Thatchmanz responds:-

“The Plaintiff will be happy to give the Defendant its physical address and no reason had been shown for the need of the financial records of the Plaintiff”.

6. The law is clear that once an Applicant reasonably contends that it fears that the Respondent may be unable to pay back a decretal amount paid out, the evidential burden shifts to the Respondent to demonstrate its financial ability (See for example the Court of Appeal decision in Nai 15 of 2002 ABN Amro Bank N.V. -Vs- Le Monde Foods Ltd. where the court found that:-

“The burden of proof shifts to the respondent to show he would be in a position to refund the decretal sum paid to him if the pending appeal were to succeed”.

7. In the grounds in support of the Motion, Pride Inn asserts that because it is not aware of the financial means of the Defendant, then it will be impossible to recover any decretal sums paid out. In the affidavit in reply, the Respondent makes no effort to prove its financial ability and I have to hold that the fear held by the Applicant of substantial loss if stay is not granted is not without a basis.

8. This Court grants the stay sought but on condition that the entire decretal sum is deposited in an interest earning account to be opened in the joint names of the advocates on record herein. The deposit to be made within 45 days herein. Costs of the Notice of Motion of 9th May 2019 shall be in the cause.

Dated, Signed and Delivered in Court at Nairobi this 14th Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

Renee for Okimaru for Plaintiff

No appearance for Defendant

Court Assistant: Nixon