



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.4 OF 2015

AFRITECH GENERAL SUPPLIES LIMITED.....PLAINTIFF

VERSUS

INSTRUMENTATION ENGINEERING E.A. LIMITED.....DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated **26th January 2019**, by which **INSTRUMENTATION ENGINEERING E.A LIMITED** (the Defendant/ Applicant) seeks the following Orders:-

“1. SPENT

2. SPENT

3. THAT a temporary stay of the Ruling delivered on 18th January 2019 and decree dated 22nd December 2017 be issued pending the hearing and determination of the appeal in this matter.

(2) The application which was premised upon **Article 159, Constitution of Kenya, 2010, Section 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules** was supported by the Affidavit of even date sworn by **NOEL JOHNSON**.

(3) The Plaintiff/Respondent **AFRITECH GENERAL SUPPLIES LIMITED** filed Grounds of Opposition dated **25th April 2019**. The application was canvassed by way of written submissions. The Plaintiff/Respondent filed their written submissions on **29th July 2019**. The Defendant/Applicant failed to file any written submissions despite having been given several opportunities to do so.

BACKGROUND

(4) Vide a judgment delivered on **22nd January 2017** **Hon Lady Justice Olga Sewe** entered judgment in favour of the Plaintiff against the Defendant in the amount of **Kshs.9,900,000** plus interest at 18% per annum from **9th May 2011**, until payment in full. Additionally the Court gave judgment in the Plaintiff's favour for **Kshs.16,500/=** in bank charges for the dishonoured cheques plus interest at 18% per annum from **26th November 2014** until payment in full.

(5) Consequent upon this judgment Warrants of Attachment and sale of the Defendants moveable assets were issued on **7th August 2018** for the sum of **Kshs.17,962,400.41**. The Defendant then filed the Notice of Motion dated **13th August 2018** seeking a stay of execution of the decree. In a ruling delivered on **18th January 2019**, this Court dismissed the application for stay. The Defendant/Applicant has now filed the present application seeking a stay pending appeal.

ANALYSIS AND DETERMINATION

(6) I have considered the present application the Affidavit in support as well as the Respondent's submissions. **Order 42 Rule 6 of the Civil Procedure Rules** allows a party to apply to the Court for a stay pending appeal. **Order 42 Rule 6(2)** provides:-

”(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: 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.

(7) The Applicant herein has sought for a stay of execution pending appeal. Firstly, there has been no demonstration that any appeal or even a Notice of Appeal has been filed in this matter so as to warrant a grant of the orders being sought.

(8) Secondly, although the application was filed timeously the Applicant must demonstrate to the Court that it stands to suffer substantial loss if the Orders sought are not granted. In **KENYA SHELL LIMITED –VS- KIBIRU & ANOTHER [1986] KLR**, the Court held as follows:-

“....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money [own emphasis]

(9) The Applicant herein has not demonstrated to the court what loss if any he stands to suffer if the stay is not granted.

(10) It is important to note the fact that the Applicant has filed applications in this matter, which have delayed or obstructed execution of the decree in question. The Court even allowed parties time to reach an agreement on a payment proposal but this fell through as the installments being offered by the Applicant were too low to clear the outstanding amount due within a reasonable time.

(11) The Respondent obtained judgment way back in **December 2017**. To date the Respondent has been unable to enjoy the fruits of that judgment. I find no merit in the present application. The same is hereby dismissed with costs to the Plaintiff/ Respondent.

Dated in Nairobi this 14th day of May 2020.

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Justice Maureen A. Odero