



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 13 OF 2019

NYALI SUN AFRICA BEACH HOTEL & SPA LIMITED....APPELLANT/APPLICANT

- VERSUS -

IDEAL CERAMICS LIMITED.....1ST RESPONDENT

NYALI INTERNATIONAL BEACH HOTEL & SPA (NOW TRADING AS NYALI SUN

AFRICA BEACH HOTEL & SPA.....2ND RESPONDENT

RULING

1. The Appellant/Applicant's Notice of Motion application dated 21st January, 2019 and filed on 25th January, 2019 was brought under the provisions of Order 22 Rules 51 & 52, Order 22 Rules 22 (i), Order 51 Rule 4 of the Civil Procedure Rules, 2010, Section 3A of Civil Procedure Act and Section 8 of the Judicature Act, Cap 8. It sought the following orders:-

a) Spent

b) That this honourable court be also pleased to grant a stay of execution of the Orders of His Honour, the Hon. C.N Ndegwa, Senior Principal Magistrate delivered on the 16th day of January 2019, in the Chief Magistrates Court of Kenya, at Mombasa in civil suit No.42 of 2016 pending inter-parties hearing and determination of the Appellant/Applicant's Application herein

c) That this Honourable court be further pleased to grant a stay of proceedings in the chief Magistrates Court of Kenya, at Mombasa in Civil Suit No. 42 of 2016 pending the inter-parties hearing and determination of the Appellant/Applicant's Notice of Motion application herein.

d) That this Honourable Court be pleased to grant a stay of execution of the Order of His Honour, the Honourable C.N. Ndegwa, Senior Principal Magistrate delivered on the 16th day of January, 2019, in the Chief Magistrates Court of Kenya, at Mombasa in Civil Suit No. 42 of 2016 pending hearing and determination of the Appellant/Applicant's proposed Appeal.

e) That this Honourable court be also pleased to grant a stay of proceedings in the chief Magistrates Court of Kenya, at Mombasa in civil suit No. 42 of 2016 pending hearing and determination of the Appellant/Applicant's proposed Appeal

f) That this Honourable Court be further please to set aside the Ruling, findings and all consequent Orders of His Honour, C.N Ndegwa, Senior Principal Magistrate delivered on the 16th day of January, 2019, in the Chief Magistrates Court of Kenya, at Mombasa in civil suit No. 42 of 2016.

g) That this Honourable Court be pleased to grant such further or other Orders as it may deem just and expedient.

h) That the costs of and incidental to this application be provided for and/or that the same be in the cause.

2. In the main, the application is premised upon the twenty three grounds as denoted on the body of the notice of motion and an affidavit in support dated 21st January, 2019 and further affidavit dated 14th June 2019 both sworn by the said **Sanjay Kishokumar Mashru**, the Appellant's director.

3. The application is opposed by the 1st Respondent vide the replying affidavit sworn on the 1st February, 2019 by **Peter Omwenga**, the 1st Respondent's advocate. It is deponed therein that the allegations that the Appellant herein is a different and independent entity from the one sued in the lower court is misleading. The 1st Respondent holds the position that the Appellant indeed changed its name and seeks this court to dismiss the application or order the Appellant to deposit the decretal sum of Kshs.6,102,157.94/= in a joint account pending the determination of the appeal.

Summary of facts

4. The matter involves an application filed by the applicant seeking orders for stay of execution and injunction by this court on the judgment of the lower court in CMCC No.42 of 2016 between *Ideal Ceramics Ltd. and Nyali International Beach Hotel & SPA trading as Nyali Sun Africa Beach Hotel & SPA*. The plaintiff in the lower court suit (the Respondent herein) obtained judgment and sought to execute it against the Appellant/Applicant. The Appellant/Applicant then filed objection proceedings in protest of execution of the decree obtained against the *Nyali International Beach Hotel & SPA*. The contention by the Appellant/Applicant was that it is separate and distinct entity from the enterprise that had been sued in the lower court suit whilst the Respondent contended that the Appellant herein was the same entity as the one sued in the lower court only that it had changed its name. It produced a letter from the former advocate whose contents confirmed that *Nyali International Beach Hotel & SPA* had changed its name to *Nyali Sun Africa Beach Hotel & SPA*.

5. The Appellant/Applicant however denied having instructing the said advocate. In its ruling the lower court found in favour of the Respondent by finding that *Nyali International Beach Hotel & SPA trading as Nyali Sun Africa Beach Hotel & SPA* was one and the same entity as the Appellant/Applicant herein. This appeal is premised on basis of the said ruling.

6. The application was canvassed by way of written submissions vide directions issued on 28.1.2019. Appellant/Applicant filed its submissions on the 19th January, 2019 whilst the 1st Respondent filed its submission on 7th June, 2019.

Submissions

7. In its submission, the Appellant/Applicant raised thirteen issues which it deemed fit for this court to determine. It is submitted therein that the parties sued in the lower court are non-existent entities and the Respondent cannot purport to use the phrase "*now trading as*" to implicate the Appellant/Applicant since no certificate showing change of name was furnished to court in accordance to the provisions of Sections 65 and 66 of the Companies Act, 2015. The Appellant/Applicant further submits that it will suffer irreparable loss in terms of damages if the stay orders are not granted.

8. The Respondent on the other hand, submits that the Appellant/Applicant is only blowing hot and cold air and should not be indulged by this court. The Respondent accuses the Appellant/Applicant of being dishonest in stating in its affidavit that its date of incorporation was 28th August, 2018 whilst the certificate of incorporation shows that it was incorporated on the 28th August, 2017. The Respondent further submits that the letter written by the alleged erstwhile advocate stating that *Nyali International Beach Hotel & SPA* had changed its name to *Nyali Sun Africa Beach Hotel & SPA* was conclusive evidence that the Applicant was the same entity as sued in the lower court. It is the Respondent's contentions that bias on the trial court has not been proved as alleged. Finally the Respondent submits that the Appellant should comply with the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 by furnishing security by depositing the decretal sum in a joint account.

Analysis and Determination.

9. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** empowers this court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for by the Rule 6(2) as follows:

"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."

10. The Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417**, gave guidance on how a court should exercise discretion and held that:

1. "The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

11. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

It is thus incumbent upon the Applicant to demonstrate meeting the threshold of the above three conditions.

12. On expeditious lodging of the application for stay, the court notes that there was no delay and in any event the Respondent does not contest the same element.

13. On likelihood of Appellant/Applicant being inflicted a substantial loss in the event the appeal succeeds after payment of the decretal amount, the Applicant has demonstrated that it is a different entity from the entity which judgment was obtained against. The Applicant averred that if stay is not granted it will be made to pay debts it is not liable to. According to the defendant the lower court misapprehended in law by relying on the phrase “trading as” in finding the Appellant/Applicant liable. As indicated above the Respondents dispute that the Applicant is different entity from the entity which judgment was obtained against and holds the position that the Applicant only changed its name.

14. In my opinion, the substrum of the appeal is whether the Appellant is the right party liable to pay the decretal sum. The question then becomes, if stay is not granted, would there be substantial loss occasioned to the Appellant/Applicant?

15. Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum. – See the decision of Musinga J (as he then was) in the case of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001.**

16. In the case of **Bungoma HC Miscellaneous Application No. 42 of 2011 James Wangalwa and another Vs. Agnes Naliaka Cheseto** the court further discussed what substantial loss entails:

“The application must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail.”

17. Since parties herein contest who is liable, this court finds the explanation by Appellant/Applicant that it would suffer loss for being made to pay debts it is otherwise not liable to, if stay is not granted.

In the case of **Absalom Doya vs Tarbo Transporters (2013) eKLR** the court observed that;

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefit under the decree. The court in balancing the 2 competing rights focuses on their reconciliation which is not a question of discrimination.”

18. The applicant has discharged his initial legal burden of proof and shifts the evidential burden to the respondent to prove that in the event the appeal succeeds they would be able to refund the decretal sum. The Respondent has however not submitted on its ability to pay the decretal sum should the appeal succeed.

Security of Performance

19. Thirdly, the court must take into consideration the provisions on security for the due performance of the decree as provided for under Order 42 Rule 6(c) of the Civil Procedure Rules, 2010. On this principle, the applicant avers that he is willing to abide by a reasonable direction as this court may deem fit to serve as security of cost. The rationale of this ground contemplates a situation where if the appeal succeeds, the applicant is eligible to enforce the decree without any further execution.

20. In my view, deposition of security is a show of good faith and serves fairly in the interest of both parties since the Respondent is not kept away from fruits of his judgment and the Applicant will stand not to lose the amount deposited if the Appeal succeeds. Since liability on part of the Applicant is yet to be ascertained and it is on this basis which forms the heart of appeal.

21. In the interest of justice and balancing the competing interests of the parties herein, this court orders that:

a) Stay of execution of the lower court’s decreebe and is hereby allowed pending the determination of the appeal on condition that the Appellant/Applicant do deposit half the decretal sum in a joint interest earning- account in the names of the advocates on record for the parties herein within 30 days from today.

b) Costs shall abide the main appeal.

Dated, signed and delivered at Nairobi on this 13th day of MAY,2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes