



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 95 OF 2020

KWACHA GROUP OF COMPANIES.....APPELLANT

-VERSUS-

PINDORIA HOLDINGS LIMITED.....RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 12th March, 2020 taken out by the appellant/applicant herein in which it sought for the substantive order for stay of execution of the judgment delivered on 31st January, 2020 in Milimani CMCC No. 8248 of 2016 pending the hearing and determination of the appeal and costs of the Motion.
2. The Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of **Nicholas Reuben Nyamai**.
3. In opposing the Motion, **Premji V Pindoria**; director of the respondent; put in a replying affidavit.
4. When the Motion came up for hearing, this court gave directions for the parties to dispose of it by filing written submissions.
5. In its submissions, the applicant argued that the appeal has high chances of success and that unless an order for stay of execution is granted, the applicant stands to suffer substantial loss since the decretal amount is hefty and the respondent is in the process of execution.
6. The applicant also argued that there has been no inordinate delay in bringing the Motion since there was in place a stay of execution of 30 days by the trial court and that there was a delay in obtaining copies of the typed proceedings, judgment and decree.
7. On its part, the respondent contended that the applicant has not demonstrated the manner in which it stands to suffer substantial loss if an order for stay of execution is not granted, neither has it indicated its willingness to provide security for the due performance of the decree.
8. I have taken into consideration the grounds set out in the body of the Motion, the facts deponed in the affidavits supporting and opposing it, and the contending submissions.
9. Before I consider the merits of the Motion, I wish to address an issue which was raised by the respondent regarding the deponent who swore the supporting affidavit to the Motion.
10. According to the respondent, Nicholas Reuben Nyamai deponed on matters not within his knowledge and which matters ought to have instead been stated by a director of the applicant.
11. In reply, the applicant argued that the aforesaid deponent was privy to the issues arising out of the dispute and is therefore competent to swear the affidavit in support of the Motion.
12. Upon considering the above, I note that it is not in dispute that the aforesaid deponent was at all material times the advocate acting for the applicant in the matter. Consequently, he had knowledge of the issues in dispute, both legal and factual. In that regard, I am of the view that there is nothing to disqualify him from attesting to the facts stated in the supporting affidavit and in any case.
13. Further to the foregoing and with particular reference to the applicant, the subject on whether or not an appeal has high chances of success is not a requirement for consideration in appeals to the High Court.

14. On the merits of the Motion, the guiding provision in considering an application seeking an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions in determining an application for stay.
15. The first condition is that the application must have been made without unreasonable delay. It is apparent that the Motion was filed slightly short of two (2) months from the date of judgment which was delivered on 31st January, 2020.
16. The applicant explained that part of the time was taken in obtaining the requisite documents for lodging the appeal. Contrary to the averments made by the respondent, I am of the view that while there has been some delay, the same is not inordinate/unreasonable.
17. Under the second condition, the applicant is required to show to this court's satisfaction the substantial loss it would suffer if the order for stay is denied. In his supporting affidavit, Nicholas Reuben Nyamai stated that the respondent has already extracted a decree and is in the process of executing the same, thereby putting the applicant at risk of suffering substantial loss and rendering the appeal nugatory.
18. The respondent through its deponent Premji V Pindoria stated that the applicant has neither stated nor shown the manner in which it stands to suffer substantial loss and that execution is a lawful process.
19. The aforementioned deponent went on to state that in any case, the respondent is in a financial position to refund the decretal sum should the same be paid and the appeal succeeds.
20. Upon considering the above, I note on the one hand that the applicant herein did not raise the issue to do with the respondent's inability to refund the decretal sum but simply argued that the sum is quite large.
21. On the other hand, while the respondent indicated its ability to refund the decretal sum, it did not demonstrate this by way of evidence. The respondent itself cited the case of **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** as referenced in the case of **Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui & another [2018] eKLR** where the court held that a respondent ought to bring proof of liquidity/resources to refund the decretal sum once the same is paid out to him or her.
22. It is a legal principle that execution is a lawful process since a party is entitled to the fruits of its judgment. Suffice it to say that given the substantial nature of the decretal sum (Kshs.15,547,950.18), I would be required to balance the interest of the parties.
23. The final condition is on the provision of security for the due performance of the decree or order. The applicant urged this court to grant an unconditional order for stay of execution while the respondent is of the view that the applicant should be made to deposit the entire decretal amount.
24. It is noteworthy that the provision of security for due performance of the decree is a mandatory requirement in **granting an order for stay of execution**.
25. In the end, the Motion dated 12th March, 2020 succeeds in terms of prayer (iii) and an order for stay of execution pending the hearing and determination of the appeal is granted on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the parties' advocates/firm of advocates within 45 days of this day, failing which the stay order shall lapse. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 3rd day of July, 2020.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent