REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 20 OF 2020

LAGOON DEVELOPMENT LIMITED..................................APPELLANT

VERSUS

PRIME ALUMINIUM CASEMENTS LIMITED.................RESPONDENT

(Being an appeal from the Ruling and Order of Hon. J. M. Kituku (SPM) in Kilifi Civil Suit No. 327 of 2019, delivered on 19th February 2020.)

CORAM: Hon. Justice R. Nyakundi

Ms. Dennis Kinaro Advocate for the Appellant

Ms. Kihanga Advocate for the Respondent

RULING ON THE STAY OF EXECUTION APPLICATION

The Respondent had been sub-contracted by the appellant to do manufacturing supply and installation of aluminum for the windows and doors at Madharini Golf Resort, Kilifi construction project. The respondent performed his obligations a fact admitted by the defendant however the bone of contention was the amount due and owing to the respondent. The respondent submitted that the amount owed was Kshs.13,197,548.24/= while the appellant submitted that it was Kshs.4,600,000.00/=.

The trial Court entered summary Judgment against the appellant for the sum of Kshs.12.697,548.24/= with interest at Court rates from the date of filing the suit until payment in full. The Court also awarded costs of the application and suit to the respondent.

The appellant herein **Lagoon Development Limited** being aggrieved by the Ruling and Order of **Hon. J. M. Kituku** Senior Principal Magistrate in **Kilifi Civil Suit No. 327 of 2019, Prime Aluminium Casements Limited v Lagoon Development Limited** delivered on 19th February 2020, filed a memorandum of appeal on the 17th of March 2020. The grounds of appeal are that:

> ***1). The Learned trial Magistrate erred in Law and in fact in failing to appreciate the principles governing the entering of summary Judgment and thereby arriving at an erroneous decision.***
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> ***2). The Learned trial Magistrate erred in Law and in fact in failing to find that the defence filed on the appellant's behalf had raised triable issues meriting a full trial of the suit.***
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> ***3). The Learned trial Magistrate erred in Law and in fact in entering the summary Judgment for the respondent for the amount that was contested whilst ignoring the amount admitted by the appellant.***
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> ***4). The Learned trial Magistrate erred in Law and fact in entering the summary Judgment for the respondent thus denying the appellant the opportunity to defend and present its case at file trial of the suit.***
>
> ***5). The Learned trial Magistrate erred in Law and in fact in completely ignoring and not considering the appellant's submissions on the objection to the respondent's suit as captured in paragraph 9 of the appellant's statement of defence and paragraph 10 of the appellant's replying affidavit as well as paragraph 13 of the appellants replying affidavit as well as paragraph 13 of the appellant's written submissions thereby arriving at an erroneous and unjust decision.***
>
> ***6). The Learned trial Magistrate erred in law and fact in failing to pronounce himself on the objection raised by the appellants to***

the respondent's suit thereby denying the appellant a fair hearing on that issue which has occasioned grave injustice and miscarriage of justice on the part of the appellant.

7). The Learned trial Magistrate erred in law and fact in failing to consider the appellant's cited authorities on the objection to the respondents suit thereby arriving at an erroneous and unjust decision.

At the appeal stage the appellant's filed a notice of motion dated 30th April 2020 seeking for stay of execution pending the hearing and determination of the Appeal.

This Court issued directions to both counsels to canvas the issue of stay interpartes by way of detailed submissions. This Ruling is based on that application for stay.

The Appellant's Submissions

Mr. Dennis Kinaro, Counsel for the appellant, in his written submissions dated 7th May 2020, submitted that Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules 2010 give the Court jurisdiction to entertain this application and further sets out the grounds for granting stay pending Appeal.

Counsel then proceeded to submit on the following three grounds:

(a). Substantial loss may result to the applicant unless the order of stay is made

Counsel submitted that the appellant had not been given the opportunity to defend the suit at the trial Court although their defence had raised triable issues. As such the appellant stands to suffer irreparable and substantial loss if the stay orders are not granted as he was condemned unheard the same being against the cardinal rule of natural justice. He submitted that natural justice demanded that a person should be given the opportunity to present evidence and to respond to arguments presented by the other party to the suit.

Further, Counsel submitted that although the appellant admitted the indebtness to the respondent amounting to Kshs.4,600,000.00/= the trial Court awarded Kshs.12,697,584.24/= to the respondent without giving the appellant the chance to defend itself as per Article 50 of the Constitution of Kenya. He submitted that the appellant's properties are at the risk of being attached and disposed off by the respondent unless the status quo is maintained pending the hearing and determination of the appeal and the same shall be rendered nugatory in the event that it succeeds. For this ground Counsel relied on the case of **James Wangalwa & Another v Agnes Naliaka Misc. Application No. 42 of 2011 {2012} eKLR.**

(b). The application has been made without unreasonable delay

For this ground, Counsel submitted that the Judgment of the trial Court was delivered on 19th of February 2020 and an order of stay of 30 days was given to the appellant. A memorandum of appeal was filed on the 17th of March 2020 hence the present application is brought without reasonable delay. Further, it was also his submission that on 15th March 2020 the NCAJ directed the downscaling of the Court operations and suspended the execution of Court Decrees until 22nd April 2020.

(c). Security for costs

Counsel submitted that the appellant was ready and willing to furnish security for costs in a joint account to be held by both the advocates of the parties herein in an interest earning account. Counsel relied on the case of **Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others {2012} eKLR, Charles Nyamwega v Asha Njeri Kimata & Another {2017} and Superior Homes (Kenya) Limited v Musango Kithome {2018} eKLR.**

The Respondent's Submissions

The respondent through their advocates **Ms. Kihanga**, in their written submissions dated the 12th May 2020 opposed the applicant's/appellant's Appeal in entirety and the resultant application dated 30th April 2020 and the supporting admissions. He proceeded to set out the following reasons for this submissions:

1. Failure of the applicant/appellant to lodge and/or serve the respondent with the requisite notice of appeal

The respondent submitted that the appellant had failed to lodge and or serve the respondent with the requisite notice of appeal as stipulated by Order 42 Rule 15 of the Civil Procedure Rules. It was their submissions that it is the Notice of Appeal which confers upon the Court the jurisdiction to grant an order of stay. For this counsel relied on the case of **Alba Petroleum Limited v Total Marketing Kenya Limited {2019} eKLR.**

2. Failure of the appellant to meet the threshold of stay of execution pending appeal

The respondents submitted that the appellant had failed to meet the threshold as required by Law to warrant grant of order of stay of execution and that for an application brought under Order 46 Rule 6 of the Civil Procedure Rules the Court is bound to consider whether the applicant seeking the stay of execution meets the threshold for granting such orders.

(a). Failure to particularize the substantial loss or harm

The respondents submitted that the appellants had failed to provide any evidence of substantial loss that would befall them should the orders as sought not be granted. They further submitted that they had only made mere assertions as to substantial loss without furnishing the Court with any empirical evidence. For this submission they relied on the case of **Samvir Trustee Limited v Guardian Bank Limited (Milimani) HCCC 795 of 1997**. Finally, they asked the Court to note that the Board Resolution annexed to the application and marked **"CWD1"** made no mention of any loss or harm likely to be suffered by the applicants.

(b). Deposit of Security

The respondent's submitted that the applicant had not furnished any security before the Court or demonstrated any willingness to furnish the decretal amount but had merely made assertions of their willingness to do so. They submitted that this failure to provide sufficient security violates the mandatory provisions of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules and the applicant is therefore not entitled to the orders as sought in the application herein.

(c). The non-existence of special circumstances afflicting the appellant to warrant stay of execution

It was the respondent's submission that the applicant had failed to establish any special circumstances warranting stay of execution as the applicant had not furnished the Court with any material evidence justifying the impeding of the respondent's lawful entitlement of the rights flowing from the subject Judgment. They submitted that the Court's discretion ought to be swayed by special circumstances established by the applicant to ensure that the respondent is not arbitrarily deprived of his right to enjoy the fruits of his Judgment. For this they relied on the cases of **Samvir Trustee Limited v Guardian Bank Limited (Milimani) HCCC 795 of 1997 and Hali & Another v Thornton & Turnip {1963} Ltd {1990} eKLR.**

(d). Non-existence of sufficient reasons to disturb the Judgment of the Lower Court

The respondent submitted that the applicant had not provided sufficient reasons to warrant the Court to disturb the Judgment of the Lower Court. Further it was their submission that the applicant does not deny that there were admissions as to the applicant's liability of outstanding debt owed to the respondent herein and that these admissions to liability formed that basis of the summary Judgment.

3. Applicants failure to extract decree and or order in the Judgment appealed from denies this honourable Court jurisdiction

It was the respondent's submission that the applicant had failed to annex the order and or decree forming the basis of the appeal which meant that the Court is not properly seized of this matter and therefore the applicant/appellants appeal is fatally and incurably defective. They relied on the cases of; **Floris Pierro & Another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) {2014} eKLR and Chege v Suleiman {1988} eKLR.**

4. Denial of respondent's right to enjoy the fruits of his Judgment.

The respondent submitted that they had suffered substantial economic loss on account of the nonpayment of the outstanding amount due to him by the applicant's/appellant's, a fact which had already been proved in the lower Court. They submitted that the applicant's suit is an abuse of the Court process and is aimed at impeding the respondent enjoyment of the fruits of his Judgment. They submitted that the delivery of the Judgment definitively established his rights to conclusion and therefore the burden of proving prejudice from the said Judgment lies with the applicant herein. They concluded that mere assertions of substantial loss by the applicant cannot suffice to deprive the respondent of his rights under the subject Judgment. For these submissions they relied on the case of **Samvir Trustee Limited v Guardian Bank Limited (Supra).**

5. Jurisdiction

It was the respondent's submission that this Court was not properly seized of this matter owing to the failure of the applicant to lodge and or file a Notice of Appeal as required by Law and the applicant's failure to extract and or annex the order and or decree forming the basis of the appeal. It was their submission that the import of non-extraction of the decree or order appealed from is that the Appeal and any subsequent application premised on the appeal is fatally and incurably defective. For this they relied on the cases of **Alba Petroleum Limited v Total Marketing Kenya Limited and Floris Pierro & Another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) {2014} eKLR.**

6. Inordinate delay

It was the respondent's submission that there was unexplained delay of over Seventy-Five (75) days and that the right of appeal is not statutory but also an equitable remedy to which must not aid indolent. As such they submitted that the appeal must collapse in-liminie.

As such he prayed that the application for stay of execution pending the hearing and determination of the appeal be dismissed with costs.

Issues for Determination

This is an application that invokes the discretionary powers of the Court which 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 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 orders as may ultimately be binding on him has been given by the applicant."

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."

It is therefore well established that the following two principles guide this Court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not capricious or frivolous. Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. As such the issues for determination in this case are as follows:

(a). Does the failure of the applicant to lodge and or serve the Notice of Appeal on the respondent expunges this Court's jurisdiction to hear this application?

(b). Is there an arguable ground for appeal?

(c). Was the appeal filed without unreasonable delay?

(d). Will the applicant suffer substantial loss if the stay of execution is not granted?

(e). Is the applicant willing to deposit the security of the decretal sum with the Court and how much should the amount be?

Deposition

Having carefully considered the application and submissions by Learned Counsel I now proceed to outline my deposition;

(a). Does the failure of the applicant to lodge and to serve the Notice of Appeal on the respondent expunges this Court's jurisdiction to hear this application?

It is the respondent's contention that the applicant failed to file and or serve them with the requisite Notice of Appeal. I agree with this assertion as after having perused the applicant's Record of Appeal I see that there is no Notice of Appeal filed. Learned counsel for the applicant in his submissions did not even endeavor to explain why the Notice of Appeal was not lodged and served on the respondent in this suit. Consequently, I will put my mind towards the issue of whether this single act of not filling the Notice of appeal renders this application moot and an exercise in futility. It is now Trite Law that the Notice of Appeal gives jurisdiction to an appellate Court to hear and determine the Appeal. The Courts have pronounced themselves on this matter several times. As such I shall turn my mind to the issue of whether this appeal will fail entirely based on the fact that the applicant did not lodge nor serve the Notice of Appeal. The overriding principle as captured in Section 1A of the Civil Procedure Rules states that:

"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its power under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding

objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."

Section 1B of the Civil Procedure Act imposes a duty on the Court to further the overriding objective in handling of disputes.

However, in the case of **Ramji Davji Vekaria v Joseph Oyula, {2011} eKLR,** the Court stated that the overriding principle can be invoked only in well deserving cases, and each case must be considered on its own peculiar circumstances. Further in the case of **Murandula Suresh Kantaria v Suresh Nanalal Kantaria, Civil Appeal No. 277 of 2005 (unreported),** the Court stated that:

> ***"the overriding principle is not a panacea for all ills and in every situation, and that proper basis must be laid before the Court can invoke the same in favour of a party. In exercising the power to give effect to the principle, the Court must do so judicially and with proper and explicable foundation."***

The same was reiterated by the Court of Appeal in the case of Daniel **Nkirimpa Monirei v Sayialel Ole Koilel & 4 others {2016} eklr** where it stated categorically that:

> ***"We may add here that the principle must be used sparingly and definitely not be called in to aid a party who is seeking to avoid what he/she may find to be tedious compliance with laid down procedures, or to subvert due process."***

The aim of the overriding objective is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. **(See the case of Kariuki Network Limited & Another v Daly & Figgis advocates Civil Application No. Nai 293 of 2009).** The Court's inherent jurisdiction under Section 3A of the Civil Procedure Act which provides that:

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

As such I invoke this Court's inherent jurisdiction and I find that this case is deserving for the invocation of the overriding objective principle and as such the failure of the appellant to file and serve the Notice of Appeal is a mere oversight that does not render the application or the appeal wholly defective. Thus, I order that the appellant do file and serve the respondent with the Notice of Appeal within fourteen (14) days.

The applicant has set out about seven (7) grounds of appeal in the memorandum of appeal. For the intended appeal to be termed as arguable,

> ***"All that is needed in Law is that there be even one arguable point and that will suffice.*** **(Commissioner of Customs v Anil Doshi, {2017} eKLR)**

The appellant's main ground of appeal is based on the fact that the Honourable Learned Magistrate delivered a summary Judgment of Kshs.12,697,548.24/= without allowing the matter to proceed to a full trial. Considering the facts of the case, I consider the complaints to be justifiable grounds of appeal, and as such, I am satisfied that the intended appeal is arguable. I am satisfied that the applicant has an arguable and not a frivolous appeal however it is essential to note that an arguable appeal does not necessarily mean an appeal that will or must succeed.

(c). Was the appeal filed without unreasonable delay?

The question of unreasonable delay was dealt with in the case of **Jaber Mohsen Ali & Another v Priscillah Boit & Another E & L No. 200 of 2012 {2014} eKLR** where the Court stated that:

> ***"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after Judgment could be unreasonable delay depending on the Judgment of the Court and any order given thereafter."***

Further in the case of **Trattoria Ltd –vs- Joaminah Wanjiku Maina NBI Misc. Appl. No. 431 of 2013 eKLR.** It is stated that:-

> ***"It is now well settled that what amounts to unreasonable delay for purposes of Order 42 Rule 6 Civil Procedure Rules is dependent on the peculiar circumstances of each case."***

However, the Court takes judicial notice of the Corona Virus Pandemic which has disrupted daily life, consequent and due to the Pandemic the NCAJ on the 15th March 2020 directed the downscaling of the Court operations and suspended the execution of Court decrees until 22nd April 2020. The Judgment of the trial Court in this matter was delivered on the 19th February 2020 and an order of stay for 30 days was given to the appellant. A memorandum of appeal was then filed on the 17th March 2020. Consequently, I find that the present application is brought without unreasonable delay.

(d). Will the applicant suffer substantial loss if the stay of execution is not granted?

What constitutes substantial loss was discussed in the case of **James Wangalwa & Another v Agnes Naliaka Misc. Application No. 42 of 2011 {2012} eKLR** where the Court stated that:

"No doubt, in Law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant 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, a question that was aptly discussed in the case of Silverstein v Chesoni {2002} 1KLR 867, and also in the case of Mukuma vs Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5 (2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

"……the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

In view of the foregoing and in the circumstances of this present case where the decretal sum awarded by the trial Court of Kshs.12,697,584.24/= is a substantial amount, I am satisfied that the appellant will suffer substantial loss if the stay of execution is not granted.

(e). Is the applicant willing to deposit the security of the decretal sum with the Court and how much should the amount be?

The applicant has indicated that it is willing to deposit the decretal sum with the Court pending the hearing and determination of the appeal. I will therefore grant this application with orders that the appellant does deposit half of the decretal sum in joint interest earning account to be opened in the names of the advocates as suggested in his submissions. The said amount to be deposited within thirty (30) days from today, failing which the order for stay shall automatically lapse.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF JULY 2020

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R. NYAKUNDI

JUDGE

This Judgment has been delivered in absence of the parties pursuant to Article 48 and 159 of the Constitution and practice directions in Gazette Notice by the Chief Justice No. 3137 dated 17.4.2020. ***(Please refer to the consent dated 30th June 2020)***