



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 115 OF 2013

SOMOCHEM KENYA LIMITED.....PLAINTIFF

VERSUS

SHRI GANESH MANUFACTURERS LTD.....DEFENDANT

SANTOSH JHA.....APPLICANT

RULING

1. Before this Court for determination is the Notice of Motion dated **5th December 2019** by which the Applicant **SANTOSHA JHA** sought for Orders as follows:-

“1. SPENT

2. THAT there be a stay of execution of the decree herein pending the hearing and determination of the intended appeal.

3. SPENT

4. THAT the costs of this application be provided for.”

2. The application was premised upon **Order 42 Rule 6(1), Order 51 Rule 1 of the Civil Procedure Rules, Section 31 and 63 of the Civil Procedure Act** and all enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.

3. **SOMOCHEM KENYA LIMITED** the Plaintiff/Decree Holder opposed the application through Grounds of Opposition dated **17th January 2020**. The application was canvassed by way of written submissions. The Applicant filed his written submissions on **28th February 2020** whilst the Plaintiff/Decree Holder filed its submissions on **24th February 2020**.

BACKGROUND

4. This application arises from the Ruling delivered by this Court on **25th November 2019** in which the Court dismissed the Notice of Motion dated **18th March 2017**, seeking to set aside the court’s orders directing that the corporate veil for the Defendant Company **SHRI GANESH MANUFACTURERS LTD** be lifted. The Applicant has filed an appeal against that Ruling and seeks a stay pending the hearing and determination of said appeal.

5. On their part the Decree-Holders oppose the application and submit that the same lacks merit and is merely aimed at depriving the Plaintiff/Decree Holder of the fruits of his judgment.

ANALYSIS AND DETERMINATION

6. I have considered the written submissions filed by both parties. **Order 42 Rule 6(1)** grants to the Court the discretion to grant a stay of execution of a decree upon application. **Order 42 Rule 6(2)** provides for the issues which the Court ought to consider before making such a stay order as follows:-

“(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 burdening on him has been given by the applicant.”

7. The Plaintiffs have submitted that this application was not filed in a timeous manner. However, I would not agree with this submission. The Ruling in question was delivered on **25th November 2019**. The present application was filed on **5th December 2019**, barely ten (10) days later. In my view ten (10) days cannot be said to amount to inordinate delay. I therefore find that this application was brought in a timeous manner.

8. The Applicant has submitted that he stands to suffer substantial loss if the stay prayed for is not granted as the intended appeal may be rendered nugatory. In the case of **ANTONE NDIAYE –VS- AFRICAN VIRTUAL UNIVERSITY [2015] eKLR**, “Substantial loss” was defined in the following terms:-

“any loss great or small that is real worth of value as distinguished from loss without value or loss that is merely nominal...”

9. The Decree Holder counters this by submitting that substantial loss has not been demonstrated. They argue that the Respondent is not a company of straw and would be in a position to refund any monies paid to it in the event the appeal is successful. However aside from the financial loss, the Applicant risks arrest and committal to civil jail. This would certainly amount to substantial loss being loss of liberty. In the premises I find that the limb of substantial loss has been demonstrated.

10. The court is mindful of the fact that a party is entitled to the fruit of his/her judgment. However, the Applicant has averred that his appeal has already been filed and is only awaiting directions from the Court of Appeal. In the circumstances, I find that the Decree Holder is not likely to suffer any prejudice if a stay is granted.

11. The Applicant has not offered any security for the performance of the decree submitting that he is so impecunious and is not in a position to offer any security. However in the case of **EQUITY BANK LTD –VS- THIGA ADAMS COMPANY LTD [2015] eKLR**, it was held as follows:-

“...of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...”

12. The general principle is that a party seeking a stay ought to offer security. The amount awarded to the Plaintiff in the judgment dated **26th April 2016** was **Kshs.6,856,791.12** together with interest at court rates and costs. I find that it is only fair that the Applicant deposit security for the performance of the decree in question.

13. Finally, I do grant a stay in terms of prayer (2) of this Notice of Motion **SUBJECT** to the Applicant depositing security in the amount of **Kshs.2.0 Million (Two Million only)**. This amount to be deposited into a joint interest earning account opened in the name of both Advocates **within thirty 30 days** of the date of this Ruling. Failure to comply means that the stay will lapse automatically with no further reference to the Applicant. Costs of this application to be met by the Applicant.

Dated in Nairobi this 2nd day of October, 2020

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Justice Maureen A. Odera