REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 283 OF 2018

STANDARD GROUP LIMITED.....APPEALLANT

VERSUS

1. MILCAH MWENDE KIMAK-HAUSER

2. KENNEDY WAMBUA HAUSER...RESPONDENTS

RULING

1. Having lodged its appeal on the 27/12/2018, the appellant filed a Notice of Motion dated 11/01/2019 seeking orders that:-

i. "The application herein be certified as urgent and be heard ex parte with regard to prayer 1 and 2 hereof.

ii. There be a temporary stay of execution of the Judgment/decree delivered herein on 07/12/2018 and the consequential decree pending the hearing and determination of this application inter-partes on a date to be set by the court.

iii. There be stay of execution of the Judgment/decree delivered on 07/12/2018 pending the hearing and determination of the appeal High Court Civil Appeal No. 283 of 2018 Standard Group Limited & Another vs Milcah Mwende Kimako-Hauser.

iv. The court be pleased to make such other or further orders as may be just and expedient in the circumstances.

v. The costs of this application abide in the appeal."

2. The grounds of the application are that being faced with a judgment in the sum of Kshs.3.9 million in favour of foreign nationals, it has appealed and is prepared to deposit the entire sum in an interest bearing account as security for the due performance of the decree because it fears if the payment is made to the decree holders, the recovery, if appeal succeeds, will be difficult for it.

3. These facts were reiterated in the Affidavit in support sworn by Caroline Cheruiyot who says that being dissatisfied with the decision, this appeal has been preferred in time and underscore the fact that the decree holders being foreigners, the decretal sum herein need to be secured to sustain the substratum of the appeal.

4. In opposition to the Application, the Respondent filed grounds of opposition whose gist was that the application was incompetent, bad in law and lacking merits as the Affidavit in support thereof was sworn without the appellant's board's Resolution hence should be expunged from the record and lastly that this being a monetary decree there was no need to grant stay of execution pending appeal.

5. Based on the papers filed counsel attended court and argued the same by offering oral submission. For the appellant, the submission were offered to the effect that there having been filed an appeal in time and an application for stay without unduly delay and regard being had to the fact that the Respondents are foreigners with no known assets in Kenya it was important to grant stay provided the decretal sum be secured because once payment was made it would be difficult to guarantee a refund if the appeal succeeds.

7. On the attack that there was no authority by a board resolution for the deponent to swear the Affidavit in support, counsel cited to court the decision in ***Korir vs Litein Tea Factory Ltd [2016]eKLR*** for the proposition that the civil procedure rules do not make it mandatory that authority to swear an affidavit be by a company resolution.

8. For the Respondent, submissions were offered to the effect that the first court of call is the trial court and that to the appellate court, a party comes only when dissatisfied with an order given on stay by the trial court and only for purposes of having it set aside.

9. On the competence of the Affidavit in support, the counsel pointed out that the assertion in the Affidavit of Carolyne Cheruiyot that she had the authority to swear the Affidavit was made bare without evidence to court of such authority. The decision in **Affordable *Homes Limited vs Handerson & Others* [2004] eKLR** was then relied upon for the proposition that legal proceeding commenced without an authority given pursuant to a board's resolution stands to be struck out. Similarly the decision in ***East African Portland Cement Ltd vs Capital markets Authority & Other*** [2014] ***eKLR*** was cited for the same proposition of the law.

10. Counsel then conceded that even though the decision cited concerned filling of suits unlike here where the contention was only on the Affidavit, authority for such the Affidavit was still necessary. For those reasons counsel prayed that the Affidavit be struck out and then application itself struck with costs made payable by the person who secured the Affidavit to be sworn without authority.

11. Having reviewed the materials placed before court it is of note that the Respondent does not challenge the merits of the Application but rather dwelt a great deal on the competence of the same. Accordingly, I discern two issues to present themselves for determination by the court:-

> **i. Is the application for stay competent or incompetent on account of Order 42 Rule 6(1) and for lack of a board resolution granting authority to Caroline Cheruiyot to swear the Affidavit in support?**
>
> **ii. If the above is answered in the positive, has the applicant met the threshold of grant of stay pending appeal?**

Competence of the Application

13. While Order 42 Rule 6(1) may be difficult to easily comprehend on account of verbosity and lack of clarity the Rule provide that both trial court and the appellate court have jurisdiction to order stay pending appeal but the application ought to be first presented before the trial court and only when a party gets dissatisfied by the decision of the trial court should such party approach the appellate court to have the order set aside.

14. That is, however, a rule of procedure to aid and not throttle the administration of justice. To this court, that rule cannot be divorced from the constitutional dictate that justice be administered fairly and proportionately, without regard to undue technicalities and without unnecessary escalation of costs. Put in the context of this matter if I decline the application and struck it out for being incompetent nothing will stand on the way of the judgment- debtor from merely reprinting the application with the case title at trial and presenting the same before the trial court. In that event I shall have merely doubled the costs of the application and escalated the aggregate costs of the litigation between the parties. Rules of procedure ought not to be applied stringently so as to overshadow the purpose and overriding objectives of the court. The prevailing jurisprudence in this country is that *the administration of justice requires that the substance of all disputes should be investigated and decided on their merit and that blunders, errors, inadvertence or even negligence should not necessarily deter a litigant from the pursuits of his right*[1].

15. I fear that if I were to so proceed, I shall have failed in my duty as a court under article 159 and the overriding objectives of the court. I hesitate to walk that path and hold that Order 42 Rule 6(1) does not deprive this court of its jurisdiction to entertain an application for stay even before one is prescribed before the trial court.

16. How about the need for authority to swear the Affidavit in support of the Application? That the Appellant/Applicant is a body corporate which needs to have its decisions made by the board and minuted as its resolutions is not in doubt. However, the Respondent has cited two decisions of the High Court which were with regard to filing of suit. Such is governed by its provisions of Order 4 Rule 1(4) Civil Procedure Act and concern verifying Affidavits at the time of filling of suits and not just Affidavits in support of interlocutory Applications. In my view Order 4 deals with plaints and has no application at all in the matter before me being an appeal. If I was wrong on that point I would still rely on the decision by H Ongudi J in **Joseph Kipngetich Korir's case** (supra) when the judge said:-

> **"It has not been disputed that the deponent (Geoffrey Kiplangat Chepkwony) is a Manager of the 1st Defendant and duly appointed to the said position by the 2nd defendant. In the case of Rongai Workshop & Transport Ltd (*supra*) Emukule, J while referring to Order 9 Rule 2 (c) of the Civil Procedure Rules and Section 2 of the Companies Act (Cap 486 Law of Kenya) found an officer of the Company to include a Director, Manager or Secretary. There is no suggestion made to the effect that the said Geoffrey K. Chepkwony is not a Manager of the 1st defendant and by extension of the 2nd defendant which appointed him".**

17. In my view an Affidavit sworn and filed in an interlocutory application is governed by the provisions of Order 19 of the Rules and one can only be struck out on account of being scandalous, irrelevant or oppressive. Such has not been alleged or proved in this matter. It therefore follows that the objection was improperly taken and cannot be upheld but must be rejected. I do reject it because even a suit filed without the authority being exhibited is capable of being ratified without necessary being struck out[2] because wanton striking out of pleadings does nothing in promoting ends of justice but rather defeats the purpose of a court system and its objectives.

Should stay be granted?

18. The purpose of grant of stay pending appeal is to ensure that parties stay with some certainty in achieving their pursuits in court by way of an appeal by sustenance of the entire purpose of that litigation. That is what the courts have expressed as the need to prevent the outcome of the appeal if successful being render nugatory or merely academic. It is intended to preserve and sustain the right to challenge a decision one feels aggrieved with[3].

19. Whether the substratum of an appeal may be lost must be discerned from the facts disclosed to court by parties. For example, in a monetary decree if a refund would be impossible on account of the decree-holder being a man of the straw impecunious or just unreachable for being outside the jurisdiction of the court, that may be a perfect case for the judgment debtor to fear inability to recoup sums paid on a

decree should the appellate court upset the decree.

20. Here it has been deponed on oath, without rebuttal, that the Respondents/decree-holders are foreign nationals who if paid the decretal sum and the appeal succeeds it will be difficult to enforce a refund. I do find that on the fact of the respondents being foreigners, it will not be easy or convenient to procure a refund in the even the appeal succeeds.

21. In that scenario, it is only fair and just to secure both sides by availing the decretal sum at the disposal of both so that on conclusion of the appeal the party who shall be adjudged to be entitled to the sum get it with ease. For that reason, I do grant stay pending the hearing and determination of the appeal but on terms that the Appellant/Judgment-debtor deposits the entire decretal sum into an interest bearing account in joint names of the advocate from the parties within 30 days from the date of the ruling. In default the Respondent will be at liberty to execute the decree.

22. I direct that the costs of this application be costs in the appeal.

23. It is so ordered.

Dated and delivered at **Mombasa** this **8th** day of **March 2019**.

P.J.O. OTIENO

JUDGE

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[1] *Trust Bank Ltd V Amalo Co. Ltd (2009) Klr 63*

[2] See Mavuno Industries Ltd vs Keroche Industries Ltd [2012] eKLR and Leo Investments Ltd vs Trident Insurance Co. Ltd [2014] eKLR

[3] See Bhutt vs Rent Restriction Tribunal [1982] KLR 417 and Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR