



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 604 OF 2016**

**SICHUAN HUASHI ENTERPRISES**

**CORPORATION EAST AFRICA (EA) LIMITED .....APPELLANT**

**VERSUS**

**STAUSLAUS LUMWACHI MATEYA.....1<sup>ST</sup> RESPONDENT**

**HUASHI CONSTRUCTION ENTERPRISES .....2<sup>ND</sup> RESPONDENT**

*Being an appeal from the ruling of Hon. G. Mmasi (Mrs.) Senior Principal Magistrate Milimani Commercial Courts, delivered on 1<sup>st</sup> September, 2016 in CMCC no. 7650 of 2007)*

**BETWEEN**

**STAUSLAUS LUMWACHI MATEYA.....PLAINTIFF**

**VERSUS**

**HUASHI CONSTRUCTION ENTERPRISES .....DEFENDANT**

**AND**

**SICHUAN HUASHI ENTERPRISES**

**CORPORATION EAST AFRICA (E.A.) LIMITED .....OBJECTOR**

**RULING**

This ruling seeks to determine the application dated 20<sup>th</sup> day of September, 2017. The same is brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 43 Rule 2 Order 42 Rule 6(1), 2(A) and 6, Order 22 Rule 22 (1) and Order 5 1 Rule 1 of the Civil Procedure Rules and it seeks the orders that; this Honourable Court be pleased to stay execution of the judgment and decree dated the 7<sup>th</sup> day of October, 2010, pending the hearing and determination of the objector’s appeal.

The application is premised on the grounds on the face of the same and it’s supported by the annexed affidavit sworn by Emmanuel Mueke, on 20<sup>th</sup> September, 2017, in which he depones that on 12<sup>th</sup> September, 2016, the trial court dismissed the objector’s (Applicant herein) application dated 30<sup>th</sup> May, 2016 but the court granted the Applicant a stay of execution for 30 days to enable it file an appeal against the said ruling which appeal it filed on the 30<sup>th</sup> September, 2016.

The Applicant further depones that the said appeal will be rendered nugatory if a stay of execution is not granted as the applicant shall be denied an opportunity to canvass its appeal and consequently driven from the seat of justice. It is also deponed that the applicant shall suffer substantial loss as it will be unable to recover against the 1<sup>st</sup> Respondent, who is a casual labourer and thus of little means, should the appeal eventually be successful. That there is no prejudice to be suffered by the first Respondent since the objector is capable of honouring such award as the court may ultimately hold as binding on it; that the application has been made and filed expeditiously, without undue delay and has merits and the Appellant ought to be given an opportunity to ventilate the same.

The 1<sup>st</sup> Respondent opposed the application vide his grounds of opposition filed on the 24<sup>th</sup> October, 2017 in which he avers that:-

- i. The application is misconceived, untenable and amounts to an abuse of the court process*
- ii. The decree issued by the subject court is not the subject of an appeal*
- iii. The appellant has no locus to apply to stay a judgment and decree to which he is not a party.*
- iv. The appellant has not disclosed any ground to merit the granting of the orders sought.*
- v. The application is bad in law and fatally defective.*
- vi. By granting the orders sought it would occasion great prejudice on the part of the 1<sup>st</sup> Respondent.*

Parties filed written submissions to the application which this court has duly considered. In its submissions, the Applicant contends that, the 1<sup>st</sup> Respondent's unlawful actions threaten to violate the Appellants' constitutional rights to property which has unfortunately been hampered by limitations in the process of challenging execution. That, the 1<sup>st</sup> Respondent should not be allowed to execute against a party it did not obtain judgment against. That as the Appellant is not a judgment debtor, it should not be ordered to deposit security as a condition for stay of execution.

The Applicant further submitted that it has an arguable appeal and that if a stay is not granted, its appeal will be rendered nugatory. It relied on the case of *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) (2015) eKLR* in which the court set out the two principles for granting a stay of execution being that ; firstly, the appeal must be arguable and secondly that the same would be rendered nugatory if stay is not granted.

In supporting the first principle, the applicant averred that its appeal is arguable for the reasons that, a court of competent jurisdiction had already determined interalia that the 2<sup>nd</sup> respondent and the Appellant are two separate entities, the 1<sup>st</sup> Respondent had failed to demonstrate any nexus between the appellant and the 2<sup>nd</sup> Respondent, each proclamation constitutes a fresh cause of action, the attachment was wrongful thus actionable trespass and that the objector having established its legal or equitable interest in the proclaimed goods, the burden of proof shifts to the Decree holder and the Auctioneer to prove that the goods belongs to the judgment Debtor (2<sup>nd</sup> Respondent) and not the Decree holder.

In respect to the 2<sup>nd</sup> principle, the Applicant argued that the 1<sup>st</sup> Respondent is a construction worker of limited means and if execution is allowed to proceed, the Appellant shall be unable to recover the money already paid

In closing, the Applicant submitted that it would be unconscionable for the court to require security by way of deposit of the decretal sum as the Applicant is separate and distinct from the 2<sup>nd</sup> Respondent, which fact it is submitted, was admitted by the 1<sup>st</sup> Respondent at ground 3 of his grounds of opposition.

In his submission, the 1<sup>st</sup> Respondent submitted that though the appellant has sought a stay of execution of the judgment delivered on 7<sup>th</sup> October, 2010, he is not a party to the said judgment or proceedings resulting to it.

That the said judgment is not also the subject of the appeal herein as the appeal relates to a ruling on the appellants' application for objection proceedings which merely dismissed the said application and therefore the only thing capable of being stayed in respect to that application is the costs of the same. The first Respondent relied on the case of *Republic Vs. The Commissioner of Investigations Enforcement "Exparte" Wanainchi Group Kenya Limited (2014) eKLR in which Odunga Judge cited the case of Raymond M. Omboga Vs. Austine Pyan Moranga Kisii HCCA No. 15/2010* in which the court remarked;

***"The court cannot see how it can order a stay of the decree that is not the subject of appeal".***

Relying on the above case, the first Respondent submitted that the application is incompetent and the same should be dismissed.

Without prejudice to the above, the first Respondent further submitted that the affidavit in support of the application is defective in that the same is sworn by an Advocate and that it is riddled with errors and apparent mistakes relating to the parties in that, it refers to the objector and the plaintiff which in this context can nevertheless be presumed to be the Appellant/Applicant and the 1<sup>st</sup> Respondent respectively.

It is contended that the facts deponed to by the Advocate are not within his knowledge yet he has moved this court to grant the orders sought while his affidavit violates the basic principles of the contents of an affidavit. That the Advocate has not disclosed the sources of his information as deponed, and as such, he is a total stranger to the allegations and that he is only making wild guesses. He has relied on the case of *Albany Taylor & Another Vs. Christopher Taylor & another (2008) eKLR* in which Kimaru Judge cited with approval the case of *East African Foundry Works (K) Limited Vs. Kenya Commercial Bank Limited (2002) eKLR* in which, Ringera Judge, held in part:

***"I also accept the further submissions of Mr. Akiwumi that indeed they consist of contentious averments of fact which an Advocate should not be allowed to depose to in a case where he is appearing as such....."***

***The unseemly prospect of counsel being called upon to be cross examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice"***

The 1<sup>st</sup> Respondent further relied on the cases of Wachira T/A Wachira & Co. Advocates Vs. East African Standard (No. 2) (2002) eKLR, Antoine Ndiaye Vs. African Virtual University (2015) eKLR, Kenya Shell Limited Vs. Benjamin Karuga Kiribu & Ruth Wairimu (1982 – 880 KAR 1018) and that of James Wangalwa & Another Vs. Agnes Naliaka Cheseto on substantial loss, and submitted that the applicant has not substantiated how it is due to suffer substantial loss if stay is not granted.

On delay, the 1<sup>st</sup> Respondent submitted that though the application was filed without undue delay, it seeks to stay judgment that was delivered way back in the year 2010.

On security, it was submitted that the 1<sup>st</sup> Respondent has not expressed its willingness to furnish security and therefore it has failed to meet the prerequisites for issuance of stay orders and it does not deserve the same. Reliance was made on the case of Republic Vs. The Commissioner for Investigations & Enforcement (supra) and that of Joseph Paul Mwangonga Vs. Kewap contractors Ltd. 2012 eKLR.

In the applicant's rejoinder submissions, it was submitted that there is no express prohibition against an Advocate who of his own knowledge can prove same facts, to state them in an affidavit on behalf of his client. It relied on the case of Regina Waithira Mwangi Gitau Vs. Boniface Nthenge (2015) eKLR in which the court cited with approval the case of Kamlesh M. A. Pattni Vs. Nasir Ibrahim Ali & 2 others CA. 354/2004 where the court held in part;

***“there is otherwise no express prohibition against an Advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too, an Advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information”*** Emphasis supplied)

With regard to the averments in the said affidavit the Appellant submitted that the facts relates to procedural matters which are within the Advocates knowledge. That in his evidence, the first Respondent told the court that he is a casual labourer, who at the material time was employed by the defendant (Huashi Construction Enterprises) as a mason and hence his inability to refund the decretal sum if it is paid to him.

Further, the appellant submitted that the 1<sup>st</sup> Respondent's grounds of opposition dated 18<sup>th</sup> October, 2017 and his submissions dated the 16<sup>th</sup> October, 2018 are irregularly on record as the said firm is a stranger to this case, not having filed or served any notice of change of Advocates. In this regard, the appellant urges the court to be guided by the finding of the court in the case of Stephen Mwangi Kimote Vs. Murata Sacco Society (2018) eKLR and also on the provisions of Order 9, Rule 9 of the Civil Procedure Rules which provides that where there is a change of Advocate, after judgment has been passed, such change shall not be effected without an order of the court.

The Appellant also relied on the case of Telkom Kenya Limited Vs. John Ochanda (suing on his own behalf and that of 996 former employees of Telkom Kenya Limited (2014) eKLR in which the court of appeal emphasized the importance of complying with the rules of Procedure, as such compliance is neither anathema nor anti-ethical to the attainment of substantive justice. For these reasons the Appellant has urged the court to strike out the 1<sup>st</sup> Respondent's submissions.

The court has carefully considered the application, the affidavit in support, the grounds of opposition and the submissions made by the parties herein, in support of their respective cases. The appellant has sought to stay execution pending the hearing and determination of the appeal.

The application is principally brought under Order 42 Rule 6(1) of the Civil Procedure Rules. Under the said Order, the conditions for granting an order of stay of execution are that;

- a) The application has been made without unreasonable delay
- b) Security for the decree or order has been given and
- c) That substantial loss may result to the Applicant unless the order for stay is made.

On the issue of delay, there is no doubt that the application was filed within a reasonable time, considering that the applicant had filed an application for stay in the lower court which was dismissed on the 15<sup>th</sup> day of September, 2017. The application herein was filed on 21<sup>st</sup> September, 2017.

On security, the court has taken time to peruse the supporting affidavit. No doubt, the Applicant has not offered any security as required under order 42 Rule 6(1) of the Civil Procedure Rules. The Appellant has instead argued that it would be unconscionable for the court to require a deposit of the decretal sum as the Appellant is a distinct entity from the 2<sup>nd</sup> Respondent/Judgment debtor which issue is the entire basis of the appeal. This, therefore, means that until the appeal is heard and determined, the issue cannot be determined conclusively.

The court having made a finding that the objector did not prove ownership of the two motor vehicles, that rendered it liable to execution process and for that reason it was important for it to offer security for the due performance of the decree pending the determination of its appeal.

The court notes that the 1<sup>st</sup> Respondent has submitted that the Appellant has no Locus to apply for a stay of a decree in a matter where it is not a party. While this may be so, my considered view is that in objection proceedings, under Order 22 particularly Rule 51, the interest of an objector can only arise after judgment and during the process of execution and not before. The objection proceedings are therefore peculiar in the sense that though an objector is not a party to the proceedings pursuant to which a decree is issued, the execution of the decree negatively affects his interest and he can only come in at that point to protect the same. The court is therefore not persuaded by that

argument by the 1<sup>st</sup> Respondent. Similarly, by virtue of this interest which he claims, and which can only be conclusively determined upon hearing of the appeal, it follows that an objector should offer security for due performance of the decree in the event that the court's finding is to the contrary.

On substantial loss, the appellant has argued that its appeal will be rendered nugatory if a stay is not granted. In particular, the deponent has stated that the 1<sup>st</sup> Respondent may not be in a position to refund the decretal sum if the appeal succeeds. The basis of this contention is that the 1<sup>st</sup> Respondent is a casual labourer whose resources are meagre. Though the 1<sup>st</sup> Respondent has disputed this assertion, my attention was drawn to his evidence when he testified before the trial court as PW2. In his evidence in chief, he told the court that he had been employed by the defendant (2<sup>nd</sup> Respondent) as a casual labourer earning wages on Saturdays. He stated that he was a mason at the material time of the accident. At no time did the 1<sup>st</sup> Respondent contend that the record of the court was not captured properly. In view of the above, the court can safely conclude that the 1<sup>st</sup> Respondent is a casual labourer as per the record.

The Appellant having raised the inability of the 1<sup>st</sup> Respondent to refund the decretal sum, the evidential burden shifted to him to prove otherwise. This was not done. Courts have held times without number that substantial loss in its various forms is the cornerstone of the court's jurisdiction for granting a stay of execution. In the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto, Bungoma HC Misc. application No. 42/2011 the court held;

***“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”

The court finds that the objector has established that it is likely to suffer substantial loss if a stay is not granted.

Though the Appellant is not a party to the proceedings, the issue as to whether execution should be levied against it or not is a critical one and it's only fair that a stay is granted pending the hearing and determination of the appeal.

Before I conclude, the appellant has asked the court to strike out the 1<sup>st</sup> Respondent's submissions and grounds of opposition as the same were filed by a firm of advocates which is not properly on record. The court notes that the issue was raised too late in the day in the appellants' rejoinder submissions and the 1<sup>st</sup> Respondent did not have an opportunity to respond to the same. This amounts to ambush and it will not be in the interest of justice for this court to strike out the said documents on that account.

On the legality of the supporting affidavit on account of it having been sworn by an Advocate, the court agrees with the holding in the case of Regina Waithira Mwangi Gitau vs. Boniface Nthenge (2015) eKLR in which the court cited with approval the case of Kamlesh M. A. Patni vs. Najir Ibrahim Ali & 2 Others CA. 354/2004 where the court held;

***“There is no law expressly prohibiting an Advocate from swearing an affidavit on behalf of his client in a client's cause on matters which he as an Advocate has personal knowledge of whether informed by his client or arising from the proceedings in the cause”***

The court has noted that the facts deponed to in the supporting affidavit, arose from the proceedings and most of them form part of the record and the Advocate did not have to disclose the source. In the circumstances, I find that, on a balance of probability the Appellant has proved that it will suffer irreparable loss if stay is not granted and therefore in my view it has succeeded in proving substantial loss.

In the premises therefore, and in the interest of justice, though the Appellant has not offered security, this court exercises its discretion in its favour and do order that there shall be a stay of execution of the decree issued in CMCC No. 7650 of 2007 pending the hearing and determination of the objector's appeal but on condition that the whole decretal sum is deposited in court within 30 days failing which, the stay order shall lapse. Costs of the application shall abide the outcome of the appeal.

**Dated, Signed and Delivered at Nairobi this 13th Day of June 2019**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Applicant

..... For the Respondent