



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 401 OF 2019**

**MULTIPLE HAULIERS (E.A) LIMITED ..... APPLICANT**

**VERSUS**

**POWER PROTECTION LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the appellant's Notice of Motion dated 10<sup>th</sup> July 2019 principally seeking orders of stay of execution of the judgment delivered by the trial court in CMCC No. 7031 of 2018 pending determination of its appeal.

2. The application is supported by the grounds stated on its face which are replicated in the supporting affidavit sworn on 10<sup>th</sup> July 2019 by *Mr. Clive Critchlow*, the appellant's General Manager in Charge of Operations and Customer Relations.

3. In the main, the applicant, *Multiple Hauliers (E.A) Limited* contends that it is aggrieved by the decision of the trial court to allow application dated 25<sup>th</sup> March 2019 which had sought that its defence be struck out and judgment be entered in favour of the respondent. It is the applicant's case that if the order sought is not granted, it will suffer irreparable loss and damage as it will be forced to settle the judgment sum amounting to KShs.7,508,192 which is not at its disposal; that its appeal which has high chances of success will be rendered nugatory since it is unlikely to recover the decretal amount from the respondent in the event that the appeal succeeds.

4. The application is opposed through grounds of opposition dated 25<sup>th</sup> July 2019. The points taken in opposition to the Motion are reproduced verbatim hereunder:

***i. This Honourable Court lacks the jurisdiction to entertain the Application and/or grant the Orders sought by the Applicant.***

***ii. The application is fatally bad in law and ought to be struck out as it is a blatant abuse of the court process.***

***iii. The applicant has not shown what loss if any it will suffer as laid down by the applicable trite law.***

***iv. The applicant is guilty of concealment of material facts.***

***v. The applicant is seriously guilty of latches.***

***vi. The application is otherwise a gross abuse of the process of court.***

5. By consent of the parties, the application was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered.

It is apparent from the respondent's submissions that it took the view that this court lacked jurisdiction to entertain the instant application because the court only had jurisdiction to hear applications for stay pending appeal when an appeal had been filed and none had been filed in this case.

6. I must say that I am surprised by this submission since the court record clearly shows that the applicant filed its appeal through a memorandum of appeal filed on 10<sup>th</sup> July 2019. For the avoidance of doubt, the provisions of *Order 42 Rule 6* of the *Civil Procedure Rules* empowers this court to hear and determine applications for stay pending appeal like the one filed by the applicant. The respondent's submissions regarding this court's alleged lack of jurisdiction is thus totally baseless.

7. The other points raised in the objection to the application are that the applicant is guilty of none disclosure of material facts and that the application amounts to gross abuse of the court process. The respondent did not however demonstrate how and in which way the application

constituted an abuse of the court process.

8. With regard to the alleged concealment of material facts, the respondent claimed that the applicant failed to annex to the application the pleadings in the lower court. I find no merit in this submission because in applications for stay, pleadings in the suit subject matter of the appeal need not be availed to the court at that interlocutory stage. An appellant is only statutorily required to avail to the court such pleadings in the record of appeal. Consequently, failure to exhibit the pleadings in the lower court in the application cannot amount to lack of disclosure of material facts.

9. In my view, the objections to the application considered as a whole are to say the least misplaced and misconceived.

10. That said, I still have to consider the merits or otherwise of the application as presented to the court by the applicant. I will start by pointing out that the law governing grant of orders of stay pending appeal is set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. For an applicant to be deserving of stay orders, he must establish that the application was filed timeously; that he was likely to suffer substantial loss if the application was dismissed and that he was ready to offer security as may be ordered by the court for the due performance of the decree.

11. In this case, the impugned ruling was delivered on 27<sup>th</sup> June 2019. The appeal was filed about two weeks later on 10<sup>th</sup> July 2019 contemporaneously with the application. There is therefore no doubt that the application was filed timeously.

12. On substantial loss, the applicant has asserted that if stay was not granted, it will be forced to pay KShs.7,508,192 which it was unlikely to recover from the respondent if its appeal was successful. This claim was not contested by the respondent. The law is that once an applicant expresses apprehension that the respondent is not possessed of means to refund the decretal amount if the appeal was successful, the burden of proving the contrary shifts to the respondent as the applicant cannot be expected to know what resources were at the disposal of the respondent. These are matters which can only be within the respondent's knowledge - **See: *National Industrial Credit Bank Limited V Aquinas Jarius Wasike & Another, Nrb Civil Application No. 238 of 2005.***

13. As the respondent did not dispute the appellant's claim that it may be incapable of refunding the decretal amount if called upon to do so, I find that the applicant has established that it may experience difficulties recovering the decretal amount if it is paid and the appeal is successful. I am cognizant of the fact that the decretal amount is quite substantial considering that it is said to be over KShs.7,000,000. Bearing this in mind, I find that the applicant has demonstrated that it is likely to suffer substantial loss if the order sought is not granted.

14. Lastly, the applicant has indicated that it was ready and willing to abide by any condition the court may deem fit to impose as a precondition for stay.

15. Taking everything into account, I am satisfied that the applicant has established sufficient cause to warrant the exercise of this court discretion in his favour by granting orders of stay as sought. It is thus my finding that the application is merited and it is accordingly allowed. Stay of execution is hereby granted in terms of prayer 3 of the application on condition that the applicant will deposit the decretal amount either in court or in an interest earning account operated by both counsel on record within the next 60 days failing which the stay orders will automatically stand discharged.

16. Costs of the application will abide outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>st</sup> day of November, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Kokebe for the applicant

Mr. Wachira holding brief for Mr. Muoka for the respondent

Mr. Salach: Court Assistant