REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.29 OF 2016

MAXAM LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

HEINEKEN EAST AFRICA

IMPORT COMPANY LIMITED.....1ST DEFENDANT/APPLICANT

HEINEKEN INTERNATIONAL B.V.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of the application dated 5th August 2019 in which the applicants/defendants herein seek orders for stay of execution of the judgment and resultant decree of this court delivered on 29th July 2019 pending the hearing and determination of the intended appeal against the said judgment.

2. The application is supported by the affidavit of the 1st applicant's Corporate Affairs and Legal Manager **Mr. Alexander Sindahera** and is premised on the grounds that:

a) On 29th July 2019, the High Court delivered its judgment for inter alia, the colossal sum of KES. 1,799,978,868.00 against the applicants.

b) Being aggrieved by the judgment , the applicants have filed and served a notice of Appeal.

c) The respondent has, in the course of these proceedings, admitted that it is financially ailing and does not own any assets.

d) The applicants are therefore unlikely to recover the colossal sum of KES 1,799,978,868.00 from the respondent should the applicant's make payment and their intended appeal be successful. The amounts involved are colossal and chances of recovery are minimal.

e) In the judgment, the Honourable judge also ordered the applicants to reinstate the respondent as an exclusive distributor for its products. In doing so, the judge went against a previous final order of the late Justice Onguto which allowed the applicants to maintain the third party distributors it had appointed.

f) The order not contravenes the provisions of the Competition Act of Kenya which prohibits such arrangements but also adversely affects the rights of third party distributors who are not parties to this suit.

g) In an effort to expedite execution, the respondent has submitted a draft decree for approval within 7 days notwithstanding the fact that at the time, the formal judgment was yet to be released to either party.

h) In addition thereto, the respondent in insisting on specific performance of the judgment by insisting the applicants supply it with products as the exclusive distributors.

i) The respondent has evidently commenced execution of the judgment exposing the applicants to substantial loss, a potential claim for contempt of court, colossal taxation costs and the high likelihood that their intended appeal will be rendered nugatory unless this Honourable court grants the orders sought urgently.

j) It is in the interest of justice that this application is expeditiously herd to avert the substantial loss that the applicants stand to incur if the appeal is granted post execution of the judgment.

k) The applicants are ready, willing and able to furnish security as may be ordered by this Honourable court pending the hearing and determination of the intended appeal.

3. Counsel for the applicants submitted that the application meets the conditions set under Order 42 Rule 6 the Civil Procedure Rules for the granting of an order of stay of execution pending an appeal.

Respondent's case

4. The plaintiff/respondent opposed the application through the replying affidavit of its Managing Director **Mr. Ngugi Kiuna** who avers that the application is fatally and incurably defective, grossly misconceived, gravely misplaced, mischievous, frivolous, scandalous, vexatious and constitutes an abuse of the court process.

5. He states that the application, as framed, raises several grounds of appeal against the impugned judgment of Makau J. and that this court lacks the jurisdiction to sit on appeal on the said judgment.

6. He further states that a substantial number of orders issued in the impugned judgment are not capable of being stayed in view of their nature and effect without having the same set aside all together which can only be effected upon the hearing and determination of the intended appeal.

7. He further states that the respondent's weak financial status has been substantially contributed to by the applicants' intentional and malicious actions and that for this reason, the applicants cannot rely on the respondent's financial position as a ground to disentitle the respondent from enjoying the fruits of its judgment.

8. He further avers that the applicants have not faulted the impugned judgment as respects the award in special damages in the sum of Kshs 1,799,978,868.00 and have not sought that stay of execution of the same be granted. He contends that the respondent should therefore be at liberty to execute for the award for special damages. He also accuses the applicants of deliberate and blantant disobedience of the court's orders issued on 29th July 2019 and adds that in the circumstances of this case, the applicants do not deserve this court's discretion as regards the granting of orders for stay of execution.

9. Counsel for the respondent submitted that the application does not meet the threshold set under Order 42 Rule 6 of the Civil Procedure Rules.

Analysis and findings

10. Having considered the application, the response filed by the plaintiff and submissions of both parties, I note that the issue for determination is whether this court should issue an order of stay of execution of the judgment of Makau J. delivered on 29th July 2019 pending the hearing of the appeal.

11. The applicable law governing stay of execution pending appeal is Order 42 Rule 6 of the Civil Procedure Rule which stipulates as follows:-

Stay in case of appeal

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside

(2) No order for stay of execution shall be made under subrule (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 binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

12. From the above provision it is clear that the filing of an appeal *per se* does not in itself guarantee a party the stay of execution as the court must be satisfied that there is **"sufficient cause"** to warrant the granting of such order of stay. Under the above provision, the conditions to be met before an order of stay of execution pending appeal is granted are:-

a) That the application has been made without unreasonable delay.

b) That substantial loss may result to the applicant unless the order is made.

c) That the applicant is willing to give such security for the due performance of the decree.

Delay

13. In the instant case, it was not disputed that the application was filed without unreasonable delay having been filed on 5th August 2019, barely 7 days after the delivery of the impugned judgment.

Security

14. The applicants were categorical, both in the affidavit in support of the application and in their submissions, that they are ready to provide security for the due performance of the decree and to comply with any reasonable order or conditions that the court may impose on them in granting the order of stay of execution. In the supplementary affidavit sworn on 13th September 2019, the applicants' deponent confirmed the applicants' willingness to offer an irrevocable on demand bank guarantee from any reputable bank on reasonable terms that the court may grant. I am therefore satisfied that the applicants have satisfied this condition on the provision of security.

Substantial loss

15. The applicants stated, in great detail, both in the affidavit in support of the application and in the written submissions, the loss that they stand to suffer if the stay orders sought are not granted. They listed the nature of the substantial loss to be suffered to range from criminal sanctions, reputational damage, a floodgate of litigation and inability to recover the judgment sum from the respondent whom they alleged, was financially crippled. It was the applicant's case that the intended appeal would be rendered nugatory unless the orders for stay of execution are granted in view of the fact that the decretal sum was to the tune of close to kshs 2 billion.

16. On its part, the respondent attributed its financial woes to the deliberate and malicious actions by the applicants. The respondent therefore argued that the applicants cannot be seen to claim that it would not be in a financial position to refund the decretal sum in the event the applicants succeeded in the appeal when they were responsible for crippling the respondent's business.

17. The proof of substantial loss that is likely to be suffered, if stay of execution orders are not issued, has been held to be cornerstone to granting a stay order pending appeal. In discussing the subject of substantial loss in ***James Wangalwa & another v Agnes Naliaka Cheseto*** [2012] eKLR, Gikonyo J. stated as follows:-

"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 it 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 Civil Procedure Rule. 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 Vs Chesoni[2002] IKLR 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 Civil Procedure Rule 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."

Demonstrating what substantial loss is likely to be suffered , is the core to granting a stay order pending appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."

18. It is not in doubt that the amount awarded by this court to the respondent in the impugned judgment is a substantial sum of Kshs 1,799,978,868.00. The applicants are apprehensive that they may not be able to recover the said sum of money from the respondent, should their appeal be successful, owing to the respondent's lack of financial muscle. The respondent does not deny that it is experiencing financial difficulties but attributes its position to the applicants' malicious actions as I have already stated in this ruling.

19. My take is that the mere fact that the respondent is experiencing financial difficulties is not a ground for denying it the fruits of its judgment/decree. In ***Shell Ltd v Kibiru and Another*** [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:

> ***"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. <u>There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts…</u>"***

20. The learned Judge further stated that: -

> ***"It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. <u>Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money</u>."*** (emphasis added)

21. Earlier on, **Hancox JA** in his ruling observed that:

> ***"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the questions of whether to refuse it would,…… render the appeal nugatory.***
>
> ***This is shown by the following passage of Cotton L J in <u>Wilson -Vs- Church (No 2) (1879) 12ChD 454</u> at page 458 where he said:-***
>
> ***"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."***
>
> ***As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."***

22. Courts have also taken the position that they must be careful in dealing with the application for stay of execution so as balance the interests of all the parties while at the same time avoid determining the merits of the appeal at the application stage. This was the position taken in ***Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat*** **(2013) eKLR wherein** the court upheld the decision of ***M/S Portreitz Maternity v James Karanga Kabia*** **Civil Appeal No. 63 Of 1997** and stated that:

> ***"That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right ……"***

23. In this case I find that the words stated in ***Nduhiu Gitahi and Another v Anna Wambui Warugongo*** **[1988] 2 KAR,** citing the decision of ***Sir John Donaldson M. R. in Rosengrens v Safe Deposit Centres Limited*** **[1984] 3 ALLER 198** are apt:

> ***"We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff…… It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……"*** *(See also* ***<u>James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR</u>.)***

24. My further finding is that this type of application nonetheless invokes the discretionary powers of the court. Needless to say, discretionary powers must be exercised judiciously and only in the most deserving cases. The Court of Appeal in ***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."

25. The above cited cases interpret the applicable statutory principles in deciding whether or not to grant a stay of execution of decree pending appeal. In the Court of Appeal case of Nairobi Civil Application No. 238 of 2005 ***National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)*** as cited by the High Court in ***Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa*** [2016] eKLR it was held that:

"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge."

26. In the instant case, the Respondent admits that its financial position is not good and has not stated that it will be in a position to refund the decretal amount to the Applicant should the appeal succeed. It therefore follows that if the Respondent executes the judgement and the Applicant's appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

27. Having regard to the findings and observations that I have made in this ruling and bearing in mind the need to balance the rights of the applicant to pursue the intended appeal and the respondent's right to be assured of the fruits of his decree, I find that a conditional stay of execution will be appropriate in this case. Consequently, I allow the application dated 5th August 2019 in the following terms:

(a) There shall be stay of execution of decree and judgment delivered on 29th July 2019 and all consequential orders pending the intended appeal, but on condition that:

(i) The applicant shall within thirty (30) days, from today's date, deposit the full decretal sum awarded to the respondent in an interest-bearing account in the joint names of the parties' advocates in a financial institution with good standing. The financial institution shall be agreed upon by counsel and in default of agreement, the Court shall appoint such financial institution.

(ii) In the alternative to the order contained in (i) hereinabove, the Applicant shall provide a bank bond for the full decretal sum from any reputable bank as a guarantee for the due performance of the decree within 30 days from the date hereof.

(iii) In default of making the deposit or bank guarantee within the appointed time, the order of stay shall automatically stand vacated and be discharged unless such orders are enlarged by the court.

(iv) The costs of this application shall abide the outcome of the appeal.

Dated, signed and delivered in open court at Nairobi this 14th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Singh and Mailu for the defendant/applicants

Mr. Nyachoti for the plaintiff/respondent

Court Assistant – Sylvia