



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 361 OF 2019

PARAGON ELECTRONICS LIMITED.....APPELLANT

VERSUS

APEX STEEL LIMITED.....RESPONDENT

RULING

1. The appellant, *Paragon Electronics Limited* (hereafter the applicant) challenged the judgment of the trial court delivered on 7th June 2019 in an appeal filed in this court through a memorandum of appeal dated 26th June 2019. Thereafter, the applicant presented a Notice of Motion dated 28th June 2019 seeking stay of execution of the judgment of the trial court pending disposal of the appeal.

2. The application is premised on the grounds stated on its face and on the depositions made in the supporting affidavit sworn on 28th June 2019 by its learned counsel *Mr. Valentine Ataka*. The applicant contends that if stay is not granted, it will suffer substantial loss; that the appeal which in its view has high chances of success will be rendered nugatory; that if the application was allowed, the respondent was not likely to suffer any prejudice which cannot be compensated by way of costs.

3. The application is opposed through a replying affidavit sworn by *Mr. Samuel Mlemwa*, the respondent's legal officer. *Mr. Mlemwa* deposed at length to matters which go to the merits or otherwise of the applicant's appeal which this court cannot delve into at this preliminary stage since its only task is to determine whether or not the applicant is deserving of the orders of stay of execution pending disposal of the appeal. The merits or otherwise of the appeal can only be canvassed during the actual hearing of the appeal.

4. In a bid to demonstrate that the application lacked merit, the respondent contended that the applicant had not satisfied the requirements for grant of stay pending appeal set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules* particularly the requirement for demonstration of substantial loss if the application was rejected. The respondent asserted that it is a solvent entity and was able to refund the decretal amount if the applicant succeeded in its appeal; that the application was filed with the aim of delaying the respondent's realization of fruits of its judgment.

5. The application was prosecuted on 15th October 2019 by way of oral submissions. Learned counsel *Mr. Ataka* appeared for the applicant while learned counsel *Ms Cheruiyot* represented the respondent. In his submissions, *Mr. Ataka* reiterated that if the application was rejected, the applicant would suffer substantial loss but did not expound what kind of loss the applicant would suffer if the application was not allowed. In addition, counsel submitted that the applicant was ready to offer security for performance of the decree by paying half of the decretal amount.

6. *Ms Cheruiyot* on her part urged the court to note that the applicant had not demonstrated that it would suffer substantial loss if stay was not granted since the respondent had the financial means to refund the decretal sum if the appeal was successful.

7. I have carefully considered the application, the affidavits on record as well as the parties' rival oral submissions. The parameters for grant of orders of stay of execution pending appeal are well set out under *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. The applicant must establish three conditions namely:

- i. That the application was filed timeously.
- ii. That if stay was not granted, he would suffer substantial loss.
- iii. That he was ready and willing to offer any security that the court may order for the performance of the decree.

8. Starting with the first condition, the record shows that the impugned judgment was delivered on 7th June 2019, the appeal was filed on 26th June 2019 and the application was filed two days later on 28th June 2019. There is therefore no doubt that the application was filed timeously.

9. On the requirement for demonstration of financial loss, I find that apart from merely asserting that the applicant was likely to suffer substantial loss if stay was not granted, the applicant did not avail any evidence to substantiate that claim. In monetary decrees like the one sought to be stayed in this application, substantial loss can only be proved by demonstrating that the respondent was impecunious and that if execution proceeded, the applicant was unlikely to recover the decretal amount if the appeal succeeded.

10. Proof that the applicant is likely to sustain substantial loss if stay was not granted is the cornerstone on which stay orders are granted because in the absence of such proof, there would be no basis or reason to suspend the respondent's right to enjoy the fruits of his or her judgment. The likelihood of substantial loss occurring to the applicant if stay was refused must be established by evidence to that effect. Mere allegations or averments cannot suffice.

11. I am in agreement with the views expressed in *Lalji Bhimji Sanghani Builders & Contractors V Nairobi Golf Hotels Limited, HCCC No. 1990 of 1995* where the court explained what constitutes substantial loss in monetary decrees and how it should be proved. The court expressed itself as follows:

“... for an applicant to satisfy this condition, he must persuade the court that the decree holder is a man of straw from whom it will be well nigh impossible, or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavit or other evidence on record. A bold statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matters I have alluded to carries no weight of persuasion in the mind of a judge.”

12. In this case, the applicant has merely averred that it was likely to suffer substantial loss if the application was dismissed but has not gone further to demonstrate what loss if any it was likely to suffer and in which way if the orders sought are not granted. The applicant has not challenged the ability of the respondent to refund the decretal amount if it is paid and its appeal is successful. The respondent has asserted that it is a solvent entity and that it has the financial means to pay the decretal amount if called upon to do so. Since this claim is not disputed, I find that there is no basis for the applicant's contention that if stay is not granted, it will suffer substantial loss or that its appeal will be rendered nugatory.

13. Having made the above finding, I find that the same is sufficient to dispose of the application. It is thus not necessary for me to consider whether or not the security offered by the applicant would have been sufficient to secure the decree pending disposal of the appeal.

14. In view of the foregoing, I am satisfied that the applicant has failed to demonstrate that it is deserving of the exercise of this court's discretion in its favour. It is consequently my finding that the Notice of Motion dated 28th June 2019 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kaburu holding brief for Mr. Ataka for the applicant

Ms Cheruiyot for the respondent

Mr. Salach: Court Assistant