



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL SUIT NO.134 OF 2009

BETWEEN

BEDROCK HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

AND

BEDROCK SECURITY SERVICES LIMITED.....1ST DEFENDANT/RESPONDENT

ERICK OUMA OKEYO.....2ND DEFENDANT/RESPONDENT

PATRICK OCHIENG ODIPO.....3RD DEFENDANT/RESPONDENT

RULING

Background

1. By a judgment dated 01st August, 2019, this court issued the following orders:

- 1. The Plaintiff's suit against the Defendants is hereby dismissed.**
- 2. The Plaintiff shall bear the costs of the suit.**

Application

2. By a notice of motion dated 06th November, 2019 filed on even date, brought under Section 3A and 3 of the Civil Procedure Act, Order 42 rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Applicant prays for orders

That there be a stay of execution of the decree/judgment delivered on 01.08.19 and any further proceedings thereto pending the hearing and determination of the intended appeal

3. The application is based on the grounds among others that the Applicant is aggrieved by the judgment dated 01st August, 2019 and has preferred an appeal which has overwhelming chances of success and is likely to be rendered nugatory if stay is not granted.

4. The application is supported by an affidavit sworn on 06th November, 2019 by **STEPHEN O. OYUGI** one of the directors of the Applicant in which he reiterates the grounds on the face of the application.

Attached to the affidavit is copy of the impugned judgment, copy of notice of appeal and letter requesting for proceedings, bill of costs and memorandum of appeal marked **SOA 1 to 5**.

5. The application is opposed by of grounds of opposition dated 15th November, 2019 and filed on 18th November, 2019 in which it is stated that the application does not meet the criteria under Order 42 rule 6 of the Civil Procedure Rules.

Analysis and Determination

6. I have carefully considered the notice of motion *vis a vis* the supporting affidavit, the grounds of opposition and the submissions filed on

behalf of both parties.

7. Order 42 (6) of the Civil Procedure Rules provides:

(2) No order for stay of execution shall be made under sub rule (1) Unless—

a. The court is satisfied that substantial loss may result to the applicant unless the order is made

b. That the application has been made without unreasonable delay; and

c. 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.

8. This suit was dismissed with costs. As correctly submitted by the learned counsel for the Respondent, the order in the judgment dated 01st August, 2019 did not give or confer on any of the parties herein any benefit that can be stayed pending the intended appeal. [See **Giant**

Holdings Limited –V- Kenya Airports Authority [2010] eKLR, Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004, Venture Capital & Credit Ltd –V-Consolidated Bank of Kenya Ltd Nairobi CA C.App.No.349 of 2003 (174/03 UR) and Attorney General V Law Society of Kenya & Another [2009] eKLR).

9. Respondents have not taxed their bills of cost. And even if the bills had been taxed, the Applicant has a duty to demonstrate that it is likely to suffer substantial loss if the stay is not granted. There is a myriad of cases on what constitutes substantial loss. In **Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu** the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

10. Similarly in **Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd** the Court stated-

“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 suits.”

11. Additionally, the court in **ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002** held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

12. From the affidavit evidence, I am not persuaded that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

13. The upshot of the foregoing is that the notice of motion dated 06th November,2019 is considered and found to have no merit and the same is disallowed with costs to the Respondents.

SIGNED AND DELIVERED AT KISUMU THIS 10th day of December 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant

For Plaintiff/Applicant

For the Defendants/Respondents