

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 693 OF 2017

NIRMA HOLDINGS LIMITEDAPPLICANT

VERSUS

JACKSON MUTISYA TITO.....RESPONDENT

RULING

1. The application dated 4th May, 2018 seeks orders **that there be a stay of execution of the ruling and order issued in this case and subsequent orders pending the hearing and determination of the Nairobi High court Civil Appeal No. 693 of 2017 or until such time as this court may order.**

2. It is stated in the grounds and the affidavit in support that judgment was entered in the Lower Court for the sum of Ksh.2,970,000/= plus costs and interest after contribution of 30% liability. The Applicant is dissatisfied with the said judgment and has appealed herein. It is further stated that the Applicant applied for stay of execution orders in the Lower Court and the same was allowed on condition that ½ of the decretal sum be paid to the Respondent within 14 days. It is averred that the said condition will render the appeal nugatory as the Respondent is not capable of refunding the same if the appeal is successful. It is averred that the appeal has high chances of success and therefore the Applicant stands to suffer substantial loss if the application is not allowed.

3. The application is opposed. It is deposed in the replying affidavit sworn by the Respondent and by his advocate that liability was agreed at 30% against Respondent and 70% against the Appellant and that the court proceeded to assess the quantum of damages. That the Applicant failed to comply with the conditions given by the Lower Court for stay of execution and instead filed the application herein which is meant to delay the Respondent from enjoying the fruits of his judgment. The Respondent further stated that the affidavit in support of the application is sworn by counsel for the Applicant without authority from the Applicant. It is further stated that there is no resolution from the Applicant company for this appeal to be filed.

4. I have considered the application, the reply to the same and the submissions of the counsels for the respective parties.

5. Order 42 rule 6 (1) provides that the court in which the appeal is preferred can consider an application for stay, notwithstanding the refusal or grant of the same by the court appealed from.

6. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides for the conditions to be met in an application for stay of execution as follows:

“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 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.”

7. In the case at hand, the ruling of the Lower Court on the application for stay was delivered on 12th April, 2018 . The application herein was filed on 7th May, 2018. The application was filed without unreasonable delay.

8. It is not denied that liability was agreed on between the parties. Indeed the appeal is on quantum, which the Applicant says is excessive. Thus to some extent, the appeal will not be rendered nugatory if the Respondent is allowed to enjoy a proportion of the fruits of his judgment.

9. Consequently, I allow the application on condition that a sum of ksh.500,000/= be paid to the Respondent and the balance of the decretal sum be deposited in a joint interest earning bank account of the counsels herein or in court within 30 days from date hereof.

Date, signed and delivered at Nairobi this 3rd day of July, 2018

B. THURANIRA JADEN

JUDGE