



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 541 OF 2017**

**LYCAN (EPZ) ENTERPRISES LIMITED.....APPLICANT**

**VERSUS**

**IMA COOLING SYSTEMS LTD.....RESPONDENT**

**RULING**

1. The application dated 18<sup>th</sup> October, 2017 seeks the following orders:

**1. Spent**

**2. That this Honourable court be please to admit the appeal filed herein out of time.**

**3. That the appeal filed herein on 9<sup>th</sup> October, 2017, be deemed as duly filed.**

**4. That this Honourable court be pleased to grant stay of execution of the judgment and/or decree in Milimani CMCC No.1845 of 2016 pending the hearing and determination of this Appeal**

**5. That the cost of this application be provided for**

2. It is stated in the grounds and affidavit in support of the application that the Applicant was aggrieved by the judgment of the lower court and wishes to appeal. The delay in filing the appeal is blamed on a miscalculation of the days. It is stated that the appeal has high chances of success and stands to be rendered nugatory if the prayers sought herein are not granted. The Applicant is willing to deposit security for the due performance of the decree.

3. The application is opposed as per the grounds of opposition dated 2<sup>nd</sup> November, 2017 which states as follows:

**1. There is no appeal filed in which an order for stay of execution pending appeal can be made as the Respondent has not been served with any.**

**2. There is no competent appeal filed in which an order for stay of execution can be made pursuant to the provisions of Order 42 rule 6(1) of the Civil Procedure Rules.**

**3. As the Applicant admits that judgment in the lower court was given on 8<sup>th</sup> September, 2017, the nature of the error which could have led the Applicant to believe that 30 days from that day would elapse on 9<sup>th</sup> October, (and not 8<sup>th</sup> or 7<sup>th</sup> October, 2017) is not disclosed.**

**4. As the intended appeal (if any) is not against the decree in which the court has awarded to the Respondent amounts admitted by the Applicant and nothing else the intend appeal is clearly without merit and the court cannot legally stay execution of the order for costs as these are not a decree for which a party can apply for stay of execution of decree under order 42 Rule 6(1) of the Civil Procedure Rules. Besides costs being in the discretion of the court, cannot be a valid ground of appeal unless the court had exercised its discretion arbitrary.**

**5. There is no valid ground upon which the court can order a stay of execution of a decree for a sum of money which was admitted by the Applicant before the matter was filed in court, in the pleadings it filed in court, at the hearing of the dispute**

and even after judgment for the admitted amount.

**6. The Applicant having been given 30 days stay at the time of the delivery of the judgment to enable it to pay the decretal sum (to which the Respondent did not object) it is in abuse of the process of this court for it to again apply for a stay of execution.**

**7. The application for stay of execution pending appeal should have been first made in the court below.**

4. The Respondent also filed a replying affidavit in opposition to the application. It is stated in the replying affidavit that the judgment given in the lower court was for the admitted sum of Ksh.274,000/= together with costs and interest. That the appeal herein is against the order for costs as opposed to the decree. That the appeal is therefore incompetent. That it's not been shown what loss will be suffered.

5. The application was canvassed by way of written submissions. I have considered the said submissions.

6. Order 42 rule 6 (1) this court as an Appellate court can entertain an application for stay notwithstanding that such an application has been granted or refused by the lower court.

7. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides conditions 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.”**

8. The proviso to section 79G of the Civil Procedure Act stipulates as follows:

**“Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”**

9. The judgment of the lower court was delivered on 8<sup>th</sup> September, 2017. The appeal herein was filed on 9<sup>th</sup> October, 2017, about two days outside the 30 days provided by the law. The application herein was filed on 18<sup>th</sup> October, 2017. The delay was not unreasonable.

10. There are no allegations that the Respondent will not be able to refund the decretal sum. Be as it may, there may be difficulties encountered in getting reimbursement in the event that the appeal is successful. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**.

**“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent's land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”**

11. I have noted that the decretal sum of Ksh.454,1000/= was deposited in court on 11<sup>th</sup> December, 2017 pursuant to the orders of the court. In the premises, I allow the application. The said deposit to remain in court pending the determination of the appeal. Costs in cause

Date, signed and delivered at Nairobi this 9<sup>th</sup> day of Oct., 2018

**B. THURANIRA JADEN**

**JUDGE**