



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 670 OF 2017

COOL JOINT ELECTRONICS LTD.....APPLICANT

VERSUS

B. S. MOHINDRA & CO. (K) LTD.....RESPONDENT

RULING

1. The application dated 22nd June, 2018 seeks orders that there be a stay of execution pending the hearing and determination of this appeal.
2. The application is predicted on the grounds stated therein and the affidavit in support sworn by Jumah Shaban. The Applicant's General Manager. It is stated that the lower court judgment was delivered on 8th November, 2017 for the sum of Ksh.1,087,479.10, interest and costs. The Applicant is aggrieved by the said judgment and has appealed. It is stated that the Applicant stands to suffer substantial loss as the judgment together with interest for eleven (11) years is a colossal amount and the execution will affect the operations of the Applicant's business as the business is not doing well and has liquidity challenges.
3. The Applicant has further averred that the application at hand was made without undue delay. The Applicant has offered to deposit security in the form of a motor vehicle. It is further stated that following the grant of a conditional stay in the lower court, the Applicant had started to liquidate the decretal sum by way of installments.
4. The application is opposed. The Respondent filed the grounds of opposition dated 16th July, 2018. It is stated that the instant application is *res judicata* as a similar application was determined by the lower court and that the Applicant is guilty of *laches*.
5. The Respondent also filed a replying affidavit. It is stated that the application is meant to deny the Respondent of the enjoyment of the fruits of its judgment. It is further stated that a similar application was made in the lower court and it was held that the security offered was insufficient. That in any event the Applicant can sell the motor vehicle offered as security and other assets and deposit the decretal sum. That the continued payment of the decretal sum by way of installments amounts to admission of liability. The Respondent's position is that the application at hand is an abuse of the court process.
6. The application was canvassed by way of written submissions. I have considered the said submissions.
7. Order 42 rule 6 (1) of the Civil Procedure Rules 2010 provides as follows:-

“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.”

From the foregoing provisions of the law, it is clear that this court has jurisdiction to entertain the application at hand.

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

9. The judgment of the lower court was delivered on 8th November, 2017 and the application at hand filed on 27th June, 2018. In the intervening period the parties were arguing the application for stay in the lower court and the ruling was delivered on 22nd June, 2018. The delay has therefore been explained.

10. It is apparent from the affidavit evidence by both parties that the Applicant has been liquidating the decretal sum by way of monthly installments. This is inconsistent with the argument that the appeal has merits.

11. The security offered by the Appellant is not sufficient. It is stated by the Applicant that the motor vehicle offered as security has not been registered in it's name and nor is there any valuation report exhibited.

12. With the foregoing, I dismiss the Preliminary Objection and allow the application on condition that the Applicant do pay the balance of the principal amount to the Respondent within 30 days from date hereof and deposit sufficient security for the balance within 30 days. Costs in cause.

Dated, signed and delivered in Nairobi this 20th day of Nov., 2018

B. THURANIRA JADEN

JUDGE