

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 243 OF 2016

CHANNA CONSTRUCTION COMPANY LIMITED.....APPELLANT

VERSUS

JOSHUA NDAKALU MUKUNA.....RESPONDENT

RULING

1. The Respondent herein, Joshua Ndakalu Mukuna filed a compensatory suit against Channa Construction Company Limited, the Appellant herein, before the Chief Magistrate's Court, Nairobi for the injuries the Respondent allegedly suffered while working for the Appellant on its construction site at Kayole on 19th October, 2013. The Appellant filed a defence denying the Respondent's claim. The suit was heard and determined in favour of the Respondent whereof he was awarded Ksh.1,000,000/- as general damages, Ksh.100,000/- for further medical expenses and special damages as pleaded and proved. The appellant was aggrieved hence this appeal.

2. The appellant has now taken out the motion dated 20th May, 2016 and is seeking for inter alia, orders for stay of execution of the judgment/decree pending appeal. The motion is supported by the affidavit Mandeep Singh Channa. The Respondent filed a replying affidavit to oppose the motion.

3. When the motion came up for inter parties hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavit filed in support and against. I have also taken into account the rival written submissions. The Appellant/Applicant has urged this court to grant him the order for stay to obviate the appeal being rendered nugatory. It is the Appellant's submission that unless the order for stay is granted the Appellant will suffer substantial loss in that if the judgment sum is released to the Respondent, he will not be in a position to refund the money since the Respondent is a man of straw. The Appellant also pointed out that its appeal has overwhelming chances of success.

5. The Respondent denied that he was impecunious. He pledged to furnish security for restitution by way of either an insurance bond or by a bank guarantee. The Respondent also claimed that the Appellant has not made any offer to provide security.

6. The principles to be considered in determining an application for stay of execution are clearly spelt out under Order 42 Rule 6 of the Civil Procedure Rules. First, an applicant must show that it would suffer substantial loss if the order for stay is not given. Secondly, the application must be filed without unreasonable delay. Thirdly, the court to consider the question of the provision of security for the due performance of the decree.

7. Let me start with the second principle. The record shows that judgment being sought to be impugned was delivered on 21st April, 2016 and the motion dated 20th May, 2016 was filed on 20th May, 2016. Parties did not address this court over this principle. However, I can discern from the record that the motion was actually timeously filed.

8. The question to be answered is whether or not the Appellant/ applicant has shown that it would suffer substantial loss if the order is denied. The Appellant has specifically stated that the Respondent is a man

of straw, therefore if the decretal amount is released to him, he will not be in a position to refund. The Respondent has not shown this court his financial status but has instead offered to provide a bank guarantee or an insurance bond. I am convinced that if the decretal sum is released to the Respondent, it is doubtful whether he will be in a position to refund the same. This in my view may be regarded as a loss. I grant the applicant order for stay.

9. The final principle to be considered is the form of security to be provided for the due performance of the decree. The Respondent has correctly pointed out that the Appellant has not made an offer on the sort of security it wants to provide. However, the failure to make an offer to provide security is not fatal because the court has unfettered discretion to decide on what security should be provided for. In the circumstances of this case, I think a fair order is to direct the Appellant/applicant to deposit the decretal sum.

10. In the end, I find the motion dated 20th May, 2016 to be well founded. An order for stay of execution is granted on condition that the decretal sum of Ksh.1,287,513/- be deposited in an interest earning account in the joint names of Advocates or firm of advocates appearing both sides within 30 days from the date hereof. In default the motion shall be treated as dismissed. Costs of the motion to abide the outcome of the Appeal.

Dated, Signed and Delivered in open court this 10th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent