



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 500 OF 2016

MORNING FOODS LIMITED.....1ST APPELLANT

HEALTHY U 200 LIMITED.....2ND APPELLANT

VERSUS

BURHANI DECORATORS & CONTRACTORS LIMITED.....PLAINTIFF

(Being an appeal from the Judgment of Hon. R. Ngetich (Mrs) Chief Magistrate in Nairobi Civil Suit No. 8200 of 2009)

BURHANI DECORATORS & CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

MORNING FOODS LIMITED.....1ST DEFENDANT

HEALTHY U 2000 LIMITED.....2ND DEFENDANT

RULING

The Appellants/Applicants have moved this Honourable court by way of a notice of motion dated the 28th July, 2016 seeking the following orders;

(1) Spent

(2) That pending the hearing and determination of this application inter-partes the respondent be restrained from executing the Judgment and Decree in Chief Magistrate Civil Case Number 8200 of 2009 delivered on 30/06/2016.

(3) That pending the hearing and determination of the appeal herein, the Respondent be restrained from executing the Judgment and Decree in Chief Magistrate Civil Case Number 8200 of 2009 delivered on 30/06/2016.

(4) That cost of this application be in the cause.

The application has been brought under sections 1A,1B,3A, 65 (1) (b) of the Civil Procedure Act and under order 42 Rule (6) of the Civil Procedure Rules.

It is premised on the grounds set out in the body of the same and its supported by the annexed affidavit of

Avni Rach sworn on the 28th July, 2016.

The deponent who is the Managing Director of the 2nd Appellant avers that; the first Appellant is no longer in operation having merged its operations and activities with the 2nd Appellant on or about the 1st April, 2016.

That the Appellants being dissatisfied with the judgment by the lower court delivered on 30/6/2016 by Hon. R. Ngetich (Mrs) have filed an appeal against the said decision. That the Appellants have an arguable and plausible grounds of appeal which they seek to ventilate at the hearing of the appeal. That the appeal raises serious triable issues of law and fact which are not frivolous.

It is further averred that the respondents have already applied for a copy of the judgment and typed proceedings and the Appellants are apprehensive that execution can be levied Anytime. That the respondents have also prepared a draft decree which they have forwarded to the appellants advocates for approval hence the urgency in bringing and having this application heard.

The Appellants have averred that they stand to suffer irreparable loss if the execution is not stayed and that in the event that the appeal is successful, they may not be able to recover the decretal sum paid to the Respondent: That the application has been brought without undue delay on the part of the applicant. That the applicants are ready and willing to comply with the conditions that may be imposed by the court for the granting of the orders sought.

The Respondents filed grounds of opposition on the 31st August, 2016 and seeks to oppose the application on the following grounds;

- (i) The applicants have not demonstrated what substantial loss they will suffer if the stay of execution is not granted.
- (ii) The applicants have not tendered any security for the due performance of the decree sought to be stayed.
- (iii) The Applicants have not demonstrated an arguable case that may be rendered nugatory if stay of execution is not granted.
- (iv) The request for stay is an abuse of the process of the court as the Applicants have offered to pay the principal decretal sum but seek to pressure the Respondent to forego its claim on interest and costs through this notice of motion.

In addition to the grounds of objection, the Respondents also filed a replying affidavit sworn by Sanjeev Parmar on 14th September, 2016. The deponent is the administration manager of the Respondent. He avers that the contents of paragraph 2 of the supporting affidavit of Mrs Rach are not capable of verification for the reason that no evidence in support thereof have been adduced.

He depones that he has been advised by the Respondents Advocate which he verify believe to be correct that the appeal from the decree of the Chief Magistrate's Court is not arguable as the decree relates to money claim for which the Appellants are liable to the Respondent. That the Appellants have not demonstrated what substantial loss if any, they will suffer by payment of the decretal sum of Kshs.861,792.16cts. That the Appellants have not demonstrated that the Respondent is impecunious and will not be able to repay the decretal sum in the event of their appeal succeeding.

The deponent further avers that the Respondent has been in business since 15th October, 1984 and has all through been financially stable. The Respondents financial stability has been confirmed by the latest audited books, copies of which are exhibited herewith; the Respondent owns several properties, including but not limited to L.R. No. 12596/89 and in the circumstances, it is improbable that the Respondent will lack means to repay the decretal sum should the Appellant's Appeal succeed.

The application was disposed of by way of written submissions which parties highlighted. The court has duly considered the application herein together with the affidavits and the submissions.

The principles that government applications for stay of execution pending appeal are set out in order 42 Rule 6 (2) of the Civil Procedure Rules which provides;

(1) 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.

On the first condition on whether substantial loss may result to the applicant unless the order is made, the appellants have submitted that the respondent has a judgment in its favour and if the stay of execution is not granted, this is unlikely to render the appeal nugatory. The appellants have also argued that the respondent has not demonstrated to the court that it will be in a position to refund the money in the event that the appeal is successful.

What amounts to substantial loss has been defined in multitude of cases. In the case of **James Wangalwa & another Vs. Agnes Naliaka Cheseto Misc. Application No. 42 of 2011 (2012) eKLR** cited in the case of **Selestice Limited Vs. Gold Rock Development Ltd (2015)** the court stated;

“No doubt, in law the fact that the process of execution has been put in motion or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule 6 of the Civil Procedure Rule. This is so because execution is a lawful process”.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail. A question that was aptly discussed in the case of **silverstain Vs. Chesoni (2002) 1KLR 867, and also in the case of Mukuma Vs Abuoga** quoted above. The last case, referring to the exercise of discretion of the High Court and the granting of stay of execution, under order 42 of the CPR and Rule 5 (2) (b) of the court of appeal Rules, respectively, emphasized the centrality of substantial loss thus;

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory: (Emphasis added).

Still on substantial loss an extract from the ruling of Justice Gikonyo in the case of **Antonie Ndiaye Vs. Africa Virtual University (2015) eKLR** which reiterated the findings of Ogola J. in the case of **Tropical Community Suppliers Limited** may be helpful where he held;

“Substantial loss does not represent any particular mathematical formula, rather, it Is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from loss without value or a loss that is merely nominal.....(Emphasis added)”.

The reasons given by the applicants to support the contention that that they will suffer substantial loss are that;

(i) There is imminent risk of execution of the decree.

(ii) There is likelihood that the applicants will be unable to recover the decretal sum in the event that the appeal is successful.

In its rejoinder, the respondent has deponed that it can readily refund the decretal sum should the appeal succeed. In support of that contention the respondent's audited books are exhibited and marked SP-1 which confirms its financial stability. It is also averred that the respondent has been in business since 15th October, 1984, and has all through been financially stable. The respondent owns several properties, including but not limited to the suit property. L.R. No. 12596/89.

It is now trite law that once the applicant calls into question the respondent's financial ability, the burden of proving such ability immediately shifts to the respondent. This position was adopted in the case of *Kenya Orient Insurance Co. Limited Vs. Paul Mathenge Gichuki & Another. (2014) eKLR* where the court cited with approval the case of *ABN Amro Bank N.V. Vs. Le Monde Foods Ltd. Civil Application No. Nai 15/2002* where the court expressed itself as follows;

“They of course, cannot be expected to go into the bank accounts, if any, operated by the respondents to see if there is any money there..... In those circumstances, the legal burden still remains on the applicant, but the evidential burden would 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. The 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.....(Emphasis added). Can the respondent herein be said to have discharged that burden? In my considered opinion, it has. I have perused through the audited books of accounts annexed to the replying affidavit of Sanjeev Parmar and I am satisfied that the respondent is in a financial position to refund the decretal should the appeal succeed in which event, the appellants would not suffer substantial loss.

On the issue of delay, it is noted that the judgment in the lower court matter was delivered on 30/6/2016. The application herein was filed on the 28/7/2016 a period of less than a month.

There is no exact measure as to what amounts to unreasonable delay. In the case of *Geoffrey Muriungi & Another Vs. John Rukunya M.Imonyo suing as legal representatives of the estate of Kinoti Simon Rukunga(deceased) (2016) eKLR*, the court had this to say about unreasonable delay;

“This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed(Emphasis added). The delay in this matter was not unreasonable and is within the acceptable limits.

On the issue of security, it has been deponed on behalf of the applicants that they are ready and willing to comply with the conditions that the court may impose. Though the respondent in its grounds of oppositions has stated that the applicants have not tendered any security for the due performance of the decree, this court is prepared to find that by the applicants deponing that they are ready and willing to abide by any conditions that the court may impose, that to me suffices as an offer for security.

Before I conclude, counsel for the applicants raised the issue of the replying affidavit having been filed without the leave of the court and that the applicant's position was prejudiced. In this regards, it is the finding by this court that the applicants did not prove any prejudice that they suffered. In my view, the filing of the replying affidavit without leave was just but a procedural defect which can be cured by Article 159 (2) (d) of the constitution. I do therefore excuse the applicants for filing the same without leave of the court and the same is admitted as though it had been filed with the leave of the court.

Having made the findings that I have made herein above, this court finds and hold that the application dated 28th July, 2016 has no merit and its hereby dismissed with no orders as to costs.

Dated, Delivered and Signed at Nairobi this 2nd day of March, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

..... *For the 1st Appellant.*

.....*For the 2nd Appellant.*

.....*For the Respondent*

.....*For the Plaintiff*

.....*For the 1st Defendant*

.....*For the 2nd Defendant*