



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 29 OF 2016
APEX STEEL LIMITED.....APPELLANT
VERSUS
ELIJAH ONGWENYI MANOTI.....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 26th April 2016, filed by the Appellant, seeking orders that there be a stay of judgment and decree in **Machakos CMCC No. 521 of 2014- Elijah Ongwenyi Manoti -vs- Apex Steel Limited**, pending the hearing and determination of the appeal filed herein. The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on the same date by Abraham Ombogo Ondara, the Human Resource Manager of the Appellant Company.

The grounds in summary are that on 24th February 2016, the trial Court delivered its judgment in **Machakos CMCC No. 521 of 2014 - Elijah Ongwenyi Manoti -vs- Apex Steel Limited**. The Appellant, being aggrieved by the judgment of the trial court, filed the current Appeal. The Appellants detailed out the reasons why they are challenging the decision by the trial Magistrate in their supporting affidavit, and stated that it is ready and willing to tender such security as this Court may order for the due performance of the decree that may ultimately be binding upon it. The Appellant further averred that the application has been brought without undue delay, and is apprehensive that the Respondent herein might proceed to enforce the judgment and decree of the Lower Court, thereby rendering the Applicant's appeal nugatory.

The Appellant reiterated these averments in submissions dated 6th February 2017 filed by the its Advocates, Eboso & Company Advocates, in which various judicial decisions were cited on the Appellant's compliance with the criteria as set out in Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules. It was submitted in this respect that in a money case, substantial loss lies in the ability of the Respondent to refund the decretal sum should the Appeal succeed as affirmed by the High Court in **Apert Industries Limited vs Joe's Freighters Limited [2015] eKLR**.

Further that the Respondent deponed in his Replying Affidavit that he is a person of means and capable of refunding the decretal sum if the Appeal succeeds, but has not adduced any evidence in support of his assertion. It was contended that the Respondent has not demonstrated sufficient means from which the Court can conclude that he is capable of refunding the decretal sum as his current employment status is not known.

The Appellant further submitted that there has been no delay on its part in filing this application and gave

a history of the proceedings as follows. The Lower Court rendered its judgment on the above matter on 24th February 2016 in the absence of both parties and that the Appellant then filed the present Appeal on 24th March 2016. The Application before the Court was filed under Certificate of Urgency on 26th April 2016, and the Appellant attended Court for ex parte hearing on 28th April 2016. The Application was subsequently fixed for inter-parties hearing on 26th October 2016 where the Court directed that the Application be canvassed by way of Written Submissions. The Appellant urged the Court to find that it moved the Court appropriately and in a timely manner.

Lastly, it was submitted that the Appellant has averred that it is ready and willing to provide security as a price for the stay sought in the application. Furthermore, that it is clear from the decision in **Selestica Limited vs Gold Rock Development Ltd, Nairobi HCC No 48 of 2015** that the Appellant does not have to furnish the security upfront before arguing the Application. It was also submitted that the Appellant had clearly demonstrated that their application has merit and that the Appeal has a high chance of success.

The Response

The Respondent opposed the Appellant's application in a Replying Affidavit he swore on 10th May 2016, wherein he averred that the trial Magistrate ruled in his favour in the judgment delivered on 24th February 2016 in **Machakos CMCC no. 521 of 2014**. It was the Respondent's contention that the Appellant does not want him to enjoy the fruits of his judgment which was legally acquired, and the application does not have high chances of success. Further, that he is a person of means and will be able to refund the decretal sum if it is paid to him. However, that if the Court deems it just to grant the said orders, then it should also be ordered that the decretal sum be deposited in a joint account pending hearing of the appeal.

S. W. Orenge & Company Advocates for the Respondent filed written submissions dated 26th October 2016, wherein the foregoing arguments were reiterated, and reliance was placed on the decisions in **Nguruman Ltd Versus- Shompole Group Ranch, HCCC No. 65 of 2009** and **Pancras T Swai vs Kenya Breweries Ltd, Civil Appeal No. 275 of 2010** for their arguments that the Appellant was trying to defeat justice and should provide security.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue before the Court is whether the judgment and decree delivered in **Machakos CMCC No. 521 of 2014 - Elijah Ongwenyi Manoti -vs- Apex Steel Limited**, should be stayed pending the hearing of the appeal. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows:

“6.(1) 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.

(2) 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

- (a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
- (b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
- (c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, this Court notes that judgment was delivered in the lower court on 24th February 2016; the Memorandum of Appeal was filed herein on 24th March 2016, while this application was filed on 26th April 2016. There was therefore no inordinate delay in filing the application.

On the fulfillment of the second condition, an applicant needs to show what specific loss or prejudice he will suffer if he pays the decretal sum. The Appellant has in this respect stated that the Respondent may not be able to refund it the decretal sum in the event that its appeal succeeds. The Respondent on the other hand has averred that he is a man of means. He however did not demonstrate the means that he has to be able to refund the decretal sum, and it is my finding that the Appellant's apprehension that he may lose the decretal sum if his appeal succeeds is valid.

Lastly, on the third condition, the Appellant indicated that it is willing to furnish security.

Accordingly, the orders that commend themselves to me arising from the foregoing are that the Appellant's Notice of Motion dated 26th April 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment and decree in **Machakos CMCC No. 521 of 2014 - Elijah Ongwenyi Manoti -vs- Apex Steel Limited**, delivered on 24th February 2016 pending the hearing and determination of the Appellant's appeal, only on condition that the Appellant deposits the decretal sum in an interest earning account in the joint names of the Appellant's and Respondent's Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Notice of Motion shall follow the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 3rd day of April, 2017.

P. NYAMWEYA

JUDGE