



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 253 OF 2015

SAFARI ESSENTIALS LIMITED. APPELLANT/APPLICANT

VERSUS

BARAKA LODGES LIMITED. RESPONDENT

RULING

The Application for determination by the court is the Notice of Motion dated the 7th October, 2015 by the Appellant/applicant. It is expressed to be brought under Order 42 Rule 6 (1) (2) and (3), Order 40 Rule 1, Order 51 Rule (1) of the Civil Procedure Rules Cap 21 Laws of Kenya

The Appellant/Applicant has sought the following Orders inter alia: -

- a. That pending the hearing and final determination of this application the Honourable Court be pleased to stay the execution of the Judgment and decree of the Senior Principal Magistrate's Court in Nairobi CMCC No. 6763 of 2012. Safari Essentials Limited – versus- Baraka Lodges Limited.
- b. That pending the hearing and final determination of the Appeal, the Honourable Court be pleased to stay execution of the judgment and decree of the Senior Principal Magistrate's Court in Nairobi CMCC No. 6763 of 2012. Safari Essentials Limited –versus- Baraka Lodges Limited.
- c. That costs of this Application be in the cause.

The Application is premised on the grounds set out on the body of the same and on the annexed Affidavit of Christopher Ransley sworn on the 7th day of October, 2015.

A brief history of the matter is that, the Appellant who was the Plaintiff in the trial court had been engaged to undertake construction works for the Respondent's tented Camp at the Maasai Mara. The contract value was Ksh.19,228,800/- and the construction was to take 90 days from the date of the contract which was in August, 2012.

The Appellant was given mobilization fees of ksh.8,800,000/- and it was agreed between the parties that the Respondent would reimburse the Appellant upto 70% of the value of the construction material but instead the Respondent declined to pay the Appellant and instead purported to terminate the construction contract between them. This move by the Respondent caused the Appellant to institute the suit in the trial court for the recovery of Ksh.5,000,000/- which was the amount allegedly owed to it by the Respondent.

The Respondent counter-claimed against the Appellant for loss of business allegedly caused by the delay in completion of the construction.

The Respondent further pleaded that it issued a termination notice to the Appellant after it was established

that he had done incomplete works in some areas of the building which it alleged was a breach of the contract entered into by the parties.

The matter proceeded before the learned Senior Principal Magistrate C. Obulutsa and on the 30th April, 2015, he delivered the judgment in favour of the Respondent by allowing the counter-claim but dismissed the Appellants claim hence the appeal herein.

The Memorandum of Appeal was filed on the 28th May, 2015 and since an Appeal does not operate as a stay of execution, the Appellant filed the Notice of Motion dated 7th October, 2015 seeking a stay of execution pending the hearing and determination of the Appeal.

In the supporting affidavit, the deponent who is the Director of Appellant has given the history of the lower matter and in addition states that the Respondent has extracted the decree and sent a demand to the Appellant requiring them to pay the decretal sum within 7 days failure to which it risks execution. It is further deponed that the 60 days stay of execution pending the preference of the Appeal that had been granted by the trial court has since lapsed and that the Appellant has an arguable appeal with a probability of success.

According to the deponent, if the Respondent is allowed to execute against the Appellant, the Appellant will suffer irreparable loss and the Appeal will be rendered nugatory.

Lastly, he deponed that the Respondent will not suffer any prejudice if the stay of execution is allowed as prayed.

The parties agreed to dispose off the Application by way of written submission. On behalf of the Appellant it was submitted that it is a trading company and if execution is levied, it will lose its trading tools and the ability to trade. The learned counsel for the Appellant relied on the case of **Sewankambo Dickson Vs Ziwa Abby HCT -00 MA 0178 of 2005** as was quoted in **Antoine Ndiaye Vs African Virtual University [2015] eKLR** on substantial loss. It also relied on the case of **James Wangaiwa & Another Vs Agnes Naliaka Cheseto Bgm HC Misc. Appl. No. 42 of 2011.**

On the part of the Respondent it was submitted that the Application is an abuse of the court process as it contravenes the mandatory provisions of order 42 Rule 6 (2) of the Civil Procedure Rules as the guidelines which the court can use for exercising its discretion in deciding whether or not to grant a stay of execution pending determination of the Appeal has not been complied with.

It was further submitted that the Appellant has failed to satisfy this Honourable Court that it stands to suffer any substantial loss at all if stay is not granted. It has also not shown that it is willing to offer such security as may be ordered by the Honourable Court. The Respondent relied on the case of **Kenya Shell Limited Vs Kibiru & Another [1986] KLR 410 Misc. Civil App. No. 51 of 2013, R Vs The Commissioner for Investigation & Enforcement Ex parte, Wanainchi Group Kenya Limited (2015) eKLR.**

I have carefully considered the Application, the Affidavit in support and the submissions made by the learned counsels in support of and in opposition to the Application.

The Application is brought under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules which provides: -

“6 (2) no order for stay of execution shall be made under subrule (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 Appellant.”***

The grounds for granting a stay of execution are now settled in law as was held in the Court of Appeal in the Case of **Equity Bank Limited Vs West Link MBO Ltd (2013) eKLR** that an Appeal does not operate as a bar to execution of judgment hence party seeking stay of execution pending Appeal must, therefore, demonstrate that they are not using the appeal to delay justice.

Back to Order 42 Rule 6 (2) on the first condition on whether the Applicant filed the Application without undue delay, judgment herein was delivered on the 30th April, 2015 and the Application was filed on the 7th October, 2015. The Appellant was aware of the judgment all through and it took it six (6) months to file the same. The Appellant has not even attempted to explain the reason for the delay though in paragraphs 9, 10, 11 it is deposed that the proceedings were applied for on the 4th May, 2015, that the Appeal was admitted on 3rd day of June, 2015 and that it did not obtain certified copies of the proceedings and judgment on time, those are not valid reasons for failure to file the Application on time. A party does not require the proceedings to file an Application for stay of execution.

Regarding substantial loss that the Appellant is likely to suffer if the stay of execution is not granted, it was submitted that it will lose its trading tools and the ability to trade. These facts are not captured in the Affidavit. In paragraph 15 of the Affidavit in support, the Appellant states that it will suffer irreparable harm but it does not disclose the loss that it will suffer. Facts contained in the submissions are not evidence because the same are not made under oath and to that extent such facts do not form part of evidence and the court cannot consider the same in making its finding.

On the third condition, the Appellant has not offered any security at all.

Though the court has a wide discretion, the provisions of Order 42 Rule 6(2) (1) fetters the discretion of the court as was held in the case of **Halai & Another -Vs- Thornton & Turpin (1963) Ltd [1990] KLR 365.**

“The superior courts discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without undue delay.”

I, therefore, find that the Applicant was unable to satisfy the conditions set out under Order 42 Rule 6 (2) (1) of the Civil Procedure Rules.

In the upshot, the Application dated 7th October, 2015 is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 11th day of February, 2016.

.....

L. NJUGUNA

JUDGE

In the presence of

..... **for the Appellant/Applicant**

..... **for the Respondent.**