



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

CIVIL APPEAL NO. 162 OF 2014

NORTHWOOD SERVICE LTD.....APPELLANT

VERSUS

MAC & MORE SOLUTION LTD.....RESPONDENT

RULING

The application before the court for determination is the Notice of Motion dated 13th May 2014 brought under Order 22 Rule 25, Order 40 Rule 1(a), Order 42 Rule 6(1),(6) of the Civil Procedure Rules seeking:-

1. **That a temporary stay of execution of decree in the original suit CMCC 3942 of 2011 Milimani MAC & MORESOLUTION LTD VS NORTHWOOD SERVICES LTD KENYA CARGO HANDLING SERVICE LTD & LUSTMAN & CO.LTD (1990) is granted pending hearing and determination of the appeal .**

The application is supported by the affidavit sworn by Said A. Maalim, a director of the applicant. He stated that they have appealed against the judgment entered against the Appellant in the original suit CMCC 3942 of 2011 Milimani **MAC & MORESOLUTION LTD VS NORTHWOOD SERVICES LTD KENYA CARGO HANDLING SERVICE LTD & LUSTMAN & CO. LTD (1990)**. The subject of appeal is a claim for special damages of Kshs.1,656,200/=. The Appellant claims that the Respondent did not produce any documents to support the alleged special damages claimed in court.

The Appellant claims that the learned magistrate failed to distinguish the personal from the corporate entity in determining whether the plaintiff had a tenancy agreement in respect of the suit premises or not which omission he asserted, is fundamental issue of law. The Appellant states that the appeal is arguable with high chances of success.

The Appellant further stated that they are willing to furnish as a security a title to a property registered under certificate of Title No. CR 53643 valued at Kshs.3,500,000/- which is way over the judgment sum. The Appellant also stated that they stand to suffer irreparable loss and damage in event the appeal is successful and if this application is not granted.

The application is opposed. The Respondent filed a replying affidavit dated 23rd May 2014 sworn by Benson Musonye Musoga, the Managing Director of the Respondent. The Respondent claimed that the application is a delaying and diversionary approach being used by the Appellant to delay the decree of the court. The Respondent further stated that the a successful litigant ought to have access to the consequences of that judicial finding and any subsequent decision which tends to impede the normal flow of such justice, can only be rendered in exceptional circumstances.

The Respondent claims that the Appellant had not met the requirement for a grant of stay of execution. The Memorandum of Association is not complete and could not be relied on by the court. The Respondent argued that the Appellant has not provided any search from the Registrar of Companies to demonstrate that Said Ahmed Abound Maalim and Saad Abdalla Abubakar are the current directors of the Appellant Company and that the instruction to conduct the valuation on the proposed property was made by Said Ahmed Abound Maalim while the property is on the other hand, registered in a joint ownership, of Said Ahmed Abound Maalim and Saad Abdalla Abubakar. The Respondent further states that there is no express written authority produced in court to show that the joint owner consented. The Respondent argues that the directors of a company cannot assume the debt and /or responsibilities of a limited company as settled in the case of **Salomon Vs. Salomon**.

The Respondent claims that the proposed property in the valuation report is also different from the property referred to as Plot No. 7150 III/MN (CR 53643) at page 75 of the annexure. It is also different from the information in the Search. The title refers to CR 55643 while according to the deed plan, the property is referred to as MN/111/7150.

The Respondent argued that a money decree can only be stayed under special circumstances which have not been demonstrated by the Appellant. The purpose of the security ought to secure its interest pending the hearing of the appeal. The Respondent stated that the security offered in this case is not appropriate considering the circumstance of the case. The Respondent further stated that the Appellant has not established what substantial loss it will suffer should the application be dismissed.

In rejoinder the Appellant states that there was typographic error in the report which cited the title as CR53643 instead of CR 55643 while the plot description number is MN 11/7150 instead of place MN/111/7150. The Respondent claimed that the error was human and stated that the Search Report filed by the directors of the Appellant company reflects the correct description of the property.

The issue for determination given the circumstance of this case, is ***whether the applicant has demonstrated conditions for granting injunction and the stay of execution sought.***

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of appeal, are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court will weigh this against the success of a litigant who should not be deprived of the fruits of his judgment. The court is called upon to ensure that neither party suffers prejudice. This was well stated in the case of **M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA, Civil Appeal No. 63 of 1997** where the Court had this to say-

“That right of appeal must be balanced against an equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

Stay of execution pending appeal is governed by Order 42 and specifically Rule 6. The court will grant the order with discretion where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose. To grant or refuse an applicant a stay of execution, is discretionary, but the discretion must be exercised judicially. The Court of Appeal at Nairobi in the case of **Butt Vs. Rent Restriction Tribunal (Madan, Miller and Porter, JJ.A)** while considering an appeal from the High Court refusing a stay of execution pending appeal held;

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judges’ discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

In applying the above principles, the Appellant argued that the judgment sum is colossal and therefore they stand to suffer substantial loss. I agree with the Respondent that the Appellant has not established what loss it stands to suffer should the application be dismissed. In **CIVIL APPEAL NO. 722 OF 200 EQUITY BANK LIMITED V TAIGA ADAMS COMPANY LIMITED** the court stated as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay – reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the Appellant/Applicant.”

In the instant case, the court is not satisfied that substantial loss may result to the applicant if the application is not granted. On whether the application was made without any delay, the record shows that the judgment was delivered on 15th March 2014; the application seeking stay was filed on 13th May 2014. I find there is a delay in bringing the application in the circumstances of this case as there is no explanation as to why it took two months before this application was filed.

On the issue of the security, the Respondent stated that the security offered by the Appellant is not appropriate. Order 42 Rule 6(2) (b) states **“such security as the court orders for the due performance....”** In my view the rule gives the court unfettered discretion and therefore it can exercise this discretion by granting an order for the payment or deposits of the decretal sum. This discretion nevertheless has to be exercised judicially and upon filing material presented and this court opines that the appeal cannot be rendered nugatory by a money decree being satisfied by payment particularly where substantial loss has not been demonstrated.

From the foregoing, I have found that a conditional stay should be granted in this case.

ORDERS

- 1. An injunction restraining the Respondent from executing the judgment or an order of stay of execution shall issue against the Respondent on condition that the Applicant/appellant deposits the full decretal sum inclusive of interest and costs within 15 days, in default of which the orders staying or preventing execution shall automatically expire without more.**
- 2. Costs are to the Respondents in any event.**

Dated and delivered at Nairobi this 13th day of May, 2015.

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D A ONYANCHA

JUDGE