



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 23 OF 2013

FEISAL MAHSEN SAGGAF..... 1ST APPLICANT
KHALID MAHSEN SAGGAF 2ND APPLICANT
QUALITY GAS LIMITED 3RD APPLICANT
MAHSON INVESTMENTS CO. LTD 4TH APPLICANT

versus

GREEN GAS COMPANY LIMITED.....1ST RESPONDENT
AHMED SHEIKH ADAN.....2ND RESPONDENT

RULING

1. The application dated 13th August 2014 is brought pursuant to the provisions of **Order 42 Rule 6(1)** and **Order 50 Rule 1** of the **Civil Procedure Rules**; and **section 3A** of the **Civil Procedure Act** whereby the applicants seek orders staying execution of the exparte judgement and decree thereof pending hearing and determination of an intended appeal.
2. The application is premised on the grounds that the respondents obtained warrants of attachment dated 30th January 2014 which were stayed by virtue of orders issued on the 17th March 2014 which are no longer operational with the dismissal of the application dated 13th March 2014. Without the order, the respondents are at liberty to execute the warrants of attachment and levy execution against the applicants which execution shall occasion loss and damage to the applicants that cannot be recoverable by way of damages. If the stay is not granted, the object of the intended appeal will be rendered nugatory. The applicants are willing and able to furnish security that is reasonable and the application has not been made without unreasonable delay.
3. The applicants' advocate, Bernard Omondi Wasonga, swore an affidavit in support of the application where he stated that pending hearing of the application, the respondent proceeded to execute the exparte decree where warrants of attachment were issued and a proclamation ensued which prompted the applicants to file the application dated 13th March 2014 which was dismissed on 31st July, 2014. The applicants filed a notice of appeal and letter requesting for typed proceedings.
4. In response thereto, the respondents filed grounds of opposition stating that the application was not made in good faith. It was filed on the 13th August 2014 under certificate of urgency but served on the 16th September 2014, thirty three days after it was filed.

The application is premature as there is no demonstration of a threat of execution against the

applicants. The application is devoid of merit and an abuse of the court process. The applicants have not demonstrated any risk of substantial loss to be suffered and they have offered no security. The objective of the application is to scuttle the applicants' quest to realize the fruits of the judgement obtained.

5. Further, the respondents deponed an affidavit in reply where they opposed the application for reasons that the applicants are Tanzanian Nationals who may abscond the jurisdiction of the court. If the appeal is successful, the respondents are in a position to refund the decretal sum. In the event that the court is persuaded to grant orders sought, it should order the applicants to deposit the entire decretal sum. Failure to do so, the respondents should be allowed to proceed with the attachment. The applicants have not exhibited a memorandum of appeal to show whether they have an arguable appeal.
6. The prayer sought herein is stay of execution of the exparte judgment and decree thereof pending determination of an intended appeal. Conditions for granting such an order are laid down in **Order 42 Rule 6** of the Civil Procedure Rules that provide thus:-

“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from 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”.

7. From the foregoing, the court is seized of the discretion to grant stay of execution. However, to do so it must be demonstrated by the applicant that substantial loss will result if no such order is granted. The application should also have been brought without undue delay and there must be willingness to furnish security as the court may deem fit. The discretion of the court in granting such an order was set out in the Court of Appeal case of **BUTT VS RENT RESTRICTION TRIBUNAL (1982) KLR 417, (MADAN, MILLER, AND PORTER, JJ.A)** while considering an appeal from the High Court that declined to grant a stay of execution pending appeal held that:

“ 1. The power of the court to grant or refuse

an application for 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 the appeal court

reverse the judges' discretion.

3. A judge should not refuse a story 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 or refuse an application for stay, will consider the special circumstances of the case and unique requirements.”

8. The ruling that necessitated a notice of appeal being filed was delivered on 31st July 2014. The aforesaid notice of appeal was lodged within 12 days of the delivery of the ruling. This was without delay. In the case of **GLENCORE GRAIN LTD VS KABANSORA MILLERS (HC MILIMANI 400 OF 2002)** the court stated thus:

“A stay order does not lie as a matter of course because one has appealed. One has to show likelihood of suffering substantial loss in case the order is refused”.

9. What amounts to substantial loss was defined in the case of **MUKUMA VS ABOUGA (1988) KLR 642** where the Court of Appeal stated that:-

“ the issue of substantial loss is the cornerstone of jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. The claim herein is for USD 1.5 MILLION. This is a liquidated claim. It was demonstrated that the sum of money claimed was paid by way of bank transfers issued to the 1st applicant who in turn invested it in the 4th applicant. It has been stated and not disputed by the respondent that they are in a position to refund the sum of money if the intended appeal is successful. And even if the applicant would have been in doubt as to a refund, the burden would have been upon them to prove that the respondents would not be able to refund sums paid in satisfaction of the decree. **(See Caneland Ltd & 2 others vs Delphis Bank Ltd Civil Application No. Nai 344 of 1999).**

11. The applicants herein have stated that the judgment entered is for a substantial sum which means that the loss will be substantial. It is not shown that any damages will be suffered; it is not even denied that the transfers were effected and consequently transferred to the wrong entity. This would mean that if stay is granted the respondent will be denied the fruits of their judgment. To exercise the discretion, it must be demonstrated that there will be substantial loss which has not been done as payment or money decree does not amount to substantial loss **(See Kenya Shell Ltd vs Benjamin Karuga Kibiru & others (1986) KLR 410).**

12. The other condition for granting stay of execution is for the applicant to provide security for due performance of the decree. The applicants state in the grounds that formed the body of the application that they were ready, willing and able to furnish such reasonable security as the court would deem fit. However, in their submissions they shifted from that position and stated that it was only fair that they be condemned to pay security relating to costs and not more. These applicants are foreigners. Right at the outset when they were served with summons to enter appearance and interim injunctive orders, they disregarded them which resulted into judgment

being entered ex parte on the liquidated sum as provided by the law on the 2/10/2013. On 10/10/2013, the firm of Sheikh and Company acted on their behalf. After the application was certified as urgent they did not return to court. Warrants of attachment were issued on 30th January 2014.

They waited until 13th March 2014, when they acted by moving to court under certificate of urgency having instructed a different firm of advocates. If they absconded from the jurisdiction of this court they may not be traced hence denying the respondents what is due to them following judgment obtained. They are therefore persons who should be ordered to pay the entire decretal sum which would be the most appropriate security if stay of execution is to be granted. This would be the only way that the respondents would be guaranteed to enjoy the fruits of the judgment in event of dismissal of the appeal.

13. The court has the discretion to grant or refuse an order of stay of execution. The court in doing so must ensure that in failure to grant stay, the appeal is not rendered nugatory. In the Butt case (Supra) it was stated:-

***“It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory per Brett, L. J. in WILSON V CHURCH (NO. 2) 12 CH D(1879) 454 AT P.459.*”**

In the same case COTTON L. J. said AT P. 458;

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal if successful is not nugatory.”

14. It is submitted that if the appeal is successful the matter will be heard on merit. It is not denied that the respondents gave the sum claimed. Therefore it is not demonstrated that the appeal, if successful, will be nugatory.

15. Consequently, the application is unmeritorious and is dismissed with costs to the respondents.

DATED, SIGNED and DELIVERED at MACHAKOS this 3rd day of June 2015.

L.N. MUTENDE

JUDGE