REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COURTS

COMMERCIAL, TAX &ADMIRALITY DIVISION

CIVIL CASE NO 406 OF 2011

QUEST RESOURCES LIMITED……..…….……..……..PLAINTIFF

Versus

JAPAN PORT CONSULTANTS LIMITED…….....…..DEFENDANT

RULING

Stay of execution

[1] This is an application for stay of execution of the judgment and decree of this court made on 12th March 2015 pending appeal. It is dated 25th March 2015. It is expressed to be brought under section 3A of the Civil Procedure Act, Order 42 rule 6 of the Civil Procedure Rules and all enabling provisions of the law. It is supported by the affidavit of EMIHO SASAKI.

[2] The application is premised on the grounds set out in the application, the Supporting Affidavit and the submissions filed herein. The Applicant made the following submissions.

APPLICANT'S GRAVAMEN

On substantial loss occurring

[3] The Applicant submitted that it will suffer irreparable loss unless stay of execution of the judgment herein is made. TheApplicant urged that a decree has been issued on the judgment herein and subject to taxation of costs it is capable of execution against the Applicant. According to the Applicant, the ascertainable decretal sum is at least 237,632,000 which is colossal sum of money by all standards. They submitted that the disclosures made of the Respondent's purported assets do not portray the Respondent to be a person of means to pay back these colossal sums of money. The only asset disclosed as belonging to the Respondent is a flat known as C-10, 4th Floor within Venus Towers of an estimated value of Kshs. 24,500,000. All the other assets belong to the shareholders of the Respondent. In law, such assets are not assets of the company as a company has a separate legal entity from the shareholders. Ample judicial authorities were cited on this point butSalomon vs. Salomon which laid this principle of law suffices here. The Applicant stated that their appeal is arguable and has considerable chances of success and therefore, if it is made to pay the decretal sum to the Respondent whose prospects of repaying

it back is seriously in doubt, and the appeal succeeds, will have the effect of rendering the Respondent *''a pious explorer in the judicial process''*. They will suffer substantial loss as the Respondent will not be able to refund the decretal sum. They annexed a Memorandum of Appeal to demonstrate the appeal has considerable chances of success. They also made this submission:

> **''The Plaintiff will suffer no prejudice by awaiting the outcome of the intended appeal. The Plaintiff runs a consultancy; it does not run a capital intensive business that requires heavy operational costs as is the case with the Defendant. It only just and fair for this Honourable Court to make an order that preserves the Defendant's ability to pursue the intended appeal''.**

They found support of the foregoing submission in the case of **Mumias Sugar Company Ltd vs. Henry KhatolwaAmukoya**and specifically on this statement:-

> **''…However, the applicant's right to pursue an appeal overrides the respondent's right to enjoy the fruits of his judgment once it is established that the respondent will suffer no prejudice''.**

On security

[4] On the other hand, the Applicant annexed its audited financial accounts which show that it has a sound financial and assets base; net profit for the year 2013 is equivalent to Kshs. 42,100,000; significant operating revenue as well as significant operating and non-operating expenses. This argument was used in two senses. One, to show they are able to pay the decretal sum herein should the appeal fail. And two, that the decretal sum is about 5.6 times the annual profit of the Applicant and, therefore, to ask the entire sum to be deposited is onerous and may cause hardships of dangerous proportions to the Applicant; such practice is unjust and may stifle appeal. They cited the case of **Tropical Commodities Ltd & others vs. International Credit Bank Limited (in Liquidation)** and **Reliance Bank vs. Norlake Investment Limited** to support this approach. They urged the court to grant a stay and allow them to provide a bank guarantee for the sum of Kshs. 75,000,000 for the due performance of any order that may ultimately be issued.

[5] The Applicant did not forget to put a rejoinder on two issues which the Respondent submitted upon. The first was the claim that the fact of the Applicant being a foreign company does not necessarily indicate the company will be unable to the pay the decretal sum. To the Applicant, international cooperation provides for avenues for enforcement of foreign judgments or suing in foreign jurisdictions. The second was on burden of proof. They faulted the submissions by the Respondent that the Applicant bears the legal burden to proof and instead cited the case of **Socnifac Company vs. NelphatKimothoMuturi and Florence Hare Mkaha vs. PwaniTawakal Mini Coach & another.** They submitted that the Applicant should at least attest that the Respondent has no known means or assets to refund the decretal sum and it is at this point that the burden shifts to the respondent to rebut the applicant's assertion. Should the respondent produce evidence of its means, the burden shifts back to the applicant and it is at this point that it may be tested by fact or law. They submitted that the Respondent did not discharge this evidentiary burden. On the basis of the foregoing, the Application urged the court to allow their application.

Respondent: We have means to refund

[6] The Respondent filed a Replying Affidavit sworn by Nderitu Wachira and submissions. They argued that the Applicant has not shown that the Respondent is not a person of means as to warrant a stay of execution. They cited the case of **Machira t/a Machira& Co Advocates vs. East Africa Standard; LaljiBhimjiSanghani Builders & Contractors vs. Nairobi Golf Hotels Kenya Limited; PamelaaAkinyiOpundo vs. Barclays Bank of Kenya Ltd; Socfinac Company Ltd (supra); Kenya Shell Limited vs. Kabiru& another;** and**JoseephGachie t/a Joska Metal Works vs. Simon NdetiMuema**to support this position. Emphasis was laid on the fact that the Respondent also has rights in his judgment which should not be ignored at the altar of the Applicant's right of appeal. In any event, the

Respondent went ahead to provide information about the assets owned by the Respondent and its principal shareholders namely Nderitu Wachira and Gemsecurities East Africa Limited. These are the principal shareholders of the Respondent who own the Respondent wholly on a 50-50 basis as a family business enterprise. Gemsecurities owns L.R. NO 13330/509 situated along Thika Road valued at over Kshs.90,000,000 as well as 4 Apartments at Rhapta Terraces in Westlands worth over Kshs. 60,000,000. The Respondent in concert with Nderitu Wachira owns assets worth in excess of Kshs. 528,000,000. Mr. Nderitu reiterated what he said in his testimony that the Respondent is a family outfit with him as the main shareholder.Therefore, he concluded that the Respondent is of means and is capable of refunding the decretal sum in the unlikely event the appeal succeeds.

Foreign company of means

[7] The Respondent stated that the Applicant has made a startling submission to the effect that it is a foreign company of significant means, yet it says payment of the entire decretal sum would *ipso facto* result into closure of its business operations. The two averments are a contradiction.Again, it is a foreign company. Therefore, the Applicant has not shown it will suffer substantial loss given its stature and status it has described eloquently as the forerunner of port engineering currently undertaking a large number of port projects.

On security

[8] The Respondent submitted that, even if in the unlikely event a stay is ordered, the security being proposed of a bank guarantee for the sum of Kshs. 75,000,000 is contrary to the provisions of Order 42 rule 6 off the Civil Procedure Rules especially given the decretal sum is in excess off Kshs. 237,632,000. The security envisaged under the rules is for the due performance of the decree i.e. sufficient to cover the entire decretal amount and not just a small proportion thereof. In sum, the Respondent urged the court to dismiss the application with costs.

DETERMINATION

[9] I do not wish to re-invent the wheel. The Applicant has filedNotice of Appeal,thus, in law he has filed an appeal. It has now applied for stay of execution pending appeal. Therefore, the applicable test is as provided in Order 42 rule 6 of the Civil Procedure Rules, where the court must be satisfied:-

a) That the application been made without undue delay?

b) That the Applicant will suffer substantial loss unless stay of execution is granted? And

c) What would be sufficient security for the due performance of the decree that might ultimately be binding on the Applicant?

Application Made Timeously

[10] I need not waste time on this ground. Judgement herein was delivered on 12th March 2015 and this application was filed on 26th March 2015. It was, therefore, made timeously.

On Substantial Loss Occurring

[11] The cornerstone of the jurisdiction of the court in determining whether or not to grant stay of execution pending appeal is the fact that substantial loss will occur upon the Applicant unless a stay is granted. By way of judicial pronouncements, courts are agreed that, substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather it is a concept which refers to any loss, great or small that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal. See the case of **Tropical Commodities Suppliers Ltd & others vs. International Credit Bank Ltd (in liquidation)** (supra) where Ogola J made a superb analysis of the jurisprudence on substantial loss within East Africa, the United Kingdom and others.

Butcontroversy seems to emerge from the submissions by the parties as to who bears the legal burden of proof that substantial loss would occur unless stay is granted.

Legal burden vs evidential burden

[12] This question has been determined by courts in a great number of cases. But many practitioners seem not to appreciate that there is a difference between the two legal concepts. In civil cases, the legal burden of proof is on the person alleging existence of a fact. The legal burden may rest on different parties depending on the allegations they have made. For example, in a case for contributory negligence, the Plaintiff bears the legal burden of proving negligence whereas the Defendant bears the legal burden of proving contributory negligence. The legal burden does not shift at all as it remains on the party making the allegation. On the other hand, evidential burden initially rests with the person bearing the legal burden, but, after such prima facie evidence is established, it will shift to the other party who will fail without further evidence. Therefore, evidential burden may shift from one party to the other.See the case of Winfred NyawiraMaina vs. **Peterson OnyiegoGichana**that:-

> **I think the foregoing justifies a little rendition on evidential burden for a fuller understanding of the decision of the court in this matter. The way I understand the law, the term Burden of proof, entails the Legal burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY'S Laws of England, 4th Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent. In simple terms see what the Supreme Court said in the case of RailaOdinga vs. IEEBC& 3 Others [2013] eKLR that:-**
>
> **''…a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden''.**

[13] Now the law on legal burden of proof and evidential burden is settled. I will proceed to determine whether it has been shown that substantial loss would occur unless stay of execution is granted. The legal burden of proof lies with the Applicant to show that the Respondent will not be able to refund the decretal sum if it is paid over to them. The Applicant submitted that the Respondent owns one flat namely C-10 on L.R. NO 209/20048-PART valued at Kshs. 24,500,000. All the other properties listed belong to the Shareholders and not the Respondent. They emphasized the concept of separate legal entity of a company to show that the Respondent's possessions are meagre, and therefore, may not be able to refund the decretal sum herein which stands at of over Kshs. 237,632,000. The Respondent argued that the Respondent is a family outfit fully owned by Mr. Nderitu Wachira and Gemsecurities who jointly with the Respondent owns properties worth more than Kshs. 528,000,000. He detailed these possessions in the affidavit and annexed title documents thereto. The Respondent also submitted that it is a consultancy firm which is still in operation. Therefore, the Respondent has means of refunding the decretal sum herein.

[14] I have considered all the arguments presented and the affidavit evidence as well as the law applicable.It must be known that, the two parties in this case have rights; the Applicant to his appeal and the Respondent to its fruits of judgment. Contrary to what the Applicant submitted, the approach in such cases is that none of the rights is the lesser only that the two rights are competing. The court, then finds itself in a novel balancing act of the two rights into an almost symmetrical bound. The Respondent is a going-concern carrying out inter alia consultancy services. This fact is not denied and indeed, the basis of the contract in issue was consultancy services provided by the Respondent. The principal shareholders of the Respondent on a 50-50 basis are Nderitu Wachira and Gemsecurities. The Respondent is a family owned business with a conglomerate nest of properties worth more than Kshs. 528,000,000. The Respondent has to its name a property worth Kshs. 24,500,000. As such, it is not defensible to say that the Respondent may not be able to refund the decretal sum herein. The Applicant has not shown that the Respondent will not be able to refund the decretal sum.I will, however, make orders which recognize and

safeguard the rights of both parties.

On security

[15] I stated that in cases of stay pending appeal, it all abounds prudent balancing of the rights of parties by the court. I am aware that:-

> **…insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts".**See the case of **Sewankambo Dickson vs. Ziwa Abby HCT-00-CC MA 0178 of 2005,** by the High Court of Uganda at Kampala.

I am also acutely aware that it is also true that the court ought not to place the Plaintiff in a position in which should the appeal fail it would be difficult for the plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered. On this see the case of **Visram RavjiHalai&another vs. Thorntorn&Tupin [1963] Ltd Civil App. No NAI 15 of 199** by the Court of Appeal of Kenya**.**Therefore the court should consider all the facts of the case in making the decision on the security it should order for the due performance of the decree or order that might ultimately be binding on the applicant. From the outset, bank guarantee for the sum of Kshs. 75,000,000 is not sufficient security at all in this case. Other factors are also worth of consideration. I am minded that the Applicant is foreign company with no assets in Kenya. From the information given by the Applicant, the company is largely solid with sound financial and asset base outside the country. I am also keen that international cooperation provides for enforcement of foreign judgment like the one in issue. But, I do not think it is apt to leave the Respondent solely on existence of a procedure which by its very nature is complicated, onerous and expensive. Parties have to transcend international or regional bottlenecks in international cooperation at great expense of time, money and other resources. Nonetheless, despite the fact that the Respondent has means of refunding the decretal sum herein, in the circumstances of this case, the following most commend to me and I hereby order:-

> **a) That the Applicant shall pay one half of the decretal sum to the Respondent within 30 days from today;**
>
> **b) That the Applicant shall deposit the other one half of the decretal sum in an interest earning account in the joint names of counsels for both parties within 60 days from today; and**
>
> **c) Each party shall bear own costs of the application. it is so ordered.**

Dated, signed and delivered in court at Nairobi this 11th day of June 2015.

F. GIKONYO

JUDGE