REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 10 OF 2014

BUBBLE ENGINEERING COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MASENO UNIVERSITY….....DEFENDANT/APPLICANT

(Being an application for stay of execution pending an intended appeal)

RULING

On 18th February 2015 the Plaintiff/Respondent obtained judgment on admission against the Defendant/Applicant for a sum of Kshs.11,339,151/= together with costs and interest and by the notice of motion dated 24th April 2015 the Defendant/Applicant seeks orders that there be a stay of execution pending hearing and determination of an intended appeal. It also seeks an order that warrants of attachment and sale issued herein to Ms. Eshikoni Auctioneers be recalled and set aside and any costs occasioned by the proclamation be met by the Plaintiff and further that the decree issued on 10th April 2015 be set aside.

The application is supported by the affidavit of Elizabeth A. Ayoo the Head of Legal Services of the Defendant/Applicant.

The gist of the application as can be discerned from the grounds on its face, the affidavit in support and the oral submissions of the Advocate is that the defendant has filed an appeal as evidenced by the Notice of Appeal; that it has already applied for copies of the proceedings and that if the stay is not granted the defendant/Applicant will suffer substantial loss as the Plaintiff/Respondent has no means of refunding the decretal sum should the stay be refused and the appeal succeeds. It is also contended that the decree issued herein is irregular as the same was not served upon the Defendant/Applicant's Advocate for approval as required by the Civil Procedure Rules, and further that the applicant is ready to deposit security for the due performance of the Decree should the intended appeal fail. Delay in bringing this application is explained on the need to change Advocates after the judgment.

Mr. Otieno D, Advocate for the Defendant/Applicant submitted that all the conditions for grant of stay pending appeal had been met. He urged that the Defendant/Applicant being a public entity payment of the decretal amount is bound to harm the public and that the Respondent has not denied and in fact makes no mention that it has capacity to refund the decretal amount and should the appeal succeed the money would be irrecoverable.

On security he urged this Court to order that only a fraction of the decretal sum be deposited and on the decree he argued that by not sending the decree to the Advocate for the defendant/applicant the defendant/applicant was prejudiced. He prayed that the warrants of attachment flowing therefrom be recalled. Relying on **Samoei V. Isaac K. Ruto [2012] eKLR** he submitted that this Court should not

concern itself with whether the appeal has chances of success. He further drew the attention of this Court to the strict timelines in the Court of Appeal and stated that the fear that the Defendant/Applicant is intent on holding onto the respondent's dues indefinitely is unfounded.

The application is vehemently opposed and the Plaintiff/Respondent has filed a replying affidavit sworn by William O. Owuor its Managing Director. Relying on this affidavit Mr. Ouma, Advocate for the Plaintiff/Respondent submitted firstly that the application is defective for being brought under Order 22 Rule 14 of the Civil Procedure Rules as the same deals with decrees sent for execution to another Court which is not the case here. Secondly that as the Notice of Appeal was filed outside of the 14 days stipulated under the Appellate Jurisdiction Act the same is invalid and this application therefore has no basis. He submitted that the discretion of this Court must not be exercised in a manner that is capricious or whimsical and hence the need for the Defendant/Applicant to satisfy the conditions. He contended that those conditions have not been met as there was a serious delay in bringing this application and substantial loss has not been demonstrated. He submitted that substantial loss is not even deposed to in the supporting affidavit. Further that the onus to prove substantial loss rests on the applicant throughout and only once that onus is discharged would the Respondent be required to file an affidavit of means. He relied on 3 authorities to support his submissions.

1. **Antonine Ndiaye V. African Virtual University [2015) eKLR.**
2. **Oriental Construction Company Limited V. Rift Valley Water Services Board [2014] eKLR.**
3. **Kantai & CO. Advocates V. Housing Finance Co. Ltd. [2014] eKLR.**

He urged that should the Court grant the stay the applicant be ordered to deposit half of the decretal sum and pay half the decretal sum to the Plaintiff/Respondent.

Regarding the decree, while conceding that the same was not sent to the applicant's Advocate for approval he submitted that there is no allegation that the same is defective. He argued that the requirement is a matter of procedure but not substance and that the rule is permissive but not mandatory. He contended that as no prejudice was demonstrated and the decree was approved by the Court in any event that ground has not basis and should not disturb the lawful process. Lastly he contended that as judgment here was on admission any further delay will occasion injustice. He prayed that this application be dismissed.

In reply Mr. Otieno D. Submitted that since they have stated that this application is brought under all enabling provisions of the law and as there is a response to the application there is no prejudice. He also submitted that an intended appeal or notice of appeal suffices under Order 42 rule 6(4) and that the notice of Appeal filed is valid as it was filed on the fourteenth day. He contended that unreasonable delay is delay without reason but that in this case the time between the judgment and the filing of this application has been explained. He reiterated that the Respondent has not demonstrated that he has capacity to repay the decretal sum and urged the Court to look at section 61 of the Evidence Act for the effect of this. He contended that as the inability to pay is not controverted in the affidavit then it is admitted and hence the authorities cited by Mr. Ouma are in the Applicant's favour. He pointed out that in any case they are not binding on this Court.

On the decree he reiterated that it was necessary to extract the decree and the prejudice here is clear in that there is a proclamation and the Defendant is required to pay Kshs.1.5 million to the auctioneer. He argued that extraction of a decree is a substantive provision that is intended to save parties from escalation of costs. He contended that no explanation was given for not complying with the provision. He urged this Court to allow this application.

A decree is defined as the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It may be either preliminary or final. Order 21 rule 7 requires that the decree agree with the judgment; contain the number of the suit, the names and description of the parties and particulars of the claim and specify clearly the relief granted or other determination. Order 21 rule 8 makes provision for preparation of the decree. Any party to the suit may prepare a draft decree and

submit it to the other party for approval and the other party shall approve it with or without amendment, or reject it, without undue delay. Once the draft is approved it is then submitted to the registrar who if is satisfied that it is drawn up in accordance with the judgment shall sign and seal the decree accordingly. Rule 8 (4) provides for what happens in the event that there is disagreement with the draft decree. In my view the procedure for approval of the decree by the other party is intended to reduce the incidence of defective decrees or situations where parties abrogate to themselves rights or reliefs not awarded to them in the final determination or judgment of the Court. It is not with due respect intended to inform the other party of the existence of the judgment but rather to ensure that the decree drawn agrees with the judgment. It is conceded that the decree here was not sent to counsel for the Defendant/Applicant for approval. Be that as it may counsel has not raised any disagreement with it. He has not said that it does not agree with the judgment or that it does not meet the threshold for a decree. The same is duly approved by the Deputy Registrar. Whereas the Deputy Registrar must be cautioned against approval of decrees that have not been approved by the other party, I am not persuaded that this ground alone is sufficient to warrant this Court to set aside the execution.

As for the title of the application, I do agree that this application ought to have been brought under O.42(6) of the Civil Procedure Rules but not Order 21 rule 8 or Order 22. however I do not agree that citing the wrong order renders the application fatally defective. In my view the title does not go to the root of the application.

Order 42 Rule 6(5) provides that for the purposes of the rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. It has been demonstrated that a notice has been given and the Defendant/Applicant is therefore properly before this Court.

On the merits of the application authorities abound that the applicant must satisfy the provisions of the Order 42 rule 6(2) – the application must have been brought without undue delay, substantial loss must be demonstrated and the applicant must be willing to deposit security.

Judgment in this case was delivered on 18/2/2015 but this application was not filed until 24/4/2015. There was therefore a delay of slightly more than two months in bringing the application. Counsel for the Defendant/Applicant explains that delay by stating that there was need to change Advocates and that leave for that had to first be obtained. He has submitted that unreasonable delay is delay without a reason and that as the applicant has given a reason for the delay the delay is not unreasonable. With due reasonable I beg to differ with him. Unreasonable delay is delay that is inordinate or excessive. Whereas two months appears to be long I do not consider it ordinate given the circumstances pertaining in our Courts.

As regards substantial loss it is trite that the onus lies on the applicant to demonstrate that it is likely to suffer substantial loss should the stay be refused and the appeal succeeds. The applicant does so by demonstrating that the respondent is a man of straw, incapable of refunding the decretal amount should the appeal succeed. Be that as it may whether or not to grant a stay is in the discretion of the Court. The Defendant/Applicant is a public body and is willing to deposit security. In exercising my discretion I have carefully considered the interests of both parties – the applicant's right of appeal and the respondent's right to enjoy the fruits of her judgment and allow the application subject to the Defendant/Applicant depositing the entire decretal sum either in Court or in an interest earning account in the joint names of the Advocates for the parties within twenty one (21) days of this ruling. The costs of this application shall abide the appeal. It is so ordered.

Signed, dated and delivered this 2nd day of July 2015.

E. N. MAINA

JUDGE

In the presence of:

Mr. Ragot for Otieno D. for Applicant

Mr. Anyumba for Ouma for Respondent

CC: Moses Okumu