



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO.127 OF 2014**

**WEST KENYA SUGAR COMPANY LTD.....APPLICANT**

**VERSUS**

**TOM MUZEE MUKHWANA .....RESPONDENT**

**RULING**

1. By the Notice of Motion dated 17/12/2014 but filed in Court on 18/12/2014, which application was filed under certificate of urgency of even date, the appellant (herein referred to as applicant) seeks an order for stay of execution of the judgment and decree in Kakamega CMC.no.438 of 2011 pending the hearing and determination of this appeal. In the alternative the applicant prays that this Court be pleased to order the respondent to provide security for the restitution of the sum of kshs.285000/= and for the entire decretal sum in the Court below, in restitution in the event the appeal later succeeds. The applicant also prays that costs of the application be provided for.
2. The application is premised on the nine grounds set out on the face of the application and is also premised on the averments in the supporting affidavit sworn by Michael Mechumo who is the Human Resource Manager of the applicant company.
3. The applicant's main grounds are that the appeal has high chances of success and secondly that the respondent being a man of straw would have no capacity to refund the decretal sum should the appeal succeed. The deponent says the applicant is ready and willing to comply with conditions as to the provision of security which this honourable Court may impose as a pre-condition for granting of the stay order, arguing further that the unconditional payment directly of the decretal sum to the Respondent and his legal advisers would not be in the interests of the applicant.
4. The Respondent opposed the application vide grounds of opposition dated 08/01/2015 and filed in Court on 12/01/2015. The four grounds of opposition are:-
  - i. That this application's contemplation and staying taxed costs ousts this Court's inherent jurisdiction.
  - ii. That the said affidavit is fatally defective.
  - iii. That the application is misconceived brought in bad faith, bad in law and abuse of the Court's process and seeks merely to obstruct the Respondent's cause of justice.
  - iv. That the said application is brought under the wrong provisions of the law and hence it is untenable.
  - v. That the application is not supported by any evidence to warrant the orders prayed for.
5. The Respondent therefore prays that the application which is misconceived should be dismissed with costs to the Respondent.
6. The parties appeared before me on 15/06/2015 and made their oral submissions. Miss Aron who was duly instructed by the firm of Okong'o Wandago & Company Advocates appeared for the

- applicant while Mr. Abok of the firm of Abok Odhiambo & Co. Advocates appeared for the Respondent.
7. The applicants submissions were weaved around the grounds set out on the face of the application as well as the averments in the supporting affidavit sworn by Michael Mechumo on 17/12/2014. Counsel for the applicant relied on two authorities, namely **Mombasa HCCA 65 of 2013 – Feisal Amin Janmohammed T/A Dunya Forwarders –vs- Shami Trading Company Ltd (2014) e KLR and – Kenya Orient Insurance Co. Ltd –vs- Paul Mathenge Gichuki & Another (2014) e KLR.**
  8. In **Mombasa HCCA No.65 of 2015,** (above) the Court persuasively held that where there is an allegation that an appeal would be rendered nugatory if stay is not granted then the burden would be on the party making the assertion, but remembering always, that an applicant might suffer from certain limitations in discharging such burden. The applicant in the said appeal was a bank and going by the case of **ABN Amro Bank N.V. –vs- Le Monde Foods Limited – Civil Application No. Nai 15 of 2002,** the Court held that a bank would not be expected to go into the bank account, if any, operated by the Respondent to see if any money was there. Fortunately, the applicant herein is not a bank, but it is not lost to this Court that that the applicant might have its own limitations in its efforts to show or prove that the Respondent herein is a man of straw.
  9. In HCCA No.40 of 2014, (supra)the Court dealt with the provisions of Order 42 Rule 6(1) and (2) and found that the applicant therein had met the threshold of the conditions for the granting of order.
  - 10.For clarity, Order 42 Rule 6(1) and 2 of the CPR under which the instant application is brought beside Sections 1A, 1B, 3A and 63 (e) of the CPA provides as follows:-

**“6(1) No appeal or second appeal shall operate as a stay of decree or order appealed from except in so far as 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, by application being made to consider such application and to make such orders 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.**

**(2) No order for stay of execution shall be made under sub-rule (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 applicant.”**
- 11.In essence therefore, for the applicant herein to be granted the orders sought, the applicant must establish first and foremost that substantial loss is likely to occur if stay is not granted. Without a demonstration that substantial loss will occur, an order for stay cannot be granted. Further, the applicant must show that the application for stay of execution was filed without undue delay and finally the applicant must provide such security as may ultimately be binding upon him.
  - 12.In this case, there is another angle to the applicant’s case and that is the applicants contention that the Respondent would not be in a position to refund the decretal sum if the same is paid out to him and the appeal actually succeeds. The applicant proposes two options: one is that the decretal sum be deposited in an interest earning account to be operated by the advocates on record or alternatively that the respondent gives security for the decretal sum should the appeal succeed.
  - 13.The Respondent on his part submitted that the applicant has not given any evidence to prove that the Respondent is a man of straw. He submitted that it is not enough for the applicant to make the statement without proof. Reliance was placed on the case of **Mutua Kilonzo –vs- Kioko David Machakos HCCA No.62 of 2008** where Lenaola J persuasively observed that an applicant must not just mention the catchphrase that the respondent is a man of straw when there is o evidence to support the statement.
  - 14.Mr. Abok also concluded that since the application has been brought under wrong provisions of

the law especially Sections 1A, 1B, 3A and 63(e) of the CPA, the same is fatally defective and should be dismissed. The argument was based on Counsel's view that the said sections apply only in those circumstances where there is no direct provision of the law governing the matter in controversy.

15. Finally Counsel submitted that if the applicant's application is to be allowed then the same should be allowed on condition that the applicant deposits the entire decretal sum into an interest earning account to be operated jointly by the two Counsel appearing. Counsel also submitted that the applicant should also be ordered to pay the costs of the suit in the subordinate Court. Reliance was placed on the case of **Francis Kabaa –vs- Nancy Wambui & Another – Nairobi Court of Appeal Civil Application NO.NAI 295 of 1996 (113/96 UR)** where the Court held that a stay cannot be granted in respect of costs.
16. I have now carefully considered the rival submissions in this matter. I have set out the relevant Order 42 Rule 6(1) and (2) of the CPR and the conditions set out thereunder which the applicant is required to fulfill before the orders sought can be granted. A careful look at the application clearly shows that the instant application was brought without undue delay after the application before the trial Court was dismissed. I am also satisfied that the applicant is ready and willing to give such security as would be binding upon him for the due performance of the decree, namely to deposit decretal sum into an interest earning account to be operated in the joint names of the advocates on record.
17. It is also clear to me that the applicant has demonstrated that it will suffer substantial loss if the decretal amount is released to the Respondent. If the Respondent is unable to refund the decretal sum should the appeal succeed, I conclude that such an eventuality would result in substantial loss for the applicant.
18. For the foregoing reasons, I find that the applicant's Notice of Motion dated 17/12/2014 has merit. The same is allowed on the following conditions:-
  1. The applicant shall deposit the entire decretal sum (excluding costs) into an interest earning account, in a bank to be agreed upon by both Counsel to be jointly operated by the firms of the advocates on record.
  2. The sum of kshs Fifty Thousand (kshs.50,000/=) deposited into Court by the applicant shall be released to the applicant so as to form part of the decretal sum referred to in (1) above.
  3. The deposit shall be made within thirty (30) days from the date of this ruling.
  4. Costs awarded to the Respondent by the Lower Court shall be paid to the Respondent within thirty days from the date of this ruling.
  5. The costs of this application shall abide the outcome of the appeal.
  6. In default of (3) above, the stay order shall automatically lapse.

Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 7<sup>th</sup> day of July 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Matete for M/s Aron for Appellant/Applicant

Miss Shibanda.....for Respondent

Mr. Lagat.....Court Assistant

