REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 125 OF 2014

TIMBER TREATMENT INTERNATIONAL LTD……..……..... APPELLANT

VERSUS

BONKO INVESTMENTS LTD..…….…….……RESPONDENT

(Being an appeal from the order of S. M. Mokua, Senior Principal Magistrate in Eldoret CMCC No. 543 of 2013 delivered on 23rd September 2014)

RULING

1. The appellant is aggrieved by the order of the lower court made on 23rd September 2014. The appellant had sought review of the judgment delivered on 26th June 2014 on the grounds that it had obtained new evidence. The learned trial magistrate declined to grant an order for review.
2. The appellant filed the memorandum of appeal on 21st October 2014. The appellant has now presented a notice of motion dated 5th June 2015 praying for stay of execution of the decree pending the hearing of the appeal. The appellant also prays for release of two motor vehicles and their cargo which were attached by auctioneers.
3. The original judgment was entered in favour of the respondent for Kshs 1,451,800. The proceedings and judgment have not been annexed. The parties entered into a written consent dated 5th November 2014 staying execution of the decree. As a condition, the appellant was to provide a bank guarantee for the decretal sum of Kshs 1,638,730. The appellant avers that the bank guarantee was obtained on 7th December 2014 and filed in court. A copy of the guarantee from I&M Bank dated 7th December 2014 is annexed. The appellant concedes that the guarantee was not served upon the decree holder. The auctioneers remained faithful to the consent until 28th May 2015 when they suddenly attached motor vehicles KAD 587P and KBM 335V and their cargo of electric transmission poles. The auctioneers are demanding fees of Kshs 220,000. The sale has been advertised. The appellant contends that the attachment is in breach of the order of consent.
4. The prayer for review was rejected by the lower court on 23rd September 2014. It was pursuant to a notice of motion by the appellant (the defendant in the lower court) dated 15th July 2014. The main grounds urged in that motion were that the defendant had discovered there was a fraudster named Steve impersonating its director. It had further been urged that the defendant was unable to file its list of documents because its principal witness became diabetic and fell blind. Consequently, the decree was passed without the benefit of the defendant's evidence. The defendant also stated that it had since discovered that the alleged transfer of poles was fraudulent

or without authority. As stated, the learned trial magistrate declined to review the decree. Those matters are all the subject of the memorandum of appeal I referred to. I cannot comment on the merits of the appeal at this stage. The appeal has not been admitted. As a matter of fact, the record of appeal has not been filed.

5. The motion is contested. The respondent filed a replying affidavit on 24th June 2015. It is sworn by Evans Miyienda, learned counsel for the respondent. He denies that he or the auctioneers acted in contempt of the consent order. He avers that the guarantee was to be furnished within 30 days. In default, the decree holder was at liberty to execute. He contends that the present motion is an abuse of court process. In that regard, he points to the withdrawal of two prior applications dated 28th May 2015 and 9th April 2015. He blames the appellant's lawyers for the errors and mistakes. He averred that the appeal is hopeless. Finally, he was of the view that if the application is allowed, the appellant should deposit the decretal sum of Kshs 1,940,374 as well as costs of Kshs 146,930 and the auctioneer's charges of Kshs 220,000.
6. On 21st July 2015, learned counsel for the appellant and respondent appeared before me and made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion, the pleadings, and depositions.
7. The court has discretion to grant a stay pending appeal by dint of Order 42 of the Civil Procedure Rules 2010. The present motion is predicated upon Order 42 Rule 6 which provides-

> *"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.*
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> *(2) No order for stay of execution shall be made under subrule (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*
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> *(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."*

8. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, the learned Judge, Madan JA (as he then was), quoted with approval the views of Brett L.J. in *Wilson v Church* (No 2) 12 Ch D [1879] 454 at 459-

> *"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"*

9. Justice Madan delivered himself thus in the *Butt* case (Supra) at page 419,

> *"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings"*

10. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General v Emerson and others* 24 QBD [1889] 56 at page 59. In the *Butt* decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it

was a "special circumstance" that gave the applicant an undoubted right of appeal. Those general principles were restated in *Madhupaper International Limited v Kerr* [1985] KLR 840 at page 846.

11. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.
12. The present motion was only presented to court on 5th June 2015. The impugned ruling was delivered on 23rd September 2014. The memorandum of appeal was presented to court on 21st October 2014. On the face of it, there would seem to be laches. However, I have noted that the appellant had sought a stay in the lower court in a motion dated 15th July 2014. It was dismissed on 23rd September 2014. There was then an application dated 9th April 2015 brought under a certificate of urgency at the High Court seeking stay pending appeal. The High Court, (Githua J) declined to certify the matter urgent. On 13th April 2015, the appellant filed a fresh certificate of urgency to expedite the motion. The motion was certified urgent and an interim order granted in terms of prayer (b) of the motion. That prayer had a patent error: it referred to the dispute in the lower court as Civil Case 543 of *2014* instead of 543 of *2013*. The order extracted was thus ineffectual. The drafting error rested entirely at the doorstep of the appellant's legal counsel. The appellant's counsel filed yet another motion dated 28th May 2015 seeking a stay of execution and to rectify the earlier errors. On 5th June 2015, counsel for the appellant filed a formal notice withdrawing the motions dated 28th May 2015 and 9th April 2015. He then lodged the present motion.
13. I would thus agree with the respondent's counsel that there has been a multiplicity of interlocutory applications for stay of execution. I have pointed out the drafting errors by the learned counsel for the appellants. The plethora of actions is anathema to the overriding objective of the court. They squander valuable judicial time and exacerbate costs. Fundamentally, they fall into the genre of abuse of legal process. See *Attorney General vs. Baker*, The Times March 2000, *Peter Muiruri v Chiera Waithaka & another*, High Court, Nairobi, Civil Appeal 27 of 2012 [2014] eKLR.
14. The key question is whether the appellant has demonstrated substantial loss. The appeal before this court relates to the order of 23rd September 2014. There is no appeal against the final decree that was made on 26th June 2014. Like I stated, the appeal has not been admitted. As a matter of fact, the record of appeal has not been filed. A copy of the impugned ruling of 23rd September 2014 has not been annexed to the motion. I cannot comment on the merits of the appeal. That will be for the appellate court. What is not in dispute is that the application for review was refused by the lower court.
15. There is then the matter of the consent of the parties in the lower court dated 5th November 2014. The consent required the appellant to provide a guarantee for Kshs 1,638,730 *within* 30 days. The respondent claims that the appellant defaulted on the guarantee. The appellant concedes it obtained the guarantee on 7th December 2014, well outside the thirty days. The appellant concedes it never served the respondent with the guarantee. The affidavit states the guarantee was filed in court *within* time; but there is *no* statement of the date when it was *filed* in the lower court. I do not have the record of the lower court. I am not satisfied in the circumstances that the appellant furnished the guarantee within the time set in the consent. I am not then able to state categorically, that the respondent, its counsel or the auctioneer acted in breach of the consent. It also follows as a corollary that the stay granted in the lower court lapsed.
16. The decree is for a *substantial* sum. I am also alive that as a general proposition the execution of money *decree* does not constitute substantial loss. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR. The appellant says that the respondent would not be in a position to refund the decretal sum if the appeal is successful. It is deposed at paragraph 20 of the supporting affidavit that the respondent is a *"shell company without assets and employees"*. The respondent has not offered evidence to show the contrary. It behoved the respondent to demonstrate it is not a man of straw. See *MDC Holdings limited and others v J.P. Machira*

Nairobi, Court of Appeal, Civil Appeal Nai 7 of 2002 (unreported), *Butt v Rent Restriction Tribunal* [1982] KLR 417. The appeal seems arguable to me. There is thus a danger that the appeal would be rendered nugatory.

17. Justice is however a two way street. The point is that the respondent has a decree; but it cannot reap the fruits of its judgment. The bank guarantee provides little solace. The prejudice is self-evident. I have said the appellant has filed a multiplicity of actions falling within the genre of abuse of court process. I have also stated that there was laches. I found earlier that the entire *blame* for *errors* that led to the withdrawal of *two* previous motions were those of the appellant's counsel. The appellant has offered at paragraph 16 of the supporting affidavit to provide security. The justice of this case then calls for a *conditional* stay.
18. I order that there shall be a *stay of execution* of the decree in Eldoret CMCC 543 of 2013 pending the hearing and determination of this appeal. There shall also be a stay of attachment or sale of motor vehicles KAD 587P and KBM 335V. The vehicles and their cargo of electric poles shall be released to the appellant. All those *three* orders are granted on *one condition:* That the appellant shall within *thirty days* of today's date *deposit* the decretal sum of Kshs 1, 940, 374 in a joint interest earning account of both advocates in a reputable bank. In default of this condition, execution shall proceed. The appellant shall also pay auctioneer's charges to be agreed between the parties within *thirty days* or assessed by the court. Finally, the appellant shall file the record of appeal; and, set down the appeal for *directions* within *ninety days* of today's date. The costs of this motion shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 15th day of October 2015

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Benja for the appellant instructed by Magare Musundi & Company Advocates.

Mr. E. Miyienda for the respondent instructed by Miyienda & Company Advocates.

Mr. J. Kemboi, Court clerk.