



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 52 OF 2014

BAMBURI SPECIAL PRODUCTS LIMITED APPLICANT

VERSUS

MUTURI KIGANORESPONDENT

RULING

The applicant via the notice of motion dated 13/5/14 seeks for stay of execution of the judgment in CMCC No. 5762 of 2008 pending the hearing and determination of this application and the appeal. The applicant further seeks the setting aside of judgment delivered in CMCC 5762 of 2008 and urged the Court to uphold the appeal and enter judgment for the appellant as prayed in the plaint in CMCC 5762.

The application is grounded on the following grounds; that the lower Court in its judgment allowed the respondent's claim after making findings that the applicant was in breach of contract; that the applicant is in the process of executing the decree and attachment was due on 17th May 2014 and if the application is not allowed the applicant would suffer irreparable loss since the costs of supplying and transporting the materials was already incurred and cannot be recovered; that the appeal has high chances of success and if execution is carried out the appeal will be rendered nugatory and that the application has been made without delay.

The application was opposed. It was argued that; the ex parte orders were awarded by misrepresentation of material facts and that the applicant has not met the threshold of the provisions of Order 42 rule 6(2) Civil Procedure Rules; that the application is calculated to frustrate the Respondent from enjoying the fruits of the judgment entered in his favor; that the applicant had concealed material facts to the Court in that the suit pertained to breach of contract and the applicant did not adhere to the terms and conditions laid out in the contract and subsequent to filing the said suit the same was found as baseless by the lower Court and dismissed; that due to the shoddy work done by the applicant he had to contract another firm to redo the said work; and that the applicant's application is calculated to frustrate the applicant from proceeding with execution proceedings. The Respondent urged the Court to dismiss the applicant's application with costs.

The application was heard on 25/6/14 and parties made oral submissions. The applicant's counsel submitted that if the application is not granted the applicant will suffer irreparable loss as she has carried out her contractual obligation and the appeal has high chances of success and that there was no inordinate delay in bringing the application. He argued that requiring the applicant to deposit security would be putting the applicant in hardship same hardship if execution was to proceed.

The respondent's counsel argued that the application did not comply with Order 42 rule 6 as the same was brought after unreasonable delay; that both parties are people of means with the an advocate of high standing with a law firm that has been in existence for a long time and the applicant being a part of

Bamburi Cement group which is by no means a small company. Further the respondent submitted that the applicant has not made any offer of security and argued that should any security be ordered the same should be held by the applicant. The respondent urged the Court to dismiss the application and referred the Court to the certificate dated 15/5/14 and indicating that the same was assessed for fees in February 2014 but it wasn't filed.

Counsel for the applicant in reply argued that the said certificate was just an annexure and sought to clarify that the Orders made by the Court made reference to Notice of Motion dated 28/12/14 and not to the unfiled application as stated by the respondent and urged the Court to find that the only application properly before the court was Notice of Motion dated 13/5/14.

I have read and considered the parties affidavits and oral submissions made in Court. The Applicant's Counsel abandoned prayers 4 and 5 and only sought prayers 3 and 6. Simply the applicant is seeking for stay of execution and costs of the application. I am guided by Order 42 rule 6 (2) of the Civil Procedure rules which provides as follows;

“(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.”

Having gone through the file I note that the Memorandum of Appeal was filed on 28th February 2014, within the 30 days period. The application for stay was filed on 14th May of 2014 about 2½ months after the appeal was filed. It has not been explained by the applicant why they took so long to do so. In the affidavits filed by the applicants the applicant does not explain the substantial loss it stands to suffer. Merely stating that the applicant will suffer loss since the cost of supplying and transporting the materials was already incurred and the appellant will not recover the same is not sufficient. The respondent has stated that he is a man of means and can refund the amounts should the appeal by the applicant's succeeds. I therefore find no merit in this application and dismiss it with costs to the respondent.

Orders accordingly.

Dated, signed and delivered this 12th day of September 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Appellant /Applicant**

.....**For the Respondent**

.....**Court Clerk**