



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 473 OF 2006

TECHARD STEAM & POWER LIMITED.....APPLICANT

-VERSUS-

MATHER & PLATT (K) LIMITED.....RESPONDENT

RULING

1. The application before the Court is the Defendant's Notice of Motion dated **5th February 2014** and filed the following day. It is expressed to be brought under **Order 42 Rule 6** and **Order 50 Rule 1** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**.
2. The application is seeking for one main order that there be a stay of execution of the Judgment entered against the Defendant on **5th December 2013** for **Kshs. 3, 505, 041/=** less **Kshs. 741,953.10/=** paid by the Defendant on admission. The application is based on the grounds stated on the face of the application and is supported by the affidavit of ERASTUS MAINGI, the General Manager of the Defendant.
3. It is the deponent's position that being aggrieved by the Judgment of this Honourable Court granted on **5th December 2013**, they prefer to appeal against the aforesaid Judgment. The deponent further informs this Court that the Defendant has timeously filed and served a Notice of appeal in the High Court on **18th December 2013**. (*Attached to the application and marked "EM 1" is a copy of the Notice of appeal*).
4. It is the Defendant's case that they stand to suffer substantial loss as the sum at stake, being **Kshs. 3,505,041/=** is of such magnitude. The Defendant is apprehensive that they may not recover the said amount from the Plaintiff hence rendering the appeal nugatory. It is also the Defendant's case that they are able and willing to deposit security for costs for the due performance of the decree as may be binding upon them. The Defendant is willing to deposit the decretal amount in an interest earning account to be held by both the Defendant and the Plaintiff's Advocates.
5. The application is opposed. The Plaintiff filed a Replying affidavit sworn on **18th February 2014** by its Managing director, PRADIN PATEL. It is the Plaintiff's contention that the Defendant has not demonstrated any substantial loss that may be suffered or occasioned to them if stay is not granted. It is further the Plaintiff's contention that the Defendant has not by means of affidavit evidence or otherwise demonstrated the facts within their knowledge which would make the recovery of the decretal amount from the Plaintiff impossible.
6. On the converse, the Managing Director avers that the Plaintiff is a solid company that has means to repay any monies ordered by the Court in the event that the Defendant's appeal succeeds. According to the deponent, this is premised on the fact that the Plaintiff was able to supply the Defendant with goods worth more than **Kshs. 6,500,000/=** on credit without jeopardising its good financial standing and assets. It is the Plaintiff's case that granting the orders sought herein will deprive them of the fruits of the Judgment.

7. The application was prosecuted by way of written submissions.

ANALYSIS

8. I have considered the application herein as well as the affidavits on record. Having done so, I take the following view of the matter.

9. This is an application for stay of execution which is provided for under **Order 42 Rule 6** of the Civil Procedure Rules. For the Applicant to succeed in this application, it must fulfil the following conditions as set under the aforementioned order:-

- a. **that the applicant may suffer substantial loss unless an order of stay is granted; and**
- b. **that the application for stay must be brought without unreasonable delay; and**
- c. **that the applicant must give an undertaking as to security.**

10. On the issue of substantial loss, it is submitted for the Defendant that it would suffer substantial loss as the decretal amount is of high magnitude. It is also the Defendant's position that it would be difficult for them to recover the decretal amount in the event the intended appeal is successful. The defendant has not demonstrated how it will suffer substantial loss if they were to pay the decretal amount to the Plaintiff. On the contrary, the Defendant has submitted that it is a reputable company with franchises all over the world and will be able to settle the decree together with interest in the event that the intended appeal is not successful. On that submission, it is inconceivable that an amount of **Kshs. 3,505,041/=** if paid out by the Defendant would occasion substantial loss.

11. The Defendant has also not substantiated its allegation that it would be difficult for them to recover the decretal amount in the event the intended appeal is successful. The Defendant has not adduced evidence to the effect that the Plaintiff will not be in a financial position to refund the decretal sum. However, in the case of **ABN AMRO Bank, N.V. Vs. Le Monde Foods Limited Civil Application No. NAI.15 of 2002**, the Court of Appeal emphasized that once the applicant in an application for stay expresses doubts on the respondent's ability to refund the decretal sum, the burden shifts to the respondent to rebut that assertion. The Court stated thus:

“In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

12. To this end, it is the Plaintiff's submissions that it is a solid company with good financial standing. This is based on the fact that the Plaintiff supplied the Defendant with goods worth more than Kshs. 6,500,000/= on credit. That may be so. However, the financial status of a company may change from time to time. Besides, this is not an indication of the current financial status of the Plaintiff Company. Therefore, the Plaintiff/Respondent has failed to demonstrate that it has means to repay the decretal amount in the event that the appeal is successful.

13. That leads me to the other two requirements for stay of execution. I take note that the application was filed in good time and the Defendant has shown that it is ready to offer security for the due performance of the decree.

14. This Court is alive to the fact that it should balance the interests of both parties. The Defendant has a right to appeal while the Plaintiff has the right to enjoy the fruits of its Judgment.

15. In view of the foregoing, I grant a stay of execution of the decree herein on condition that the Defendant deposits within thirty (30) days from the date of this ruling, the decretal sum of **Kshs. 3,505,041/=** in a joint interest earning account in the names of the advocates for the parties herein. If the Defendant fails to comply, the Plaintiff will be at liberty to execute.

Costs shall be for the Respondent.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 3rd Day of October 2014.

E.K.O OGOLA

JUDGE

Present:-

Mwaura holding brief Waweru for the Plaintiff

Okeyo for the Defendant

Teresia – Court clerk