

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL 198 OF 2010

RONGAI WORKSHOP & TRANSPORT LIMITED.....PLAINTIFF

VERSUS

MALINDI SALT WORKS LIMITED.....DEFENDANT

RULING

In their Notice of Motion dated 10th October 2011 and filed on 24th October 2011 the Appellant/Applicant sought a stay of execution of the decree issued in Nakuru CMCC No. 198 of 2010, pending the hearing and determination of the appeal herein.

The conditions for grant of a stay of execution are set out in Order 42, rule 6(2) of the Civil Procedure Rules. The condition's are -
the court is satisfied that substantial loss may result to the applicant unless the order is made, and the application has been made without unreasonable delay, and the Applicant has offered security as the court may order for due performance of such decree or order as may ultimately be binding on the Applicant.

The decree herein is in the sum of Ksh 761,300.25. The Applicant is ready and willing to deposit this sum either into court or into a joint interest earning account in the name of the Applicant's and Respondent's counsel.

The Application was however opposed in a Replying Affidavit of Vanessa Jane Evans sworn on 11th November 2011 and filed the same day. The Respondents contend that the application is mischievous, scandalous, vexatious and abuse of the court process as it is brought by a Third Party, Fidelity Shield Insurance Co. Ltd, who is not a party to this suit, and therefore cannot purport to appeal on a judgment to which it is not a party.

The Respondent's contention concerns the Supporting Affidavit of the Applicant, Malindi Salt Works Limited. It is not sworn by any officer of the Appellant but by one Gladwell Kamau who described herself as an Assistant Manager – Claims, Fidelity Shield Insurance Company Ltd (the Defendant's/Applicant's Instructing client).

The Motion herein is inter alia grounded upon Order 51 rule (1) which provides that unless otherwise provided under the Rules, all applications shall be brought by way of a Notice of Motion. Rule 4 thereof provides for the contents of every notice of motion, and where the Motion is grounded on evidence by Affidavit, a copy of any Affidavit intended to be used shall be served.

The recognized agents of a corporation under Order 9, rule 2(c) of the Civil Procedure Rules 2010, is an officer of the Corporation duly authorized under the corporate seal of such Corporation.

Gladwell Kamau by her own Affidavit is an Assistant Manager – Claims of Fidelity Shield Insurance Co. Ltd which she depones to have authorised her to swear the Affidavit. That company could authorize her to swear an affidavit in respect of its subrogation rights under its policy with the Appellant with another Insurance Company under the usual knock-and-knock agreements common in the insurance industry. It could not possibly do so in the context of an application for stay of execution in a matter in

which the Insurance Company is not yet exercising such rights, and more importantly, it is not even a party to.

Equally important, by the Assistant Manager-Claims own averment, she is not an officer of the appellant company, and cannot under Order 9, rule 2(c), of the Civil Procedure Rules purport to be an officer of the appellant corporation.

Although Order 19 rule 7 of the Civil Procedure Rules allows the court to receive any affidavit sworn for the purpose of being used in any suit, notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or in any technicality, the Supporting Affidavit is certainly against the rules of agency under Order 9 rule 2(c) of the Rules, aforesaid. It is also contrary to the provisions of Section 2 of the Companies Act (Cap. 486, Laws of Kenya) which defines an officer of the company as including a director, manager or secretary.

Any purported authorization by the Applicant Company to Gladwell Kamau to swear the Supporting Affidavit on its behalf would be clearly contrary to Section 2 of the Companies Act as the said deponent is neither a director, Manager or Secretary of the Applicant Company.

In the circumstances therefore, the Supporting Affidavit of Gladwell Kamau is incompetent and is scandalous, irrelevant and oppressive to the Respondent. It is therefore struck out.

This leaves the Applicant's Motion bare, and without any fur or clothing. It cannot therefore stand on its own. It too must fail for those reasons.

But suppose, I was entirely wrong in these conclusions, is there any other reason why the Motion should stand dismissed? In the case of KENYA SHELL LIMITED VS. KIBIRU & ANOTHER [1986] KLR 410 (a case on all fours with this one) the Court held inter alia -

In an application for stay the court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without cause and secondly that execution would render the proposed appeal nugatory.

In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

In this case, the Respondent has in paragraph 6 of the Replying Affidavit of Vanessa Jone Evans deponed that it would be able to immediately refund the decretal sum to the Appellant in the event of the Appeal being successful. This deponent attached the Respondent's Balance Sheet Profit and Loss Accounts for the year ended 31st December 2010 showing a healthy profit of Ksh 26.7 million, nett of tax. The Applicant has not controverted this and say that the Respondent is a body of straw.

The decretal sum is Ksh 761,300.25, balancing the Appellant's fear of inability to get a refund of its money should the appeal be successful, and the Respondent's as a litigant should not be deprived of the fruits of judgment, and noting this is a money decree of which the Respondent has demonstrated an ability to pay, I would dismiss the applicant's Notice of Motion dated 11th October 2011 with costs to the Respondent.

Dated, signed and delivered at Nakuru this 6th day of July, 2012

M. J. ANYARA EMUKULE
JUDGE