REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION 16 OF 2009

WOLFGANG JOSEF MIEHLE ……APPLICANT

VERSUS

ATHACON GENERAL CONTRACTORS ……..RESPONDENT

R U L I N G

The application by way of Notice of Motion dated 13-3-09 is made under Order XLI Rule 4 Civil Procedure Rules and section 3A Civil Procedure Act – it seeks stay of execution of the judgment and decree issued in SRMCC (Kilifi) 240 of 2007, and also stay of any further consequential orders issued thereto pending determination of an appeal filed by the appellant/applicant against the said judgment and decree made on 17-2-09.

It is based on grounds that,

1) The appeal filed has good prospects of success.

2) Substantial loss will result if stay is not granted.

3) If the intended prosecution proceeds then the appeal will be rendered nugatory

The application is supported by the affidavit of the applicant Wolfang Josef Miehle who states that he has an arguable appeal which is touching on the issue of jurisdiction.

The judgment was entered in the sum of Ksh. 705,862/- plus costs and interest against the applicant and respondent has already issued a demand for the payment vide a letter dated 19-2-09 and plaintiff/respondent intends to execute the decree any time and if that happens then the appeal will be in vain. He points out that the sum involved is colossal and if execution proceeds then he will suffer irreparable loss.

The application is opposed and in the replying affidavit sworn by Athamase Mwamba Mwambari, it is stated that the applicant has not met the legal requirements to entitle him to be granted prayers sought and the application is merely intended to delay respondent's enjoyment of the fruits of his judgment.

It is also his contention that the appeal has no chances of success as it is grounded on wrong provisions of the law and is just a ploy to persuade this court to grant the orders sought. That since filing of the memorandum of appeal on 13-3-09, there hasn't been any effort to show the court that applicant was interested in the appeal.

Further that the only reason why applicant rushed to court to obtain stay was due to the proclamation served on them by Makuri Auctioneers.

Respondent states that he has a sound financial base and is capable of compensating the applicant in terms of damages in the event that the appeal succeeds. He prays that the application be dismissed.

At the hearing of the application, Mr. Gakuo on behalf of the applicant submitted that the application was filed expeditiously and without any inordinate delay. He reiterated the issue of an arguable appeal and appeal being rendered nugatory and also pointed out that applicant is ready to deposit any security up to and including the entire decretal sum in court.

He argued that applicant had satisfied the requirements of Order 41 rule 4. He urged the court to expunge the Replying Affidavit on grounds that it does not comply with the mandatory provisions of Order XVIII Rule 4 which requires an affidavit to contain description of the deponent, address and place of abode, pointing out that the said affidavit only has the deponent's address – he sought to rely on the decision in **Bare and 13 others V Maendeleo ya Wanawake Organisation HCCC 494 of 2004 (Nrb) at page 20.**

Mr. Tarus on behalf of the respondent submitted that the Replying Affidavit is properly on record and that the fact that appellant gave his address as Mombasa and swore the affidavit in Mombasa clearly demonstrates where his abode is.

Further that applicant's place of work is also deponed to in the affidavit and that it is not indicated that applicant will suffer substantial loss if the orders are not granted saying that the only issue that came close to that was the reference to the sum being colossal. – whatever that means. It is argued that applicant does not state the difficulties he is likely to encounter in the event that the appeal succeeds and that respondent has demonstrated that he is a man of substance, capable of refunding the sum, if the appeal succeeds, as anticipated under Order 41 Rule 4(2). Further that filing of an appeal does not automatically warrant stay and so the application should be dismissed.

Mr. Gakuo's response is that part 4 of the affidavit makes reference to substantial loss and in any event the respondent has not disclosed what he does for a living or his source of income.

Let me first address the issue of the Replying Affidavit and whether it should be relied on – we need to get that straight because a lot depends on whether from that point the application should be considered as unopposed. I had expected that Mr. Gakuo would have addressed it as a Preliminary point, but he responded to its contents and raised its validity right in the middle of his arguments.

It is correct hat the affidavit only refers to the applicant's postal address but not his abode – that address and place of swearing are not the same as the place of abode and if they are, then the same is not so stated in the affidavit –to that extent it offends Order XVIII Rule 4 Civil Procedure Rules. Should it be struck out in the spirit of the **Bare Case** (infra). Actually the holding in Bare's case was that

"***Order XVIII Rule 4, it is mandatory that every affidavit should state the description of the true place of abode and postal address of the deponent merely describing the deponent is not enough nor is the address of the legal counsel,***

The Postal address must be that of the deponent – that last portion seems to actually bail out the applicant and in the Bare's case, there are several other defects and omissions which led to striking out of the affidavit and not just the issue of place of abode.

"***No order for stay of execution shall be made …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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant"

On the grounds on the face of the application, applicant has alluded to suffering loss – but he did not specify his meaning – this is a monetary decree. Is it his fear that if respondent gets paid the sum he will not recover it? Certainly he does not clearly state that, his only lament being that the sum is colossal. For purposes of argument, if it is to be taken that this was his meaning by referring to "colossal sum visa vis the loss anticipated, would the respondent be in position to repay the same? All that the respondent states is that he works for Kenya Ports Authority Mombasa and that he is also a partner in a firm known as Athcon General Contraction. He has annexed his staff identity card which shows that he is an assistant quantity surveyor. However that does not disclose to this court what his income is or the liquidity of the firm he alludes to. I think the test has been clearly laid out in the case. **Kenya Shell –versus- Benjamin Karuga and Another CA 97/86 (Nrb)** that the party feared to be person of straw, must be able to demonstrate they are actually of substance, not just by unleashing titles, but giving evidence of what their earnings are – this hasn't been done. So on that limb – the applicant has not sufficiently demonstrated the substantial loss likely to be suffered and even if the court was to infer from what is state on the grounds on the face of the application, there isn't an iota of anything on which to peg those fears to and so although respondent fails that test, the applicant has failed to satisfy the fear of substantial loss.

Then there is the issue of whether the application has been made without unreasonable delay – certainly the applicant acted expeditiously – the judgment was delivered on 17-2-09, and by 13-3-09 this application had been filed. The memorandum of appeal was filed within 13 days, there was no delay on the part of the applicant and the argument that after filing appeal, the applicant has not taken any other steps (one month later) towards having the appeal heard, has no leg on which to stand. The applicant is not guilty of unreasonable delay in presenting this application.

What about security for costs for due performance? The applicant is more than willing to abide by any

orders that the court may make to that effect and has even offered to deposit the entire decretal sum in court- that would effectively fulfill the other condition anticipated by Rule 4.

There is also the question as regards the appeal being rendered nugatory if the orders are not given. The applicant's main contention is that there is a vital legal point he wishes to pursue on appeal. The aspect of an appeal being rendered nugatory seems to have developed from the views expressed by Brett J. in **Wilson V Church (No.2), 12 ChD[1979] 454 at pg 459** that as a general rule the court ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory and in the same case Cotton J. stated:

"***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."***

In the present instance if the appeal, (which is challenging the lower court's jurisdiction in the matter) where to succeed when execution has taken place, then the appeal will have been rendered nugatory – I therefore find that it is in the interest of justice that stay orders do issue pending hearing and determination of the appeal. This is given on condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the applicant's counsel and the respondent's counsel, in a financial institution to be agreed upon by the respective advocates - this deposit must be done within TWENTY ONE (21) DAYS from today.

Delivered and dated this **9th** day of **July 2009** at Malindi.

H. A. Omondi

JUDGE