



**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**CIVIL APPLICATION NO. 290 OF 2008**

**BETWEEN**

**TWIGA CHEMICAL INDUSTRIES LIMITED ..... APPLICANT**

**AND**

**ALLAN STEPHEN REYNOLDS ..... RESPONDENT**

**(An application for stay of execution of the part of the Ruling of the High Court of Kenya at Nairobi (Waweru, J) dated 3<sup>rd</sup> October, 2008**

**in**

**H.C.C.C. NO. 2772 OF 1997)**

**\*\*\*\*\***

**RULING OF THE COURT**

Following the termination of his employment with *Twiga Chemicals Industries Limited*, the applicant herein, *Allan Stephen Reynolds*, the respondent, sued the applicant for various sums and for breach of the contract of employment. Githinji J, (as he then was) gave him judgment for KShs.7,116,628.34 plus costs and interest at 12% per annum from the date of the suit till payment in full. The decree followed and upon computation, the decretal sum came to KShs.14,203,040.50.

The applicant was aggrieved and immediately it filed a notice of appeal dated 19<sup>th</sup> November, 2004, declaring its intention of appealing against the aforesaid decision. Thereafter he successfully moved the superior court for an order of stay of execution pending the filing and determination of the appeal. The stay was, however, conditional on the applicant depositing within thirty (30) days of the date of the ruling, the entire decretal sum in an interest bearing account in the joint names of the advocates then on record for the parties in a bank or financial institution to be agreed or appointed by the court. Waweru J made the order and in doing so, he discounted KShs. 2 million which had earlier been deposited in court pursuant to an order of the court. The result was that KShs.12,203,040.50 was the net amount to be deposited.

The applicant was of the view that the order was oppressive as in its view the condition the court imposed was extremely onerous. Soon after the ruling on the stay application was delivered, its counsel, filed a notice of appeal announcing its intention of appealing against that decision, and thereafter filed this application for orders that the order requiring it to deposit KShs.12,203,040.50, within 30 days be stayed. There is no indication on the face of the application how long the order of stay prayed for would

remain in force. However, the affidavit in support of that motion states that the stay would be until the final determination of Civil Appeal No 300 of 2006. That appeal is against the decree in the matter.

In the meantime, the applicant wanted its application to be heard by this Court on priority basis, but its request for an urgent hearing was declined. Fearing that the respondent would execute the decree at the expiry of 30 days in which the applicant was allowed to make the deposit, it decided to comply with Waweru J's order. So at the hearing of this application on 30<sup>th</sup> September, 2010, the applicant had already complied with the order which it wants stayed. It should be noted that the order of deposit was made on 3<sup>rd</sup> October, 2004, and this motion was filed on 31<sup>st</sup> October, 2008.

At the hearing of the motion an issue was raised by the Court whether, in the foregoing circumstances, any useful purpose would be served in hearing and determining the motion. Mr Peter Kingara's answer was that the applicant wanted this Court to review the superior court order and direct the applicant to give alternative security, say a bank guarantee. It was his view that tying down over KShs.12 million in a deposit account was burdensome to the applicant. Additionally, Mr Kingara submitted that the superior court had ordered the applicant to deposit a sum in excess of the decretal sum.

In answer, Mr Mugambi for the respondent, did not think the amount which was ordered to be deposited exceeded the decretal sum. He pointed out that an earlier bank guarantee for KShs. 5 million which had been filed had by 22<sup>nd</sup> September, 2009, lapsed with the result that the deposit was within the sums due to the respondent. Mr Mugambi urged the view, that proceeding with the hearing of the motion was no more than an academic exercise.

The application is expressed to be brought under **rule 5 (2) (b) of the Court of Appeal Rules**, a provision which donates original jurisdiction to the Court to entertain applications of this nature. It is a power which is discretionary and like all discretionary jurisdictions the power must be exercised on the basis of evidence and sound legal principles.

Two principles guide the Court in applications under the aforesaid provision. The applicant is obligated to show firstly, that his appeal or intended appeal is, **prima facie**, arguable, or put in a different way, that it is not frivolous. Secondly, and in addition, that unless it is granted a stay or injunction as the case may be, its appeal, or intended appeal, if it were to eventually succeed, the success will be rendered nugatory. See **RELIANCE BANK IN (LIQUIDATION) V NORLAKE INVESTMENTS [2002] 1 EA 227**.

On the assumption that the applicant's Civil Appeal No 300 of 2006, or any other appeal likely to be filed to challenge the order of deposit, is arguable, we are not satisfied, that a refusal of a stay will render the success of that appeal nugatory. The applicant deposited the entire decretal sum, and since the deposit was made, we were told that the applicant is still trading. A period in excess of two years has gone by and no indication was or has been given to us that the deposit has demonstrably adversely affected the applicant. Besides it was not demonstrated to us that the sums deposited exceeded the decretal sum.

We agree that, as stated in **GITAHU & ANOTHER V WARUGONGO [1986] KLR 621**, the security a court orders in any given case should be least disadvantageous to the party to provide it. However, the onus was on the applicant to present material to show, at least on a **prima facie** basis, that the sums ordered to be deposited were too high, and oppressive.

We have no jurisdiction at this stage to review the order of deposit. Our duty extends to granting a stay and no more. The power to review vests in the bench which will eventually hear the applicant's appeal, if at all it will be filed. The appeal against the stay order has not been filed and our understanding is that it might not be filed. This, as we stated earlier, is discernible from the affidavit in support of the motion. The applicant wants a stay pending determination of Civil Appeal No 300 of 2006. We doubt whether in that appeal an issue has been raised concerning the reasonableness of the condition the superior court imposed for granting a stay.

We have not lost sight of the fact that the discretion of the Court under **rule 5 (2) (b)**, above, is wide and unfettered, and that the court has power to grant a stay if the justice of the case so demands. However, in the circumstances of this case, there is no proper basis for granting a stay. Accordingly, the application dated 31<sup>st</sup> August, 2008 fails, and it is dismissed with costs to the respondent. It is so ordered.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of October, 2010.**

**S. E. O. BOSIRE**

-----

**JUDGE OF APPEAL**

**P. N. WAKI**

-----

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

-----

**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR.**