



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 294 of 2009 (UR 202/2004)

DIGITAL CITY LIMITED.....APPLICANT

AND

MULTI TOOLS (KENYA) LIMITED.....RESPONDENT

(Application for stay of injunction pending the hearing and determination of an intended appeal from the judgment and order of the High Court of Kenya at Nairobi (Koome, J)

dated 18th September, 2009

In

H.C.C.C. No. 78 of 2008)

RULING OF THE COURT

Under **Rule 5 (2) (b)** of this Court's Rules, the applicant, Digital City Limited, asks the Court to stay that part of the superior court's order which directed the applicant to deposit the sum of Shs.1 million in a joint account to be operated by the respective advocates for the parties; that money was to be deposited as a condition upon which the applicant would be allowed to defend H.C.C.C. No. 78 of 2009, filed against the applicant by Multi Tools (Kenya) Ltd., the respondent herein. In the case in the superior court, the respondent had claimed from the applicant the sum of Shs.2,022,996.50 which was said to be due to the respondent from the applicant in respect of goods sold and delivered by the respondent to the applicant. The applicant filed a memorandum of appearance and followed that up with a statement of defence. The applicant thereafter filed a notice of motion under **Order 35 Rules 1 (a) and (2)** of the Civil Procedure Rules; the motion prayed for summary judgment against the applicant and it is that motion which Koome, J heard and by her ruling dated and delivered on 18th September, 2009, the learned Judge ordered the deposit of Shs.1 million by the applicant as a condition for being allowed to defend.

On the issue of whether the applicant has shown an arguable appeal, we have no doubt that the applicant has done so. The learned Judge appears to have found and held that the applicant had shown that it had at least one triable issue – the discrepancy between the cheques paid and bounced and the sum claimed in the plaint. We may also add that the respondent itself had produced a running statement of accounts between the parties running from 11th February, 2005 and 31st January, 2008. As at 31st January, 2008

the total sum shown as being due is Shs. 469,526.50 cents . The learned Judge's finding that there were triable issues appears to have been right and has not been challenged in the motion before us. We are satisfied the applicant's intended appeal is an arguable one. It is not to be forgotten that an arguable appeal is not one that must or will succeed.

We have some difficulty with the question of whether the appeal will be rendered nugatory. All that Mr. Issa for the applicant told us is that the applicant does not have the Shs.1 million to deposit and that if it were to be forced to do so, it might be forced out of business. But as Mr. Rimui for the respondent pointed out to us that assertion is not supported by any evidence such as bank statements, statements of accounts showing the company's cash-flow and such like documents. We do not think it would be right to simply accept the applicant's bald statement that it is unable to pay.

But we are equally worried on the question of how the learned Judge came by the figure of Shs.1million, unless we take it that she decided to order the applicant to deposit half of the sum claimed in the plaint. We have, however, referred to the statement of accounts which was produced by the respondent itself and which shows that the outstanding amount as at 31st January, 2008 was Shs.469,526.50 Taking into account all the circumstances of the case, we grant to the applicant a stay of the order made by the superior court on condition that the applicant shall deposit in the account specified in the Judge's order the sum of Shs.500,000/- within ten (10) days of the date of this order. If the applicant fails to comply with this order within the stated period, its notice of motion dated and lodged in this Court on 25th September, 2009 shall stand dismissed with costs. Otherwise the costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 16th day of October, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.