REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Application 204 of 2009 (UR 140/2009)

DEVCON GROUP LIMITED .....APPLICANT

AND

TIMSALES LIMITED .....RESPONDENT

(*Being an application for stay of execution pending hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Milimani Commercial) (Lesiit, J.) dated 6th March, 2009*

in

H. C.C.C. No. 165 of 2007)

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RULING OF THE COURT

The applicant herein filed an application by way of Notice of Motion, dated 24th June, 2009 brought under ***rule 5(2)(b)*** of the Court of Appeal Rules seeking the following orders:

1. This application be heard ex-parte in the first instance.

2. There be a stay of execution and judgment in Nairobi High Court (Milimani Commercial Division) Civil Case No. 165 of 2007 delivered on 6th March, 2009 pending the hearing and determination of the intended appeal.

3. The costs of an (sic) incidental to this application abide the result of the intended appeal.

The application was made on the following grounds:-

(a) The notice of appeal has been lodged and served in accordance with *rule 74* ***of the Court of Appeal Rules.***

(b) That the applicant has an arguable appeal with food (sic) chances of success.

(c) That the intended appeal will be rendered nugatory if the orders sought are not granted.

(d) That the applicant will suffer irreparable loss if the said orders sought are not granted whereas the respondent will not be unduly prejudiced by the orders sought.

(e) The applicant is a going concern.

(f) The applicant has already filed a record of appeal being Civil Appeal no. 93 of 2009.

In support of the application is an affidavit sworn on 24th June, 2009 by ***David Nduhia Muthoga***, a director of the applicant company. The affidavit has annexed to it a draft Memorandum of Appeal. In opposition to the application the respondent has filed an affidavit sworn on 27th July, 2009 by ***Rakesh Bvats***, the Financial Controller of the respondent company.

The background to the application is a contention on the part of the respondent, that by agreement made between the applicant (plaintiff) during the first part of the year 2004, the respondent agreed to supply the applicant with assorted timber products as and when ordered by the applicant and the applicant agreed to pay for the goods so supplied within 30 days from the date of each delivery, and further agreed to pay the respondent on all overdue accounts in accordance with the respondent's terms and conditions of sale. The respondent stated that it supplied goods worth Kshs.8,598,696.11 being the principal amount which in turn attracted interest of Kshs.9,957,103.08. The total indebtedness is said to be Kshs.18,555,799.19. Judgment was given in favour of the respondent for this amount and the said judgment is the subject matter of the intended appeal.

On the issue of arguability of the intended appeal the learned counsel for the applicant ***Mr. Mwendwa*** in his submissions stated that he intends to argue in the intended appeal that the trial court did admit inadmissible secondary evidence instead of primary evidence in a situation where a case for its admission had not been laid. In addition he shall contend in the appeal that as regards the awarded interest there was no agreement between the parties that it would be paid and finally that the trial court erroneously gave a judgment based on unproven custom and usage.

On the point whether the appeal if successful would be rendered nugatory counsel submitted that the amount awarded was substantial and likely to drive the company into bankruptcy.

On the issue of arguability of the intended appeal ***Mr. Omuga***, the learned counsel for the respondent in his brief submissions contended that the claim on interest was in writing by way of invoices and that the respondent claim was on solid ground in that it had the backing of custom and usage. Concerning the issue of the evidence admitted ***Mr. Omuga*** stated that the evidence was properly admitted and was not in fact controverted during the hearing by the applicant. He further contended that the applicant could not possibly explain the returned cheques totaling Kshs.3,387,200/=.

Turning to the issue whether the intended appeal if successful could be rendered nugatory, the respondents counsel submitted that the matter before the Court involves a money decree and the respondents exhibited financial statements reflecting that the respondent was worth more than 1.8 billion and was therefore in a position to refund the entire decretal amount should the appeal succeed. He further asked the court to take into account that the applicant had not made any repayment proposals either by way of reasonable instalments or otherwise and therefore any future delay would prejudice its chances of recovery in view of the amount involved.

After placing the contrasting cases of both parties on the scales, on the first test, we are of the view that whether or not there was agreement as between the parties to charge interest and the extent of the application of custom and usage as regards the charging of interest are not frivolous issues.

On the second test as to whether the appeal if successful would be rendered nugatory if a stay was not granted, the rival arguments do not present the Court with an easy task. First, the decretal amount is approximately Kshs.19 million which is a substantial amount. Second, the applicant contends that if and when compelled to pay the amount this might drive the company into bankruptcy and eventual liquidation. We consider that at the end of the day both tests as set out above have one overriding

objective, namely to enable the court to act justly. In the circumstances we are of the view that hardship to both parties is inevitable. The only difference is which is the greater hardship?

On the one hand, the respondents are likely to be kept away from the fruits of the judgment until the appeal is finalized. On the other hand, the applicant could be compelled to knock at the doors of bankruptcy courts. We think it would be in the interest of justice to strike a balance of attempting to spread the hardship evenly. We have opted to do this on a balance of convenience. On this point we are certainly not reinventing the wheel. Of course, cases such as: ***RELIANCE BANK LTD V. NORLAKE INVESTMENTS LTD [2000] IEA 227*** and ***ORARO AND RACHIER ADVOCATES V. COOPERATIVE BANK OF KENYA LTD [2007] IEA 236***, show when it is properly proved that a refusal to grant an order of stay would result in an applicant suffering a hardship as would be out of proportion to any suffering a respondent might undergo awaiting the hearing of an appeal, the Court would take that as a factor amounting to rendering the success in the pending appeal nugatory. We think we have such a case in our hand, principally because of a possible bankruptcy or liquidation.

In the circumstances, our inclination is to grant a conditional stay and the same is hereby granted on condition that the applicant pays within 30 days the sum of ***Kshs.8,598,696.11*** being the accepted principal amount into an account in the joint names of the applicant and the respondent firms of advocates. Such an account to be opened in a reputable bank and on the further condition that the account be an interest earning account to be maintained until the appeal is heard and determined or until further orders of the Court. We further order that in default of compliance with the above terms the application shall automatically stand dismissed.

The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 9th day of October, 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR