



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 663 OF 2012

AEXCEL AUTO SPARES LIMITED.....PLAINTIFF

-VERSUS-

SIYAMA COMPANY LIMITED.....DEFENDANT

RULING

1. The Notice of Motion application dated 14th May 2019 is filed by the defendant. It is for stay of execution of the judgment and decree of 8th May 2019. By that judgment the plaintiff was awarded Ksh 15,010,715.98 and Ksh 46,500/=.

2. The defendant failed to attend trial of this case.

3. The defendant has based his application on the grounds that the trial court failed to consider his defence. He has filed a Notice of Appeal. He has a good arguable appeal.

4. By the affidavit in support of the application sworn by Abubakar Mohammed Ahmed, the defendant stated that it is apprehensive the plaintiff will execute the decree against it which will render the appeal nugatory. That if execution does proceed it will suffer financial hardship and its operations will be handicapped because of the present financial hardship times.

ANALYSIS

5. I have considered the parties submissions.

6. The defendant ought to demonstrate it has met the conditions of Order 42 Rule 6 of the Civil Procedure Rules. They are that substantial loss will result if the orders of stay are not granted, that the application has been made without delay and that security for the due performance of the decree has been given.

7. The defendant filed the application on 14th May 2019 and there was therefore no delay. The defendant however fails to support its allegations that it will suffer substantial loss. The defendant did not attach company accounts or bank statements to prove substantial loss. The defendant did not also speak of the security it would offer if stay is not granted.

8. The defendant ought to bear in mind the necessity of proving substantial loss. The defendant did not attach company accounts or bank statements to prove substantial loss. The defendant did not also speak of the security it would offer if stay is not granted.

9. The defendant ought to bear in mind the necessity of proving substantial loss. A case in point is **G.N. Muema P/A (sic) Mt. View Maternity Nursing Home v Miriam Maalim Bishar & another (2018) eKLR** as follows:

“10. In this latter case **Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema**(Supra), **Odunga J** stated as follows:-

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgment and that would be denying a successful litigant of the fruits of judgment which should not be done if the applicant has not given to the court sufficient

cause to enable it exercise its discretion in granting the order of stay.”

10. In the end the orders that commend themselves to me and which orders I make are as follows:

a. There shall be a stay of execution of the judgment dated 8th May 2019 on condition that the defendant deposits in this court within 30 days the decretal sum. Failure to deposit as ordered that amount will automatically vacate the stay order.

b. The defendant shall pay the costs of the Notice of Motion dated 14th May 2019.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of March 2020.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant