



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 155 OF 2016

MOMUL TEA FACTORY.....APPELLANT

- V E R S U S -

RENT A FINE CAR LIMITED.....1ST RESPONDENT

HENRY MURIITHI NYAGAH.....2ND RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 30th March 2016 in which Momul Tea Factory, the applicant herein, sought for the following orders:

1. THAT this application be heard ex-parte in the first instance on the ground, inter alia, that execution of the decree passed herein on the 23rd January, 2015 against the appellant/applicant is imminent. In the event of the execution of the said decree the appellant/applicant would suffer irreparable loss and damage.

2. THAT this honourable court be pleased to issue a temporary order of stay of execution of the ex-parte judgment made on the 18th September 2014 by Hon. C. Obulutsa (Mr) and subsequent consequential orders emanating from the ruling dated 13th November, 2015 of the honourable Mr. T. S. Nchoe against the plaintiff/ respondent either by himself, agents, servants or anyone acting through him in any way howsoever until the determination of this application.

3. THAT this honourable court do issue a temporary order of stay of execution of the ex-parte judgement made on the 18th September 2014 by Hon. C. Obulutsa (Mr) and subsequent consequential orders emanating from the ruling dated 13th November, 2015 of the honourable Mr. T. S. Nchoe against the plaintiff/respondent either by himself, agents, servants or anyone acting through him in any way howsoever until the determination of the applicant's appeal.

4. THAT this application be heard inter-partes on such date at such time as this honourable court may direct.

5. THAT this honourable court be pleased to give such further and/or other directions as it may deem fit and just to grant.

6. THAT the costs of this application be provided for.

2) The aforesaid motion is supported by the affidavit of Bernard Mwaura. When served with the application, Rent a Fine Car Ltd and Henry Muriithi Nyagah, the 1st and 2nd respondents respectively filed the replying affidavit of Christine Atieno Otieno to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavit filed in support and against the motion. I have further considered the rival written submissions. The background of this application is short and straightforward. On 18th September 2014, a default judgment in the sum of ksh.484,297/= was entered in favour of the respondents and against the appellant. The record shows that the appellant applied to have the default judgement to be set aside before the trial court pursuant to the provisions of Order 10 rule 11 of the Civil Procedure Rules. Hon. T. S. Ole Nchoe heard the aforesaid application and had it dismissed on 13th November 2015. Being dissatisfied with the aforesaid decision the appellant preferred this appeal. The appellant has now taken out the motion dated 30th March 2016 in which he sought for *inter alia* an order for stay of execution pending appeal.

4) The principles to be considered in application for stay are well stated under Order 42 of the Civil Procedure Rules. First an applicant

must show the substantial loss it would suffer if the order for stay is denied. Secondly, that the application for stay should be filed without unreasonable delay. Thirdly that the court should consider the provision of security for the due performance of the decree.

5) The motion for stay of execution was filed on 6th April 2016 and the decree sought to be stayed was issued pursuant to the ex parte judgment entered on 18th September 2014. The appellant avers that it discovered that a default judgment was entered against it on 24.2.2015 and proceeded to file application for stay and setting aside on 11.3.2015. The application was heard and dismissed on 13.11.2015 prompting the appellant to prefer this appeal. It took the appellant about four (4) months to file the motion for stay.

6) It is the respondent's arguments that the delay to file the motion is inordinate and unreasonable. It is apparent to me that there was a delay of nearly four (4) months before the appellant filed the motion for stay. In my humble appreciation I think there is a delay in filing the application but I am not convinced that the delay is not inordinate. In the circumstances I will excuse late filing of the motion.

7) The other issue is the substantial loss the appellant is likely to suffer if the order for stay is denied. The applicant has argued that if the order is not granted the respondents will proceed to execute the decree thus rendering the appeal nugatory. It is further argued that if the decree is not stayed, the respondents may attach the appellant's goods even before appeal is heard. The respondents did not address this court over the issue. I am persuaded by the arguments of the appellant that if the order for stay is not given then the appellant will suffer substantial loss.

8) Thirdly, the law requires the court to make the provision for security for the due performance of the decree. The applicant has specifically pleaded that it is willing to deposit such sums this court may order. The respondents did not address this court over the issue touching on the provision of security.

9) After considering the arguments of the parties and the material placed before this court, I am convinced that a fair order is to direct the appellant to deposit the decretal sum as security for the due performance of the decree.

10) In the end, I grant the order for stay pending appeal on condition that the appellant deposits the decretal sum in the joint names of the advocates and or firms of advocates within 30 days from the date hereof. In default the motion will be treated as having been dismissed.

11) Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents