



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 215 OF 2018

ANTI-COUNTERFEIT AGENCY.....APPELLANT

VERSUS

ESTHER MAWIA MWANIA

T/A TONER MART TECHNOLOGIES.....1ST RESPONDENT

WALL STREET BUSINESS PARK LIMITED....2ND RESPONDENT

RULING

1. The Notice of Motion dated 8th June, 2018, was taken out by Appellant who sought for the following orders inter alia:

i. *Spent*

ii. *Spent*

iii. *This Honourable Court be pleased to stay the execution of the judgment and decree of the Chief Magistrate's Court in Civil Case No. 6431 of 2013 pending the hearing and determination of this appeal.*

iv. *Costs be paid to the Appellant*

2. The facts of this dispute are that the 1st Respondent had filed an action by way of Plaint against the Appellant. The Appellant had received a complaint from Manco Gerhard Bosch that the 1st Respondent was selling counterfeit Hewlett-Packard Toners and Hewlett-Packard Ink cartridges.

3. Accompanied with officials from the Hewlett-Packard Company and Manco Gerhard Bosch, the Appellant visited the premises of the 1st Respondent, seized the suspected counterfeit goods and took inventory of the same.

4. The Appellant is said to have stored the suspected counterfeit goods at a warehouse depot situate along Mombasa Road. In the month of December 2012, there was a heavy down pour in Nairobi and this resulted in water seeping to the warehouse and damaging the suspected counterfeit goods.

5. The Appellant pleaded that the damage was as a result of an Act of God and that the damage was beyond their control and in their counter-claim, placed blame on the landlord of the warehouse for poor drainage.

6. The parties filed their submissions and the suit was heard and determined in favour of the 1st Respondent in the sum of Kshs. 4,761,600. The Trial Court found that the Appellant was culpable given that there are state organs mandated with investigating counterfeit claims.

7. Further, the court found the Appellant liable attributing it to neglect on the part of Appellant for failure to ensure that the suspect counterfeit goods were stored safely pending the analysis of their legitimacy as they owed the 1st Respondent a duty of care.

8. The Appellant has subsequently filed a Memorandum of Appeal challenging the Trial Court's decision citing lack of evidence to prove the value of the alleged goods and how the said compensation amount was derived.

9. The Appellant has now taken the above mentioned motion in which it sought for the abovementioned orders pending the outcome of this Appeal.

10. This Court granted an order for stay of execution of the judgement and decree of the Chief Magistrate's Court in Civil Case No. 6431 of 2013 on 11.6.2018 to last for 30 days and the same have been extended over time.

11. The Motion is supported by the Affidavit of Fridah Kaberia, the Deputy Director, Corporate Services of the Anti-Counterfeit Agency, a government agency mandated to fight counterfeiting in the country.

12. She stated that the judgment was entered against the Appellant and the appellant has preferred this Appeal against the entire judgment. She stated that the 1st Respondent has moved to proclaim the Appellant's properties in execution of the said judgment and decree and that the proclaimed items form part of the Appellant's tools of trade. The proclaimed items comprise of computers which contain sensitive information on suspects either being prosecuted or being investigated and there poses a danger of the information falling into the wrong hands who in this case were the auctioneers.

13. It was argued that the Appellant is funded by the exchequer and as such, would have to seek for parliamentary allocation to satisfy the decree. She argued that the appeal raised arguable points of law and facts to be determined at the full hearing and that the appeal would be rendered nugatory if an order of stay is not granted.

14. The Motion is opposed by the respondents who filed the Replying Affidavit of Esther Mawia Mwanja in which she states that she filed CMCC No. 6431 of 2013 against the Appellant seeking compensation of Kshs. 4,761,600 being the value of the ink cartridges and toners confiscated and consequently damaged while under the care of the Appellant that judgment was delivered in her favour.

15. She stated that she was never charged under the Anti- Counterfeit Act in respect of the confiscated goods. She argued that the Appellant had reserve funds for contingencies and that they have not demonstrated the loss they may suffer and that the information in the computers can be stored in flash disks.

16. Ms. Mwanja argued that the Appellant had delayed to prosecute the appeal and that they have failed to offer any security for the due performance of the decree.

17. I have considered the grounds stated on the face of the Motion and the facts deponed in the affidavits filed in support and against the Motion. The judgment was delivered on 4th April, 2018 while the Memorandum for Appeal was filed on 3rd May, 2018 and this application was filed on 8th June, 2018. Section 79G of the Civil Procedure Act provides that an appeal from a Subordinate Court to the High Court shall be filed within 30 days from the date of the decree or order appealed against. In the instant case, the Memorandum of Appeal was filed within the stipulated timeframe and this demonstrates that the Appellant had the intention to expeditiously prosecute his case. The motion was timeously filed.

18. The Appellant has stated that the 1st Respondent has identified their computers as items to be proclaimed. They have argued that these computers form part of their tools of trade as they use them during their investigations and that the computers hold sensitive information pertaining on going cases in court and their investigations. The 1st Respondent has challenged this and argued that the said information can be stored in flash disks and that the Appellant has failed to demonstrate that the computers are their main tools of trade.

19. Having considered the rival submissions, I am convinced that the Appellant stands to suffer substantial loss in the event their computers are proclaimed.

20. By dint of Order 42 Rule 8 of the Civil Procedure Rules on the issue of security, Statute provides:

8. No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

21. From the foregoing, this court finds that the appeal is arguable and deserves to be heard on merit. The Appellant has also demonstrated that it stand to suffer substantial loss if the order for stay is not granted thus rendering their appeal nugatory.

22. The Application dated 8th June, 2018 is allowed and the following orders are issued:

i. That there shall be stay of execution of judgment and decree of the Chief Magistrate's Court in Civil Case No. 6431 of 2013 pending appeal.

ii. Each party to meet its own costs of the motion

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J.K. SERGON

JUDGE

In the presence of:

.....For the Appellant

.....For the Respondents