



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 56 OF 2017

THE CHAIRPERSON,

EMBAKASI CENTRAL CONSTITUENCY.....1ST APPELLANT

JOHN NDIRANGU.....2ND APPELLANT

- V E R S U S -

JOHN KANYI MUNGAI.....RESPONDENT

RULING

1) The appellants herein, took out the motion dated 21.2.2017 in which they sought for *interalia*:

1. That the applicants have never been served with summons to this suit and were therefore not aware of the existence of this suit until 23.11.2016 when they were informed of the Order nisi by the Equity Bank Kayole Branch Manager.

2. That the applicants never got into any contracts orals or otherwise nor did they hire the plaintiff's motor vehicle as alleged in his plaint.

3. That the applicants have a very good defence with high chances of success.

2. The motion is supported by an affidavit jointly sworn by Elias Mutethia Mate and John Kariuki Ndirangu plus a further affidavit sworn by Elias Mutethia Mate. When served with the motion, the respondent filed grounds of opposition to resist the motion.

3) When the motion came up for interpartes hearing before this court, learned counsels were in agreement that the order for stay of execution of the decree and the garnishee order. However, the learned advocates were unable to agree on the form of security to be given. That issue was left to this court to determine. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support of the application.

I have further considered the grounds of opposition plus the rival oral submissions of learned counsels.

4) The background of this matter is short and straightforward. The respondent herein had filed an action against the appellants before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi vide the plaint dated 18.7.2016. In the aforesaid plaint, the respondent sought judgment against the appellants in the following terms:

a) General damages for breach of contract

b) Loss of user and business at ksh.4,000/= per day from 3rd July 2015 until the date of judgement.

c) Special damages in the sum of kshs.1,243,200/= plus interest.

5) On 8th September 2016, the respondent obtained judgement in default of appearance and defence. The respondent proceeded to extract the decree which indicates the decretal sum as follows:

Principal amount	ksh.2,971,200/=
Interest	ksh. 50,795/=
Costs	ksh. 146,687/=
Total	ksh.3,168,687/=

6) Upon extracting the decree, the respondent thereafter proceeded to file garnishee proceedings whereof the 1st appellant's monies held at Equity Bank (K) Ltd, Kayole Branch in account no. were attached. Upon learning of the issuance of garnishee order, the appellants filed an application to have the exparte judgment and the garnishee order set aside. The application was heard and eventually dismissed on 16.2.2017. Being aggrieved by the dismissal order, the appellants filed this appeal contemporaneously with the motion dated 21.2.2017, the subject matter of this ruling. I have already set out the sort of orders the appellants are seeking.

7) Learned counsels are in agreement that the order for stay of execution should be granted pending appeal. However, they are unable to agree whether or not an order should be made directing the appellants to provide security. The respondent is adamant that the appellants should deposit the decretal sum in an interest earning account in the joint names of learned advocates or firms of advocates appealing in this appeal. The appellants are of the view that since there is no money budgeted to settle the decree, they should not be ordered to provide security.

8) The provisions of Order 42 rule 6(2) of the Civil Procedure Rules give the court a wide discretion in determining the question whether or not security should be provided. Order 42 rule (6) (2) (b) provides as follows:

“No order for stay of execution shall be made under subrule (1) unless

(a)....

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicants.

9) Though the court is given a wide discretion when it comes to deciding the provision for security, it should be noted that it is desirable to make orders directing applicants to provide security to avoid a situation where the respondents' decree is rendered illusory at the end of the appeal. In case the appeal fails the respondent should be able to quickly have the decree satisfied. In the case before this court, it is clear from the appellants' submissions that the appellants are not willing to provide security on the ground that there is no money in the account already attached vide a garnishee order. A fair order in the circumstances of this case is to order, which I hereby do, that an order for stay of execution of the decree is given pending appeal on condition that the appellants should deposit the decretal sum of ksh.3,168,689/30 in an interest earning account in the joint names of learned advocates and or firms of advocates appearing in this matter within 30 days from the date hereof.

10) In the alternative, the garnishee order issued by the trial court to attach ksh.31,168,689/30 held in

account no. Equity Bank Kayole Branch, do remain in force but the aforesaid monies should be released by the bank to either party until this appeal is heard and finalised or until further orders are issued by this court. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 28th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent