REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 272 OF 2008

HASHI ENERGY LIMITED ……………………………...……..PLAINTIFF

VERSUS

WANGETHI MWANGI ……………….…...........1ST DEFENDANT/APPLICANT

NATION MEDIA GROUP LIMITED...................2ND DEFENDANT/APPLICANT

RULING

This court delivered a judgment in favour of the plaintiff against the defendants on 8th December, 2016. The defendants were aggrieved by the said judgment and have since filed a notice of appeal to challenge the same.

On 6th March, 2017 the defendants filed a Notice of Motion under Sections 1A, 1B , 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules for Orders to stay execution of the judgment pending the determination of the appeal.

The application is supported by an affidavit sworn by one Sekou Owino the 2nd defendant's legal counsel alongside the grounds set on the face on the application. The application is opposed and there is a replying affidavit sworn by Mr. Ahmed Hashi, a director of the plaintiff. Both parties have filed written submissions.

Following an order by Sergon J on 12th June, 2017 this court was seized of the matter for directions leading to this ruling. I have read the application, the reply thereto and submissions by both parties.

It is true that the plaintiff has commenced execution proceedings. This was done before costs were taxed and is one of the grounds that have been raised by the defendants. Whereas Section 94 of the Civil Procedure Act implies that execution may be allowed before costs have been ascertained, there is an implied requirement that leave be sought from the court in such circumstances. Such leave having not been obtained, the defendants submit the execution proceedings are illegal.

The plaintiff has countered this by stating that such leave was not required in the circumstances of this case because, by a letter dated 22nd February, 2017 addressed to its lawyers it waived its costs for purposes of extracting the decree. Following the said letter, on the same day, 22nd February, 2017 the plaintiff's advocate wrote to the Deputy Registrar of his court with a copy to the advocates for the defendants, forwarding the draft decree for approval. In the said letter the said advocate specifically stated as follows,

“Kindly note that we are under express instructions from our client to waive the costs of suit awarded by court. We attach hereto a copy of letter from our client to this effect.”

I have read the case of the **Lakeland Motors Ltd Vs. Sembi (1998) KLR 682.** Section 94 aforesaid requires ascertainment of costs by taxation. The plaintiff having waived his right to the costs of the suit, no leave was required and no formal application for leave was necessary under Section 94 of the Civil Procedure Act aforesaid. The execution proceedings cannot therefore be faulted.

The provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules are clear and unambiguous. An order for stay of execution shall not be available unless;

“ the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

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 applicant.”

The application was filed within three (3) months from the date of delivery of the said judgment, but considering the intervening December holidays and court vacation, I consider it was filed timeously.

On the issue of whether or not substantial loss may result to the defendants, I have considered the fact that the plaintiff holds a valid judgment following a full trial. The issue of whether or not the decretal sum is substantial should not be a guiding principle in the circumstances of this case.

There has not been any tangible loss that has been demonstrated by the defendants, which may be visited upon them if a stay order is not granted. Mere apprehension of loss is not tangible evidence. I note that the defendants have pledged to abide by any order or provide security as may be awarded by this court. The profile of the plaintiff has not been doubted either by any evidence or submission. There is also no doubt that has been cast upon its capacity to refund any money that may be due if the defendants’ appeal succeeds.

Without addressing the merits of the appeal, of which I have no capacity to do, it is noted in the judgment of this court that the defendants had listed a witness without filing a witness statement and who was not called.

It was also observed that a party cannot proof its case through cross examination and, I add, submissions. By stating that **“the amount of damages awarded is antithetical to the basic right to information, the freedom of expression and to the defendants’ role in disseminating information”** the defendants appear to be arguing their case afresh before the same court. The orders sought are discretionary. That discretion is to be invoked by weighing the interests of both parties – See **Absalom Dova Vs. Turbo Transporters [2013] e KLR.**

Having considered all the material placed before me in totality, and bearing in mind that the defendants have a right of appeal which should not be rendered nugatory, but at the same time considering the rights of a successful litigant, I make the following orders.

The defendants application is allowed on the following conditions; there shall be a stay of execution upon the defendants paying to the plaintiff half (50%) of the decretal sum. The balance of the decretal sum shall be deposited in an interest earning account in the names of both advocates appearing for the parties. The above two conditions shall be complied with within 30 days from today.

The costs shall be on appeal.

Dated at Nairobi this 21st Day of June 2017.

A. MBOGHOLI MSAGHA

JUDGE