



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 574 OF 2016

HORIENTERTAINMENT LIMITED.....APPELLANT

- V E R S U S -

LEO INVESTMENTS LIMITEDRESPONDENT

RULING

1. Horientertainment Ltd, the appellant herein filed an action against Leo Investments Ltd, the respondent herein before the Chief Magistrate's Court, Milimani Commercial Courts. The appellant took out the motion dated 18th May 2016 in which it sought for an order of mandatory injunction to compel the respondent to grant it access to the premises known as stall no. 9 situate in the building standing on L. R. 209/34/182, known as Diamond Plaza, to remove its property therein. The respondent filed the replying affidavit of Sanjay Amritlal Harkhani to oppose the motion. The motion was heard and allowed on condition that the appellant deposits ksh. 1,135,544/- or in the alternative provides a bank guarantee for the aforesaid amount. Being aggrieved by the aforesaid decision, the appellant preferred this appeal.

2. The appellant has now taken the motion dated 6th September 2016 in which it sought for:

1. This application be certified as urgent and be heard ex-parte on the first instance.

2. This honourable court do order a stay of execution of the order made in Milimani CMCC NO. 3028 of 2016 on the 19th day of August 2016 pending the hearing and final determination of this application.

3. An order do issue in terms of prayer 2 hereof pending the hearing and final determination of the appeal lodged herewith.

4. The respondent herein whether by itself, its servants, agents, employees or any other person or entity working under its directions and instructions be compelled to unconditionally grant the appellant/applicant therein access to the premises known as STALL NO. 9 situate in the building known as DIAMOND PLAZA erected on that parcel of land known as L.R. No. 209/34/1&2, Parklands Nairobi for the purpose of removing the appellant/ applicant's property therein pending the hearing and determination of this application.

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

6. The costs of this application be provided for.

3. The motion is supported by the affidavit of Yuki Kashiwagi.

When served with the motion, the respondent filed the replying affidavit of Sanjay Amrilat Harkhani to oppose the same.

4. When the motion came up for interparte hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions. I have considered the ground stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. The appellant has basically sought for two orders. First, is an order for stay of execution of the order issued by the trial court pending the hearing and determination of this appeal. Second, is an order of mandatory injunction to compel the respondent to grant the appellant access to Diamond Plaza buildings to remove its property pending the hearing and determination of this application. The second prayer will obviously lapse at the determination of this motion, therefore what commends itself for consideration is the prayer for an order for stay of execution pending appeal.

5. The principles to be considered in determining such an application are well settled. First, an applicant must show the substantial loss he would suffer if the order is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly, the provision for security for the due performance of the decree or order must be considered.

6. It is the submission of the appellant that it is unable to raise the sum of kshs.1,135,544/= the trial court had ordered to be deposited in court as a condition for the grant of a mandatory order for injunction. It is further argued that if the appellant is compelled to deposit the aforesaid sum the appellant will experience severe cash flow problems which may lead to the collapse of its business. It was also pointed out that the respondent is holding a sum of ksh.474,000/= being a security deposit therefore there is no need to provide additional security. The appellant further argued that the amount ordered to be made as a deposit by the trial court is unjustified since the monthly licence fee payable by the appellant was only ksh.110,000/= although the method of calculation is not clear to the appellant. The respondent is of the view that the condition imposed by trial court was fair to protect other parties and hence the appellant should comply with the order. It was pointed out that the trial court took into account Clause 5(f) of the licence agreement on the amount payable if the appellant wished to exit. The respondent further argued that it is apprehensive that the appellant's business may have run into losses and wants to abscond to the respondent's detriment whom the appellant owes colossal sums in form of license fees arrears. Before concluding the determination on the question of substantial loss, it is important to consider the effect of an order for stay of execution in this matter.

7. I have already set out the sort of orders issued by the trial court.

The learned Resident Magistrate granted an order of mandatory injunction in favour of the appellant to compel the respondent to allow the appellant gain access to Diamond Plaza building to collect its property therein on condition that the appellant deposits in court a sum of ksh.1,135,544/=. The appellant has appealed against the order claiming *inter alia* that the condition imposed is not justified. The appellant is now seeking for an order for stay of execution of the aforesaid orders pending appeal. In my humble view, if the order for stay is granted, then the mandatory order for injunction together with the conditions imposed for its grant will stand suspended pending appeal. It is obvious that the appellant successfully obtained mandatory orders of injunction save that the trial court imposed conditions. The appellant now seeks to have those orders stayed. The other prayer was for a grant of mandatory orders of injunction similar to that which was granted by the trial court. I declined to consider this prayer because it was sought pending the hearing and determination of this motion. It is curious to note that the appellant is seeking for an order which has already been granted by the trial court. It looks more comical because the appellant is seeking to stay the order it has already secured and at the same time it seeks to be given a similar order to the one he seek to stay. The appellant's conduct amounts to an abuse of the court process. If the appellant was unhappy about the condition imposed for the grant of the order for mandatory injunction, if well advised, it should have specifically dealt with that issue rather than seek to

impugn an order it successfully sought from the trial court. If the order for stay of execution is denied, it means that the orders given by the trial court shall remain. In other words, the appellant will be entitled to access Diamond Plaza to collect its goods upon depositing in court kshs.1,135,544/=. If the order for stay is granted the order for mandatory injunction shall stand suspended, meaning that the appellant's goods will still remain locked up in Diamond Plaza building.

8. In view of the circumstances I have stayed in detail and in view of the fact that I have found the appellant to have abused the court process, I do not intend to consider principles for determining applications for stay. The motion is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 19th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent