

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 187 OF 2015(OS)

NZIOKA & CO. ADVOCATES..... PLAINTIFF

- V E R S U S -

HARIT SHETH ADVOCATES.....DEFENDANT

RULING

1) On 22.09,2017, this court issued an order directing the firm of Harit Sheth Advocates (applicant) to honour a professional undertaking made on 27th March 2015 and 5th April 2013, by paying to the firm of Nzioka & Co. Advocates (respondent), a sum of ksh.25,000,000/= plus costs. Being dissatisfied the applicant filed a Notice of Appeal to express its intention to challenge the decision in the Court of Appeal. The applicant has now taken out the motion dated 9th October 2017 in which it sought for *interalia* an order for stay of execution of the aforesaid decision pending the hearing of the intended appeal. The motion is supported by the affidavit of Harit Sheth. When served with the motion the plaintiff/respondent filed the replying affidavit of Joseph Nzioka and grounds of opposition to resist the motion.

2) I have considered the grounds set out on the face of the motion plus the facts deponed in the supporting affidavit. I have also considered the grounds of opposition and the rival oral submissions.

3) It is the submission of the defendant/applicant that all the money the law firm received on account of part payment of the decretal sum in H.C.C.C no. 617 of 2012 has been released and paid out in full by the defendant to its clients and is therefore no longer in the possession, custody or control of the defendant. The defendant further argued that it does not have enough money of its own to pay the sum of kshs.25,000,000/= to the plaintiff. It was argued that the aforesaid sum was intended to be made from the outstanding balance of the decretal amount in H.C.C.C 617 of 2012 which balance remains unpaid by the government. The defendant averred that unless the order for stay is given, it would suffer substantial loss in that any execution will cripple its operations and may be forced to shut down completely thus destroying the livelihoods of its members, employees and their respective families. It is also submitted by the defendant that the plaintiff will not be in a position to refund kshs.25,000,000/= to the defendant in the likely event that the defendant's intended appeal succeeds. The defendant further argued that its appeal will be rendered nugatory unless the order for stay is given and proposed to give a bank guarantee as security for the amount payable.

4) The plaintiff/respondent has urged this court to dismiss the motion stating that the defendant is in default of the professional undertaking and thus extremely guilty of laches which potentially prejudices the plaintiff. The plaintiff further argued that the defendant has not shown the substantial loss it would suffer if the order for stay is denied.

5) In its ruling of 22.9.2017, this court factually found which fact is not disputed that the defendant had received a sum of ksh.600,000,000/= as of 23rd April 2016 and has not pro-rated any funds therefrom as per the professional undertaking dated 29.3.2013. The defendant has stated that if it is forced to pay the aforesaid amount, it may be forced to close shop. It has also argued that the plaintiff may not be in a position to refund the money if its appeal succeeds. The above twin arguments were meant to show this court that the defendant will suffer substantial loss if the stay order is denied. The issue in dispute is not a money decree but it is money which is payable by virtue of a professional undertaking the defendant gave. In essence it is a matter where the amount has already been ascertained. When the defendant gave

the undertaking, he undertook a risk which it cannot now come around and complain. In my view, the defendant cannot be said to suffer substantial loss because it has a recourse of pursuing its client to compensate it after it has fulfilled its professional undertaking. The argument that the plaintiff may not be in a position to refund cannot be countenanced by this court because it is not envisaged that the defendant would in any event pursue the plaintiff for any remedy. The defendant's available recourse is to pursue its client for any reliefs in law. Having come to the conclusion that the defendant/ applicant has not shown the substantial loss it would suffer if the order for stay is denied, I find no merit in the motion.

6) In the end, the defendant's motion dated 9.10.2017 is dismissed with costs to the plaintiff.

Dated, Signed and Delivered in open court this 17th day of November, 2017.

J. K. SERGON

In the presence of:

..... for the Plaintiff

..... for the Defendant