

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 59 OF 2017

EUROFIX INDUSTRIES LIMITED.....APPELLANT

- V E R S U S -

HUDSON LUTENYO MAKANIRESPONDENT

RULING.

1) Hudson Lutenyo, the respondent herein, filed an action against Eurofix Industries Limited, the appellant herein, before the Chief Magistrate's Court, Milimani Commercial Courts. In the aforesaid suit, the respondent sought for damages for the injuries he sustained in the course of the employment of the appellant's premises that left him with serious injuries. The suit was heard and in the end, judgment was entered in favour of the respondent in the sum of ksh.4,122,744/ The appellant was aggrieved, consequently it preferred this appeal.

2) The appellant/applicant has now taken out the motion dated 23.05.2017, the subject matter of this ruling, in which it sought for *inter alia* an order for stay of execution of the decree and or judgement of the trial court pending the hearing and determination of this appeal. The motion is supported by the affidavit of Osman Batur Dedeoglu. The respondent filed a replying affidavit of Hudson Lutenyo Makani to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) 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 application. I have also considered the rival submissions.

4) The applicant avers that the respondent has threatened to execute the decree therefore there is need to maintain the *status quo* by granting an order for stay. It is also argued that unless the order is granted the appeal will be rendered nugatory since the respondent will proceed with attachment. The respondent opposed the motion arguing that the application for stay was filed in bad faith and with the sole intention of preventing the respondent from enjoying the fruits of his judgment. The respondent also pointed out that the applicant's motion is devoid of any merit with the sole intention of delaying the conclusion of the suit. The respondent further argued that if the court is to find merit in the application then the judgement sum must be deposited in court as a condition.

5) The principles to be considered in determining an application for stay are well stated under Order 42 of the Civil Procedure Rules. First, an applicant must show the substantial loss it would suffer if the order for stay is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly that the court should consider the provision of security for the due performance of the decree.

6) On the first principle, the appellant/applicant is of the view that it would suffer substantial loss if the order for stay is denied because its equipment will be attached ,which loss will be further compounded by the fact that there is no evidence that if the respondent is paid the decretal sum he would be in a position to refund if the appeal turns successful. The respondent on the other hand submits that, the applicant had not complied with the judgement five months after its delivery and he was forced to apply for warrants of attachment issued on 17th May,2017 for execution by Mutrix Auctioneers. That justice delayed is justice denied and the respondent will be the one to suffer prejudice if the said orders sought for are granted. With respect, I am convinced that the appellant has shown that it would suffer substantial loss if the order for stay of execution is denied.

7) The second principle is that the application should be filed without unreasonable delay. It is apparent on record, that this appeal was filed on 22.02.2017 while the motion was filed on 23.05.2017. I am satisfied that the motion was not timeously filed.

8) The third principle is the provision of security for the due performance of the decree. The appellant is saying that, it is willing to furnish security. The respondent on the other hand is saying that if this court is inclined to grant the order for stay then, the same should be granted on condition that the appellant pays the decretal sum. On my part I think a fair order on the issue touching on security, is which I hereby direct, that the appellant deposits the decretal sum of ksh. 4,122,744/- in an interest earning account in the joint names of the advocates and or firms of advocates within 30 days from the date hereof. In default, the motion will be treated as having been dismissed.

9) In the end, the order for stay is granted on condition specified hereinabove. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 8th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent