

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 493 OF 2017

MX FRYS LIMITEDAPPELLANT

- V E R S U S -

VELJI DHARAMSHI SHA1ST RESPONDENT

TARACHAND DHARAMSHI2ND RESPONDENT

RAMESHCHNDRA DHARAMSHI3RD RESPONDENT

NAVINCHANDRA DHARAMSHI SHAH4TH RESPONDENT

RULING

1) The appellant herein has taken out the motion dated 18.9.2017 in which it sought for *inter alia* an order for stay of proceedings in Nairobi C.M.C.C no. 2081 of 2008. The motion is supported by the affidavit of Aziz Mohamed. When served, the respondents opposed the motion by filing the replying affidavit of Jared Omari Mituga. Learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

2) 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. It is the submission of the appellant that the primary suit was dismissed and the counter-claim ordered to proceed *ex parte* for hearing on 10.5.2017. The appellant further avers that it came to learn of the development on 23rd August 2017. The appellant took out the motion dated 26.5.2017 and applied for the dismissal orders to set aside. The appellant's motion was ordered dismissed on 25.8.2017 for lacking in merit. The appellant stated that the ruling was delivered in the absence of the appellant who had no notice.

3) The appellant being dissatisfied, filed this appeal to challenge the dismissal order pending the hearing and determination of this appeal. The appellant is now seeking for stay of proceedings *vide* the motion dated 18.9.2017. It is the submission of the appellant that unless the order for stay of proceedings is given the counter-claim will be heard and determined without the appellant being heard thus making it suffer substantial loss.

4) The respondents on the other hand have urged this court to find that the motion dated 18.9.2017 is misconceived, incompetent and without merit. The respondents have further stated that the appellant lost interest to pursue the case after it vacated the respondents premises. The respondents pointed out that the contradictions, inaccuracies and the false statements made in support of the appellant's application could not warrant the exercise of the court's discretion to set aside the orders made on 10.5.2017. This court was beseeched by the respondents to find that the appellant has not given any sufficient reason to warrant stay of the lower court proceedings.

5) In their response to the appellant's motion, the respondents do not deny the averment that if the order to stay proceedings of the suit before the trial court is not given, they will proceed to prosecute the counter-claim. With respect, I agree with the appellant's argument that if the respondents are allowed to proceed with the counter-claim, this appeal will be rendered nugatory. The respondents may obtain favourable judgment which they may execute against the appellant before being heard. I am satisfied that it is in the best interest of justice to grant the order sought so that the appellant is not condemned

unheard.

6) In the end, I find the motion to be with merit. It is allowed in terms of prayer 3 with costs abiding 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