



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 300 OF 2015

PATRINICK PRODUCTS LTD.....APPELLANT

VERSUS

ZINGO INVESTMENT LIMITEDRESPONDENT

RULING

1. Vide a notice of motion dated 17th June 2015 and filed in court on 19th June 2015 under certificate of urgency, the appellant/applicant Patrinick Products Limited seeks from this court orders:
 1. Spent
 2. Spent
 3. That this court be pleased to substitute security to set aside the exparte judgment in CMCC 7680 of 2013 of cash with a deposit of title to land.
 4. That the court be pleased to direct that Auctioneers fees in CMCC 8680 of 2013 be taxed.
 5. That the court be pleased to extend the time for filing of the defence, witness statements and all documents and such pleadings filed on 7th May 2015 be deemed as duly filed in the extended period.
 6. That the court be pleased to grant any other orders that it deems provided for.
2. The application is brought under the provisions of Article 159(2) (d) of the Constitution, Section 3A, 75 of the Civil Procedure Act and Order 51 Rule 1 and Order 43 Rule 1, Order 41 rule 2 and Order 10 Rule 11 of the Civil Procedure Rules and all other enabling laws. The application is predicated on the grounds that
 - a. The appellant/applicant is in hardship as is not in a position to raise the required amount being kshs 1,725,206 on or before 22nd June 2015 as condition to set aside the exparte judgment.
 - b. The appellant/applicant without prejudice to the above is ready and willing to offer two land titles being title No. THIKA MUNICIPALITY BLOCK 18/983 and MWEIGA BLOCK 5 /MUTHUINI/575 as security in place of cash; the Auctioneers fees amounting to kshs 265,430 is arbitrary, exorbitant and inconsistent with the provisions of Rule 55 (1) of the Auctioneers Rules 1997 (LN 120/1997 & LN144/2009).
 - c. The appellant /applicant in furtherance to (b) above undertakes to supplement any balance if any of the security, by way of cash to be deposited into court or an interest bearing account.
 - d. Unless a stay of execution is granted, the appellant/applicant stands to suffer irreparable loss as the respondent will proceed to auction the appellant/applicant.

- e. The applicant has acted timeously and without inordinate delay in pursuing this application.
 - f. The appellant/applicant has a strong case and in fact has a counterclaim corroborated on record by the respondent's own list of documents and hence fundamental trial issues.
 - g. The respondent suffers no prejudice whatsoever as the *ex parte* judgment has already been set aside.
 - h. It is in the interest of justice that the appellant/applicant is not condemned unheard.
 - i. Unless this application is allowed the *ex parte* judgment will completely lock out the appellant/applicant from defending the claim against it.
3. The application is further supported by an affidavit sworn by Patrick Mwangi Mureithi the Managing Director of the appellant/applicant Company on 18th June 2015 providing the factual history of two matters CM CC 7680 and 7909 of 2013 wherein *ex parte* judgment was entered against him and he was ordered by a decree of the Chief Magistrate's court at Milimani to pay kshs 3,767,818 and when he sought to set aside the said *ex parte* judgment against him, the court granted him the orders conditional upon him depositing security for both matters within 21 days from 14th April 2015 and in default thereof execution would proceed.
 4. The applicant further complains that the auctioneer who had only been instructed to proclaim its property were seeking kshs 557,830 in both suits which according to it, is excessively high and unjustified. That following the order for deposit of security, it applied for variations of the said orders but by a ruling made on 22nd May 2015 Honourable Ngetich (Mrs) Chief Magistrate only extended the period for the depositing of security by a further 30 days but rejected the prayer for substitution of security and since it was not in a financial position to raise the security ordered by the trial court, it had to file this appeal and the application herein. That the applicant's director is a businessman with dependants being children in primary school and university hence he was incapable of raising that amount of security within the short period of time hence his plea for substitution of the security from cash to title to his two parcels of land whose value exceeds the decretal sum that he was ordered to deposit in court by about kshs 400,000/- as evidenced by the valuation reports filed in court. That since he was not served with summons to enter appearance, unless the orders sought herein are granted, he stands to suffer unheard yet he has a strong case against the respondent. The applicant annexed several exhibits to his affidavit including pleadings in the lower court, copies of titles to land, land valuation reports, Auctioneers proclamation forms, and statement of account for Zingo Investments among others.
 5. The application was opposed by the respondent through a replying affidavit sworn by Robert Njoka Muthara the Managing Director of the respondent company. Mr Muthara contends that the appellant/applicant is a dishonest man since after entry of judgment in both suits he went to visit the respondent and asked the respondent to call off execution process to enable the applicant pay the debt within 21 days but which he defaulted.
 6. Further, that the trial court did grant the appellant extension of 30 days to deposit security which he again proposed to settle but reneged and that therefore the proposal to substitute the security of cash with titles to land was a ploy of defeating the course of justice considering that none of the properties was registered in the appellant/applicant's names.
 7. Further, that in any event the applicant filed defence out of time after the period he was granted had expired hence he could not sanitize the disobedience of court orders by lodging this application. He maintained that auctioneers charges were correct, justifiable and consistent with the provisions of the law. The respondent urged this court to dismiss the applicant's application with costs.
 8. In a rejoinder to the respondent's replying affidavit, the applicant filed a supplementary affidavit with leave of court on 3rd July 2015 denying the contention by the respondent that the application was in any way intended to delay the matter before the subordinate court but that it was the respondent's refusal to have the security substituted that had delayed determination of the matters. He also clarified that he wished that the cash security to be deposited in court be substituted with title to land security. That he was not in a position to raise the cash within a short period of time hence the respondent's insistence was only meant to punish the applicant. Further, that there was no inordinate delay in filing this application as his advocate was waiting for certified copies of proceedings and ruling which had nonetheless not been availed as at the time of filing of the application for stay of execution. The applicant also

- maintained that he had a strong defence against the respondents claims and that he wished the security to be deposited in court so that he could be heard on the merits of the claims against him and that he was advised to file this application for substitution of security since he could not raise cash money within the shortest period of time granted by the court. He denied ever knowing of the existence of the cases lodged in the subordinate court and or meeting the respondent and asking him to call off the execution process.
9. The applicant also maintained that his wife was ready to give her title to land as security and that she was willing to come to court. Further, that he had proved that it was the respondent who owed him money vide bounced cheques issued all amounting to kshs 566,120.
 10. When the matter came up before Honourable Onyancha J on 19th June 2015 under certificate of urgency, he granted interim stay of the ruling of Honourable Ngetich CM in CMCC 7680/2013 and directed service of the application upon the respondent. When the matter came up before me on 25th June 2015 for interpartes mention. I granted temporary stay upon the decretal sum being deposited in court within 21 days. On 27th November 2015 the applicant reported that he had deposited kshs 3,060,000 short of kshs 149,000 to cover this appeal and HCCA 299/2015. He sought 14 days to complete the deposit and by 15th October 2015 he had deposited the entire decretal sum into court. The parties also agreed to have the application disposed of by way of written submissions.
 11. The appellant/applicant filed theirs on 15th September, 2015 whereas the respondent filed theirs on 2nd October 2015, which submissions I have carefully read and considered.
 12. It is however worth noting that the applicant seeks, substantively, for the substitution of security ordered by the trial court from cash deposit to title to land documents since it is alleged that he is experiencing financial hardships hence unable to raise the decretal sum which will in essence oust him from the judgment seat of having a fair hearing before the trial court. That being the case, would this court be in order to make such an order at this interlocutory stage of the appeal without in effect determining the entire appeal in a summary manner? The answer is that indeed, to substitute security at this stage would be tantamount to determining the appeal summarily without according both parties a hearing on the merits of appeal. It is for that reason that this court did insist that the appellant, in order to enjoy status quo in the lower court, must deposit the whole of the decretal sum being security for the due performance of decree as required under Order 42 Rule 6 (2) of the Civil Procedure Rules.
 13. The appellant did deposit the said decretal sum as ordered by this court pending hearing and determination of this application interpartes. Since it appears that what the appellant was essentially concerned about was the period within which he was to deposit the security, and the appellant having complied with orders of this court for depositing of security, this court would find no injustice in holding at this stage that the appellant had indeed deposited security for the due performance of decree.
 14. But for stay of execution pending appeal to issue, the applicant must meet two other conditions. The first being that he should demonstrate to the court that he shall suffer substantial loss if the stay is not granted and that the application was made without unreasonable delay. Beginning with the latter condition, it is not in dispute that the order which is being challenged was made on 29th May 2015 and this application was filed herein on 19th June 2015 which was within 30 days of the delivery of the impugned ruling. That being the case, and as 30 days is the statutory period allowed for appeals from the subordinate court to the High Court, assuming it was legitimately filed, I find that the application herein was made without unreasonable delay.
 15. On whether the applicant shall suffer substantial loss if stay of execution is declined, the applicant contended that he was in financial difficulties and that unless stay was granted and the ruling of the court stayed, he would lose the right to defend the suit yet he had a good defence, coupled with a counterclaim that raises serious triable issues.
 16. The court notes that the Memorandum of Appeal raises many more issues than the issue of security deposit before the appellant is allowed to defend the suit in the lower court. This is further emphasized in the submissions filed by the respondent which in essence concern the merits of this appeal. That being the case, and the appellant having deposited the decretal sum in this court; to fail to stay the ruling of the trial court would amount to allowing the respondent to proceed with execution of decree since the setting aside of *exparte* judgment was conditional

- upon the appellant depositing security in the form of the whole of the decretal sum within a stipulated period of time. That in itself would oust the appellant from a hearing.
17. Accordingly, I grant the appellant/applicant orders staying the ruling of Honourable Ngetich (Mrs) Chief Magistrate) delivered on 22nd May 2015 and all consequential orders pending hearing and determination of this appeal on merits.
18. I further order that the decretal sum deposited in this court as security shall be deposited in a joint interest earning account to be opened and operated by both parties advocates within 21 days from the date hereof unless such period is enlarged by this court. The said sums shall be held until further orders of this court on its disposal upon an appropriate application.
19. The appeal herein shall be fast tracked for disposal in the following manner:-
- i. The appellant to file and serve record of appeal within 90 days from the date hereof.
 - ii. The Executive Officer of the Chief Magistrate's Court to submit to his court the original trial record within 90 days from the date hereof .
 - iii. Upon submission of the said trial record, the Deputy Registrar of this court to place the file herein before a judge for admission of the appeal not later than 7 days of the date of receipt of the lower court record. Upon such admission, the appellant to cause the appeal to be listed for giving of directions on appeal as stipulated in Order 42 Rule 13 of the Civil Procedure Rules.
 - iv. And finally, that this appeal shall be heard within 9 months from the date hereof unless such period is enlarged by this court on sufficient cause being shown.
20. The issue of auctioneer's charges can only be dealt with at the trial stage by the court. Similarly, the prayer for enlargement of time cannot be granted by this court as it is the trial court that has the jurisdiction to hear and determine that issue. Accordingly, I reject prayers No. 3, 4, and 5 of the Notice of Motion dated 17th June 2015.
21. Costs of the application shall abide the outcome of the appeal herein.

Dated, signed and delivered in open court at Nairobi this 20th day of January, 2016.

R.E. ABURILI

JUDGE

Coram Honourable R.E. Aburili J.

C.A. Adline

Mr Mworira for appellants/applicant

Miss Mumo holding brief for Mr Murrithi for respondent

COURT- Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

Mr Mworira – this appeal is being heard with CA 299/2015. We pray that the orders herein do apply to the CA 299/2015.

Miss Mumo- That is so.

R.E. ABURILI

JUDGE

COURT- This ruling to apply to CA 299/2015 as appropriate.

R.E. ABURILI

JUDGE

20/1/2016