



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 214 OF 2015

A .O. BASID LIMITED. APPELLANT/RESPONDENT

VERSUS

TAKAFUL INSURANCE OF AFRICA..... RESPONDENT/APPLICANT

R U L I N G

The Application before the court for determination is the Notice of Motion dated 28th October, 2015. The same has been brought under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 7, Order 42 Rule 6 of the Civil Procedure Rules.

The Application seeks for the following orders inter alia.

1. That this Honourable Court be pleased to vary, set aside and/or vacate interim orders restraining the Respondents from attaching the Applicant's goods on the 18th June, 2015 by the Hon. Justice Mabeya.
2. That, the Honourable Court directs the Appellant to deposit the decretal sum in Court pending the hearing and determination of this Application and/or the Appeal.
3. That the Honourable Court executes the warrant of attachment to conclude this matter.
4. That the cost of this Application be in the cause.

The Application is premised on the grounds set out on the body of the same and is supported by the Affidavit of Fatma Muhamed Abdallah annexed to the Application.

The summary of the Applicants case as captured in the Affidavit is that; the Applicant sought and obtained leave from the court to file a Memorandum of Appeal and the leave to act as stay to the judgment given in favour of the Respondent. It is further deponed that the Application herein is a blatant abuse of the court process and was filed with the sole intention of denying the Respondent fruits of its judgment.

That the Applicant has previously acknowledged owing the Respondent and has even proposed modalities of paying the debt but when the payment was not forthcoming, the Respondent obtained a judgment and extracted a decree dated the 15th December, 2014 and appointed Auctioneers to execute the same. The Applicant partially satisfied the decree by paying the Auctioneer a sum of Ksh.1,500,000/- as part payment of the decretal sum and issued post-dated Cheques for the balance which upon presentation to the bank were returned unpaid.

That the Applicant filed two Applications seeking a stay of execution before the trial court both of which were dismissed by Honourable Mr. Obulutsa and Mr. Chesang on 30th April, 2015 and on 19th June, 2015

respectively. The Applicant then moved to the High Court on the 11th June, 2015 seeking interim orders restraining the Respondents from attaching the Applicant's goods and on the 18th June, 2015, Hon. Justice Mabeya granted the orders sought in the said Application.

That the Respondent has suffered and continues to suffer loss, prejudice and financial constraints due to the orders issued by the Hon. Justice Mabeya and that since the orders were granted, the Applicant has been playing hide and seek and for these reasons the Respondent prays that the orders be vacated and/or be set aside.

The Application is opposed vide a Replying Affidavit by A. O. Basid sworn on the 16th November, 2015 wherein he depones that; the Application is an abuse of the court process and an afterthought.

That the Applicant was not served with the summons to enter appearance or the notice of entry of judgment as required under the law hence the Application to set aside the interlocutory judgment.

The part-payment made by the Appellant was done under duress after the Respondent instructed an Auctioneer who in the company of Police Officers threatened to attach the Appellants goods forcing it to release to him a sum of Ksh.1,500,000/-.

That the cheques that the Appellant is alleged to have given to the Respondent were for a different case and not the one herein. It was further argued that the Respondent was served with the Application dated 11th day of June, 2015 but it refused to attend court for hearing and there is no explanation for non-attendance and in their absence, the Judge was right in granting the Orders sought in that Application.

That the Appellant has disputed owing the Respondent any money and the more reason why it filed the Appeal which is still pending hearing. The Applicant denies that it is disposing off its properties and/or winding up its business as alleged by the Respondent. It is only fair that the Appellant be given a chance to prosecute the appeal as the same has merits.

I have considered the Application, the replying affidavit and the submissions by the learned counsels and it's true that interim orders were granted by Hon. Justice Mabeya on the 18th day of June, 2015 in favour of the Respondent/Appellant. The said orders were given pursuant to the Application dated the 11th June, 2015 which came up for hearing on the same date. The Respondent/Applicant did not attend court and therefore the same proceeded ex parte. The Respondent has not bothered to explain why he did not attend court on that day despite having been served with the Application.

Though it has been argued that the Appellant had made similar Applications in the trial court, Order 42 Rule 6 of the Civil Procedure Rules allows a party to apply for a stay of execution to a court to which an Appeal is preferred and the appellate court shall be at liberty, on an Application being made to consider such an Application and make such order thereon as may seem just notwithstanding such an Application shall have been granted or refused by the court appealed from.

The Appellant has already filed an Appeal in this matter and in my view, the same is arguable as the Appellant has denied owing the Respondent all the monies claimed.

The Appellant also submitted that the cheques issued to the Respondent were for a different case and not the one before the court. The issue of service of summons has also been raised in the Appeal and it's also a very relevant and valid issue.

The part-payment alleged to have been paid by the Appellant in satisfaction of the decree has been explained by the Appellant in that the same was paid under duress after it was threatened with execution by the Auctioneers who went to its premises in the presence of Police Officer.

In the premises aforesaid, I find that the Respondent has not given me valid reasons why I should interfere with the orders that were given by Honourable Justice Mabeya, on the 18th June, 2015.

The end result is that the Application dated the 28th October, 2015 is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 18th day of February, 2016.

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L. NJUGUNA

JUDGE

In the Presence of

..... *for Appellant*

..... *for Respondent*