



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1095 OF 2003

SYNRESINS LIMITED.....APPLICANT

VERSUS

PRAVIN VORA T/A CONSTRUCTION.....RESPONDENT

RULING

1. **Synresins Limited** the Applicant herein took out three motions dated, 30th March 2016, 31st March 2016 and one dated 12th April 2016 in which it sought for the following orders that I have consolidated:
 - i. *That this application be certified urgent.*
 - ii. *This honorable court do grant orders staying execution of the decree and all consequential process pending the hearing and determination of this application inter-partes and appeal in the Court of Appeal;*
 - iii. *That this court do allow the Applicant to deposit the decretal sum in court and stay execution of the decree dated 7th March, 2016 and all consequential process pending the hearing and determination of the application for stay of execution dated 30th March, 2016.*
 - iv. *That this honorable court be pleased to grant leave to the firm of Muema Kitulu & Company Advocates to come on record for the plaintiff/ Applicant herein in place of M/s Kithi & Company advocates, Maendeleo House, 4th Floor, Monrovia street / Utalii lane. P.o Box 2676-00100 Nairobi.*
 - v. *That further this honorable court be pleased to issue an order directing M/s Kiriiyu Merchants Auctioneers to restitute the plaintiff's property attached on the 4th day of April 2016, shortly after this honorable court issued an order of stay of execution.*
 - vi. *Costs of this application be provided for.*
2. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent to have the matter dispose of by written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application. The Applicant avers that the **M/s Kiriiyu Merchants Auctioneers** have already executed and the Applicants goods are now in the custody of the Respondents auctioneers which are now attracting storage charges and that they may be running the possibility of damage or misplacement at the auctioneers storage yard. The Applicant claims that it stands to suffer irreparable loss and his business has been paralyzed and the fate of his employees left at the mercy of the outcome of the application for stay and that there is a possibility of the Applicants business

which has run for over 40 years collapsing. The Applicant has also intimated that it is willing to provide security for the decretal sum once called upon to do so by the court.

3. The Respondent on the other hand contends that the applications by the Applicant have been filed in bad faith and are an abuse of the court process. He argues that no substantial loss will result to the Applicant since execution was done with the plaintiffs participation and it failed to apply for stay within a reasonable time. It further asserted that the Applicant has not offered any tangible security for the due performance of the decree. He also called a bluff the Applicants assertions that his business will collapse since according to the contract agreement and documents filed in court, it is evident that the Applicant deals in general construction which business is still running. He further stated that he is capable of paying if the appeal succeeds since he has several assets and buildings in Nairobi and is in active business. He averred that should the restitution prayer be allowed, then the application should be allowed on condition that the auctioneers fees and costs are paid. He reminded the court that equity aids the vigilant and not the indolent and accused the Applicant of being indolent and only acting after realizing that its goods had been attached by auctioneers.
4. The principles to be considered in an application for stay are well settled under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, there must be threat of substantial loss on the part of the Applicant if the orders of stay fail to issue. Secondly, the application must have been brought without unreasonable delay and thirdly, the provision for security has to be considered.

On the first principle, the Applicant is required to show that it will suffer substantial loss. The cornerstone of the jurisdiction of the court in determining whether or not to grant stay of execution pending appeal is the fact that substantial loss will occur upon the Applicant unless a stay is granted. The legal burden of proof lies with the Applicant to show that the Respondent will not be able to refund the decretal sum if it is paid over to them. In this case, the Applicant only claims that its business will collapse and its employees will be rendered jobless. The Respondent on the other hand claims that the Applicant deals with general construction which business is still running despite the execution. The Applicant has also not shown that the Respondent will not be in position to pay the decretal sum should the appeal succeed. However, there are goods that have already been proclaimed and they are in possession of **M/s Kiriyyu Merchants Auctioneers**. It has only been stated that the goods are proclaimed and are in storage. Therefore, the execution might have began but it has not been completed since the same are yet to be disposed of to obtain the decretal sum. Indeed as argued by the Applicant, the confiscation of the goods will attract storage charges which the Applicant will be required to meet should the appeal be successful. It is therefore in the interest of justice, that the issue of substantial loss be considered in this case while balancing the interests of the parties, especially given the claims by the Applicant that his business will collapse. In any case, I note that the Applicant has offered to give security equal to the decretal sum.

5. The second principle to be considered is that an Applicant must file the application for stay without unreasonable delay. Judgment herein was delivered on 19th February 2016 and this application was filed on 30th March 2016, which was 41 days later. This does not amount to undue delay.
6. Thirdly, the court must take into consideration the provision of security for the due performance of the decree. On this principle as I stated above the Applicant has offered the decretal sum as security.
7. In the end, I find the motions to be well founded. Consequently arising from the applications this court grants the following

orders:

- i. An order for stay of execution of the judgment delivered on 19.2.2016 and the resultant decree pending appeal on condition that the plaintiff/applicant deposits the decretal sum of

kshs.5,000,000/= in an interest earning account in the joint names of advocates and firms of advocates within 30 days from the date hereof. In default the aforesaid motions will be deemed as having been dismissed.

- ii. The goods attached by Kiriiyu Merchants Auctioneers be restored to the plaintiff's applicants and the plaintiff should have them disposed of pending appeal.
- iii. The auctioneer to be taxed in the meantime but payment thereof to await the outcome of the appeal
- iv. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 31st day of May, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent