



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLENOUS NO. 84 OF 2015

ROVIN INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

MARK WATIMA

ROSE MAKOKHA

BLACKROSE TRANSPORTERS LIMITED.....DEFENDANT

RULING

1. The notice of motion dated 18th February, 2015 seeks orders for stay of execution of the warrants of attachment in CMCC NO. 2031 OF 2012 and leave to file appeal out of time. The applicant's main contention is that the judgment was delivered in their absence and that the Respondent has commenced execution.

2. Vincent Watako Mulondo, the director of the plaintiff swore a replying affidavit on 27th February, 2015 in opposition to the application. He stated that after the Plaintiff obtained judgement ex parte and warrants of attachment, the defendants filed a notice of motion dated 29th June, 2012 seeking stay of execution and the setting aside of the ex parte judgment. That the application was allowed and the defendants were ordered to pay costs as well as thrown away costs to the plaintiff as well as bear auctioneers costs. He stated that by a letter dated 25th November, 2013 and received by the defendant's advocates on 27th November, 2013, the defendants were invited for the fixing of a hearing date on 6th December, 2013 at the registry but that the defendant's representatives did not turn up. A hearing date was nonetheless taken and the defendants' advocates were served with a hearing notice on 16th December, 2013 indicating that the matter was slated for hearing on 8th April, 2014. He stated that thereafter the matter proceeded for hearing on 8th April, 2014 and submissions were tendered on 19th May, 2014. The defendants filed an application dated 20th May, 2014 seeking to set aside the proceedings of 19th May, 2014 which application was dismissed. Judgment was subsequently entered in favour of the Plaintiff. It was his contention that when the judgment was reserved for 30th October, 2014, parties were informed that judgment would be delivered on notice. He further contended that the Defendants were aware of the judgment since a clerk from the firm of the defendants' advocates was present in court. He stated that in any event the court file was available at the registry for perusal. He stated that the defendants are guilty of material non disclosure and ought not to be entertained by this court. He states that the defendants have not demonstrated that they stand to suffer substantial loss if their application is not allowed; that being a money decree, the non-existent appeal cannot be rendered nugatory; that the plaintiff is in a position to refund the decretal sum since it is a company with assets worth millions of shillings.

3. I have considered the application herein and the submissions tendered. This application is based on Order 42 Rule 6 (2). That Rule provides:-

" (2) No order for stay of execution shall be made under sub-rule (1)

unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

4. The above Rule was discussed in the case **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** where it was held as follows:-

"The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him."

5. The Appellant states that he is likely to suffer loss considering that there exists warrants of attachment and that the execution will render the appeal nugatory. Bearing in mind that the Appellant has a right of appeal, it is worth maintaining the status quo. The application was filed about 4 months after judgment but considering the events, the delay is understandable. The upshot is that the application is allowed. As to security, I order that the Appellant deposits, ksh.575,838/80 in an interest earning account in the joint names of the advocates appearing in this matter within 45 days. In default the application to be treated as having been dismissed. Costs of the motion to abide the outcome of the intended appeal.

Dated, Signed and Delivered in open court this 24th day of April, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent