REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 52 OF 2014

MILCAH J. MUTWOL ..... APPELLANT/APPLICANT

VERSUS

FRACA SERVCOM ..... RESPONDENT

(Being an appeal from the Judgment and decree of the Honourable S. Mokua (Senior Principal Magistrate) in Eldoret Chief Magistrate's Civil Case No. 994 of 2010 delivered on 16th January, 2014)

RULING

The Notice of Motion for determination is dated 21st May, 2014. It is brought under Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 42 Rule 6 and 7 of the Civil Procedure Rules and all other enabling provisions of the law.

The Appellant prays that there be stay of execution of the judgment and decree in Eldoret Civil Suit No. 994 of 2010 between Fraca Servcom -V- Milcah J. Mutwol pending the hearing and determination of the intended appeal.

The main grounds upon which the application is brought are; that the Appellant has preferred an appeal against the Judgment of the trial court, that the Respondent has commenced execution of the decree of the Judgment by proclaiming her goods which, if they are sold she stands to suffer substantial loss, that the Appellant is willing to abide with the terms the court will attach in granting the orders and that the Respondent stands to suffer no prejudice if the orders sought are granted.

The application is also supported by the affidavit of Milcah M. Mutwol the Applicant herein sworn on 21st May, 2014. She reiterates the grounds upon which the application is premised and adds that if the application is not allowed, the intended appeal shall be rendered nugatory.

The application is opposed by way of a Replying Affidavit sworn by Benjamin Shitsukane, the managing director of the Respondent. He depones that the Respondent is a serious business company capable of refunding the decretal sum if need arises. To this end, he annexed the Respondent's bank statement to demonstrate its financial ability. He states that if the orders sought are granted, then the court should order that the entire decretal sum be deposited in a joint interest earning account in the names of the advocates on record.

The application was canvassed before me on 22nd July, 2014. The respective advocates urged the court to determine the application based on the supporting and replying affidavits as well as the authorities filed in support of the application.

I have accordingly considered the application and I take the following view of the matter.

The principles guiding the court in considering an application for stay of execution under Order 42 Rule 6 (2) are the following:-

(a) The court must be satisfied that substantial loss may result if the order is not granted.

(b) The applicant must bring the application without unreasonable delay.

(c) The applicant must be willing to furnish security for the due performance of the decree, or the court may order that such security as may be binding upon the applicant be furnished for the same purpose.

As regards the first issue for determination – whether the Applicant will suffer substantial loss of the orders prayed for is not granted, it is worthwhile noting that Applicant did not furnish the court either with the judgment or the decree. Either of the two would have enabled the court to discern what the terms of the trial court Judgment were and their implication on the Applicant. But from the Memorandum of appeal, I get it that some general damages were awarded to the Respondent from a claim of libel (defamation) against the Appellant. The specific amount has not been disclosed. The Respondent on the hand by bank statements annexed to the Replying Affidavit demonstrates that it is able to pay back all the sums, if any event, the appeal succeeds. The only loss the Applicant has demonstrated regards loss of property which has been proclaimed. If this were to be examined against the financial ability of the Respondent, I think the Respondent is an entity capable of paying back the amounts the Applicant may lose.

But again, the position demonstrated by the Respondent may not be constant. The financial ability in its future remain unknown as at now. For this reason, I would find the application in favour of the Applicant.

On the second issue – whether the application has been filed without unreasonable delay, the appeal herein was filed on 8th May, 2014, whereas the application was filed on 21st May, 2014. Hence, there was a delay of thirteen (13) days which by all standards was not reasonable.

Lastly, is the issue on security for the due performance of the decree. The Applicant has submitted herself to the conditions the court will set under this head.

In the end, it is my considered view that this is a merited application. I allow it with the following terms:-

(a) A stay of execution against the Judgment and decree of Eldoret Chief Magistrate's Civil Case No. 994 of 2010 do issue pending the hearing and determination of the appeal herein.

(b) That the Applicant shall deposit the entire decretal sum together with assessed costs in a joint interest earning bank account in the names of the advocates for the parties within 14 days of this ruling.

(c) That the order for stay of execution issued in (a) above shall lapse if order (b) is not complied with.

(d) Costs of this application are payable by the Applicant.

DATED and **DELIVERED** at **ELDORET** this 21st day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Kigen for the Appellant/Applicant

Mwinamo for the Respondent