



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE**

**MISC. APPLICATION NO. 536 OF 2014**

**MIDROC WATER DRILLING COMPANY  
LIMITED.....APPLICANT/INTENDED APPELLANT**

**VERSUS**

**PURAALE CONSTRUCTION**

**COMPANY LIMITED..... RESPONDENT/INTEDNED**

**RULING**

1. This decision is the outcome of the motion dated 14<sup>th</sup> July, 2014 taken out by Midroc Water Drilling Company Limited, the Appellant herein. In the aforesaid motion, the Applicant sought for the following orders that;
  - i. the Honourable Court be pleased to grant leave to hear the Notice of Motion herein before the duty Magistrate on priority basis.
  - ii. the Honourable Court be pleased to set aside the judgment and decree dated 3<sup>rd</sup> of October, 2013 with all consequential orders emanating from it
  - iii. the entire suit and/or proceedings be stayed and referred to an arbitration and/or in the alternative the whole claim be struck out for being a claim out of unprocedural contract or illegal contract.
  - iv. the orders of leave to hear this application do operates as stay of execution of a decree dated 3<sup>rd</sup> of October, 2013 and consequential orders emanating from it.

The motion is supported by the affidavit of Mohammed Chute, the Chairman of the Appellant/Applicant. When served with the motion, Purrale Construction Company Limited, the Respondent herein, filed the Replying affidavit of Tomas Leremore, the Respondent Director to oppose the same. When the motion came up for interpartes hearing, Learned Counsels appearing in the matter recorded a consent order to have the motion disposed of my written submissions.

2. Before considering the merits or otherwise of the motion, let me set out in brief the background of this dispute. Puraale Construction Company Limited, filed a suit before the Chief Magistrate's Court to recover a civic debt from Midrock Water Drilling Company Limited. The Applicant's advocate appears to have entered appearance but failed to file a defence to defend the suit with the time prescribed. The Respondent successfully applied for entry of judgment in default of defence on 16<sup>th</sup> September, 2013 and thereafter sought to execute the decree. The Applicant filed two

applications one dated 17<sup>th</sup> October, 2013 and the other dated 29<sup>th</sup> October, 2013 seeking to set aside the default judgment but had them withdrawn when the Respondent filed preliminary objections. The Respondent thereafter filed the application dated 7<sup>th</sup> November, 2013 seeking for similar orders as earlier sought.

On 4<sup>th</sup> February, 2014, the trial Court gave the Applicant leave to file a defence out of time on condition that it deposits Ksh. 2,170,172/= it the decretal amount in Court within 21 days. It would appear the Applicant did not attend Court when case was due for mention to confirm compliance.

3. The Respondent commenced execution proceedings against the Applicant who in turn was prompted to file the application dated 27<sup>th</sup> February, 2014 for stay of execution and enlargement of time to file a defence.

The trial Court finally gave the Applicant an order for stay of execution on condition that it deposits Kshs. 500,000/= as security before the interpartes hearing date. In the ruling of 15<sup>th</sup> April, 2014, the trial Court gave the Applicant 10 days to deposit the entire decretal sum. The Applicant again took out the motion on 2<sup>nd</sup> May, 2014 whereof it sought for an extension of 30 days to enable it comply with the order. The aforesaid application was dismissed on 19<sup>th</sup> June, 2014. Being aggrieved by the aforesaid decision, the Applicant has now filed a Memorandum of Appeal with the intention of challenging the ruling of 19<sup>th</sup> June, 2014. It contemporaneously filed the motion dated 14<sup>th</sup> July, 2014 the subject matter of this ruling.

4. Having set out in detail the background of this motion, I will now address my mind to the merits on otherwise of the same. 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 motion. I have further considered the written submission filed by the Applicant.

It is the submission of the Applicant that it ought to have been given a chance to a defence on terms which are just and fair. The Applicant complained that it was unfair and unjust to be required to deposit the whole decretal sum of Kshs. 2,074,535/40 before being allowed to file a defence and counter-claim. The Applicant cited Articles 50 and 159 of the Constitution as giving it a right to be heard. The Applicant averred that it would show on appeal that the trial Court entered when it imposed unreasonable terms before it is allowed to file a defence. The Respondent urged this Court to dismiss the motion on the ground that the Applicant has abused the Court process. The Respondent further accused the Applicant of material non-disclosure and for using the motion as a delaying gimmick.

5. It was further pointed out that the orders issued on 19<sup>th</sup> June, 2014 are incapable of being stayed being negative orders. I have already stated the orders the Applicant is seeking vide the motion dated 14<sup>th</sup> July, 2014. Prayer 1 and 2 have already been overtaken by events in that the orders were to last until the motion is heard interpartes. What is pending for determination is prayer 3 and 4 of the motion. The substantive prayer is for stay of the ruling delivered by the trial Court on 19<sup>th</sup> June, 2014 pending the hearing and determination of the intended appeal. With respect, I agree with the Respondent's submission that the ruling delivered on 19<sup>th</sup> June, 2014 merely dismissed the motion dated 2<sup>nd</sup> May, 2014.
6. It is clear from the face of the motion that the Applicant did not apply for an order for stay of execution of the decree and this Court cannot give orders gratuitously, they have to be prayed for. There is also a serious complaint that the Applicant is hellbent to delay the conclusion of this matter by using a plethora of applications. After a critical examination of the recorded proceedings I am convinced that such an inference can be made relating to the Applicant hence it is not entitled to the orders sought.

7. The averments made in the affidavits filed both sides show that the Applicant's main prayer has always been for move time to comply with the terms set by the trial Court to enable it file a defence. The Applicant was not denied a chance to file a defence but was merely given a condition for deposit the decretal sum in Court. It would appear the Applicant does not intend to comply with the order. The Applicant initially stated that it did not deposit the decretal sum in time because its advocate had inadvertently failed to deposit on the due date. Later the Applicant changed the story and alleged that the order requiring it to deposit the decretal amount was unfair and unjust. I find this conduct not forthright.
8. For the above reasons, I see no merit in the motion dated 14<sup>th</sup> July, 2014. The same is dismissed with costs to the Respondent.

**DATED, SIGNED and DELIVERED this 18<sup>th</sup> day of December 2014.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....**for the Appellant**

.....**for the Respondent**