



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 807 of 2002

KENAFRIC DIARIES LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

- VERSUS -

THE ADVERTISING COMPANY LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. By a **Notice of Motion** dated **28th September 2012**, the Defendant/Applicant seeks to stay the execution of the Judgement of this court delivered on 7th February 2012 by Honourable Lady Justice Khaminwa, pending the hearing and determination of the present application and the intended appeal. The application is supported by the affidavit of **PAUL OWORA** sworn on **1st October 2012**.

2. The Applicant in its affidavit of support advances the following grounds:-

a. That the performance of the Company's business has not been impressive due to a changing technology in advertisement.

b. That the Company's financial turnover is meagre and that for that reason it ought not to be exposed to a one off payment of the decretal sum.

c. That (b) above notwithstanding the Defendant is in a position to finish a bank guarantee for the decretal sum.

3. The application is opposed by the Plaintiff/Respondent on the grounds of opposition filed on 9th October 2012 the summary of which is that:-

a. The intended appeal will not be rendered nugatory by the payment of the decretal sum and that the application lacks bona fides and is aimed solely at derailing the execution proceedings.

b. The suit herein was filed in 2002 and Judgement obtained in February 2011, about nine years later and the Plaintiff has been kept away from the funds

c. No security has been offered for the performance of the decree.

4. I have carefully considered the application and the opposing submissions. Factors to be considered for stay of execution are set out in Order 42 Rule 6 (2) of the Civil procedure Rules. Under the Order the Applicant must satisfy the court that:-

- a. *Substantial loss may result to the Applicant unless the order of stay is made;*
- b. *The application has been made without immeasurable delay.*
- c. *Security for the due performance of such decree or order as may ultimately be binding on him has been duly given by the Applicant.*

5. Those matters were considered in **CARTER & SONS – VS – KERUNGO CONTRACTORS (K) LIMITED, NAIROBI C.A. 271 OF 1997** where the Court of Appeal held that:-

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the Applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the Applicant must furnish security. The application must of course be made without unreasonable delay.”

6. In the case of **CENTURY OIL TRADING CO. LTD. – VS – KENYA SHELL LIMITED [2003] 1EA 41**, the High Court confirmed that for an Applicant to succeed in an application for stay of execution, the Applicant must satisfy the requirements set out above.

7. The Respondent submitted that the Applicant has not established sufficient cause for the grant of the orders sought in this application, and that the above requirements have not been met. Indeed the Defendant’s own admission as to its financial situation raise grave concerns to the Plaintiff and fortify the Plaintiff’s position that the decretal sum ought to be paid immediately, as it is the Plaintiff who is likely to suffer substantial loss should the Defendant go under in business.

8. Although the Plaintiff alleges financial difficulties no evidence has been placed before the court to show the same or to prove that the operations of the Plaintiff would be severally crippled and hampered if it were to pay the entire decretal sum. There is indeed no proof of possible financial loss.

9. On the issue of security the Plaintiff is prepared to execute a Bank Guarantee for the decretal amount notwithstanding their allegation that they are currently hard pressed financially. On their part the Respondent have opposed the provision of a Bank Guarantee stating that the same is not a good security given the perilous financial position of the Defendant. If the Applicant goes under, it is submitted, the guarantee will no longer be available and the Plaintiff will be totally exposed. In any event, the Respondent submits, such a guarantee must be backed by a cash deposit.

10. I however do not understand the Respondent’s fear. If there is a bank guarantee which is backed by cash, it is then irrelevant if the Defendant’s company goes under. It is the Bank, and not the Defendant, who shall be called upon to honour the guarantee.

11. The amount of the decree is over Ksh.5,270,000/= with interest accruing.

12. This court has a wide discretion on the issue of security. In the exercise of that discretion I make the following orders:-

a. *The Applicant shall within **14 (fourteen) days** from this date release to the Plaintiff/Respondent **Kshs.2,083,143.05/=** being the Principal Sum with an attendant written undertaking by the Plaintiff to reimburse the same in the event the appeal succeeds. (See Nakuru HCCC No. 60 of 2001- Dr. Paul M. Mathu – Vs – Ibrahim K. Gichimu)*

b. *The balance, including costs, shall be secured by a Bank Guarantee executed by the Defendant/Applicant in favour of the Plaintiff/Respondent pending the hearing and determination of the intended appeal. The said Guarantee to be executed and deposited with the Plaintiff within 30 days from the date hereof.*

c. *The costs of the application shall be for the Plaintiff/Respondent.*

13. The Notice of Motion application dated 28th September 2012 is allowed subject to above orders.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Ouma for the Plaintiff

Matheu for the Defendant

Teresia – Court Clerk