

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCC NO. 164 OF 2000

TOYOI INVESTMENT LTD PLAINTIFF

=VERSUS=

UCHUMI SUPERMARKET LTD DEFENDANT

RULING

Mr. Kibichiy has come on record holding brief for **Mr. Fraser**, advocate for the Defendant. He informed Court that the purpose of Court attendance and filing of the Notice of Motion dated 18th day of July, 2013 was so as to confirm that the Defendant had complied with the orders granted by Hon. **Justice F. Ochieng** on 29/04/2013 pursuant to an application by the Defendant seeking orders of stay of execution.

According to **Mr. Kibichiy**, the Defendant had fully complied with orders of conditional stay of execution as directed.

In particular, he submitted that the Defendant had executed a bond of over Kshs 40 million and filed it in Court and urged the Court to order the status quo be maintained. He also expressed fears that, notwithstanding that the bond had been executed, the Plaintiff had commenced execution proceedings.

Mr. Kimani, holding brief for **A.G.N Kamau**, advocate for the Plaintiff on the other hand submitted that, although the bond was executed, it was so executed out of the time limit given by the Court. That therefore, nothing prevents the Plaintiff from executing.

From the brief submissions by the respective counsel, it is apparent that both parties are negotiating a settlement. Annexed to the Replying Affidavit sworn by **Allan George Njogu Kamau** advocate sworn on 23/7/2013 is a Draft Discharge voucher and a proposed consent settling the matter dated 18/06/2013, forwarded by counsel for the Defendant to counsel for the Plaintiff for consideration vide a letter dated 18/06/2013, marked annexure '5'. In response, counsel for the Plaintiff wrote a letter dated 19/06/2013 to counsel of the Defendant confirming that the draft Discharge Voucher and Consent letter were acceptable. This letter is marked annexure '6' attached to Replying Affidavit.

The succeeding annexures all demonstrate the intense negotiations undertaken towards having the matter settled. Infact, a duly executed Discharge Voucher is marked as Exhibit 10 B. The latest correspondence relate to the final stages of executing the consent for filing in Court which appears not yet settled.

In view of the foregoing, I think, it would not be prudent for the Plaintiff to execute or threaten to execute when negotiations are still on-going.

Of paramount importance is that the Defendant has already executed the bond as ordered by the Court. The bond was duly executed on 15/05/2013 and filed in Court on 21/05/2013. The Court ordered that the bond be executed within 15 days of the ruling (29/04/2013). But by a Consent signed by Counsel for both parties, parties agreed to extend time within which to file the bond by a further 14 days. Ultimately, therefore, the bond having been filed on 21/05/2013, was filed within time.

I accordingly find that the Defendant has not failed to fulfil any of the conditions given by the Honourable judge in his ruling of 29/04/2013. The said Judge had requested that the matter be

mentioned before him to confirm compliance with his orders. In his absence, however, I have had to deal with this issue.

The status quo should therefore be maintained, save to add that parties should continue with their negotiations towards settlement of the matter. It is upon settlement that execution should proceed as against the agreed sum. And if parties do not agree, the Judgment of the Court cushions the Plaintiff, in the event that the Defendant does not prefer an appeal.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JULY 2013.

G.W. NGENYE-MACHARIA

JUDGE

25/07/2013

In the presence of:

Mr. Kibichiy Advocate holding brief for **Mr. Fraser** Advocate for the Defendant/Applicant and **Mr. Kimani** Advocate holding brief for M/s **A.G.N. Kamau**, Advocate for the Plaintiff/Respondent.