



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

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 28 OF 2009**

**SIGMA FEEDS LTD .....APPLICANT**

**VERSUS**

**DIRECTOR NAIROBI CITY**

**PLANNING DEPARTMENT.....1<sup>ST</sup> RESPONDENT**

**TOWN CLERK CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**METCOURT HOSTELS LIMITED .....INTERESTED PARTY**

**RULING**

By way of notice of motion application dated 20<sup>th</sup> April, 2012 the Applicant (Sigma Feeds Limited) prays for orders:-

1. **THAT this Honourable Court be pleased to certify this application as urgent and to dispose with the service hereof in the first instance.**
2. **THAT there be a stay of execution of the Decree issued herein and all other subsequent orders be stayed pending the hearing and determination of this application as regards the further reliefs sought herein and also the intended appeal.**
3. **THAT the Defendant/Respondent's Advocate/Client Bill of cost of Taxation be set aside, varied and all the consequential orders thereof.**
4. **THAT in the alternative the Honourable Court do first hear and determine the contempt of court application filed by the Ex-parte Applicant and/or hear and determine the suit filed on 28<sup>th</sup> August, 2008 in Nairobi HC ELC No. 420 of 2008.**
5. **That the costs of this application be provided for.**
6. **That such other and/or further orders be made as this Honourable Court may deem fit and fair to grant.**

The application which is premised on the inherent power of the court, sections 1A, 1B, 2A and 5 of the Judicature Act, Order 52 of the Supreme Court Laws of England, sections 3 and 3A of the Civil Procedure Act, Order 22 Rule 22(1) of the Civil Procedure Rules and all enabling provisions of the law and procedure is supported by the grounds on its face to wit:-

- a. **THAT there is pending for hearing and determination of suit filed on 28<sup>th</sup> August, 2009 in Nairobi HC ELC No. 420 of 2008 by the applicant for contempt of court proceedings against**

**the Defendants/Respondents threat who are also the decree-holders herein and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.**

- b. THAT the Respondents' Bill of Costs was taxed on 13<sup>th</sup> March, 2012 against the Applicants and there is serious threat of execution by a wrong doer who is the subject of contempt of court proceedings.**
- c. THAT there is an intended appeal pending, and/or high chances of a set off with the damages/costs in ELC HC No. 420/2008.**
- d. THAT this Honourable Court has jurisdiction and power to stay the execution of the said decree issued herein, otherwise the appeal, contempt proceedings and other damages may be irreparable and turn to a nullity.**
- e. THAT this application has been brought in good faith and is intended to expedite the final resolution of these claims and in all fairness to all parties.**

The application is also supported by an affidavit sworn by counsel for the Applicant, Mr. C Njuru Kihara. The affidavit reiterates the grounds in support of the application and adds that the bill of costs dated 19<sup>th</sup> April, 2010 was **“hurriedly taxed to avoid the typing of proceedings for purposes of the intended appeal.”** The same affidavit also confirms that the Bill of Costs was taxed at kshs.570,585/= on 13<sup>th</sup> March, 2012. The application is further supported by a further affidavit sworn on 4<sup>th</sup> June, 2013 by counsel for the Applicant. Through the said affidavit the Applicant tabled before the court an order issued on 29<sup>th</sup> July, 2010 by Muchelule, J in **Nairobi High Court ELC Civil Case No. 420 of 2008 SIGMA FEEDS LTD V METCOURT HOSTELS LTD** granting leave to the Applicant herein, and who is the plaintiff in the said case, to commence contempt proceedings against certain persons including the City Council of Nairobi through the Town Clerk. Through the further affidavit aforesaid, the Applicant also exhibited a copy of a Notice of Appeal in respect to this matter.

The Director, Nairobi City Planning Department and the Town Clerk of the City Council of Nairobi who are the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein opposed the application through a replying affidavit sworn by Advocate Pauline N Sewe on 22<sup>nd</sup> May, 2012. The respondents strongly opposed the application and submitted that this matter was never consolidated with **ELC No. 420 of 2008** and the outcome of the pending matter should not be an issue in this case. The respondents also argued that there is no pending appeal and the Applicant has even not offered security for costs. The respondents further argued that execution in respect of costs cannot be stayed. It is further the respondents' case that even though a Notice of Appeal was filed by the Applicant the same abated since no further action was taken within the period provided by the rules relating to appeals to the Court of Appeal.

The Applicant herein who was the Ex-parte Applicant in the substantive judicial review proceedings had sought orders of certiorari, mandamus and prohibition against a decision made by the respondents. Metcourt Hostels Limited had been named as an Interested Party. Through a judgment delivered on 1<sup>st</sup> April, 2010 Justice Jeanne Gacheche dismissed the Applicant's application with costs. Thereafter the respondents proceeded to file a bill of costs and after hearing the parties the Deputy Registrar taxed the bill at Kshs 570,585/=. The respondents subsequently asked the Applicant to pay the assessed costs and that is when the Applicant filed this application. In essence the, Applicant seeks to stay the payment of the costs.

I have carefully considered the arguments for and against the application. For an application for stay of execution to succeed, an applicant must establish that there is sufficient cause for staying the execution. An applicant must also demonstrate that irreparable loss will be suffered if stay is not granted. The application for stay must also be brought without undue delay. The prime purpose for which stay is granted is to ensure that were the applicant to succeed on appeal then such victory would not be rendered nugatory.

The Applicant filed this application without undue delay since the ruling of the Deputy Registrar was delivered on 13<sup>th</sup> March, 2012 and this application was filed on 20<sup>th</sup> April, 2012. The Applicant has proceeded on the assumption that it would succeed in **ELC No. 420/2008** and be awarded costs. The applicant has also assumed that the respondents will be found to have acted in contempt of court. It must

be noted that although the Court has granted leave in **ELC No. 420 of 2008** to the Applicant to commence contempt of court proceedings against certain parties who include 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent is not a party to that case. If the Applicant is to succeed in that case, such success would only be against the named defendants. The presumption by the Applicant that it may be awarded damages or costs in **ELC No. 420 of 2008** is just but speculation. Such speculation is too remote to influence the grant of stay in this matter.

The Applicant has indeed exhibited a Notice of Appeal dated 8<sup>th</sup> April, 2010 but no evidence was provided to confirm that an appeal was indeed filed.

Looking at the material placed before the court, I agree with counsel for the respondents that there is no basis for granting stay of execution. Any costs paid by the Applicant can always be refunded.

The application herein is therefore dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of July, 2013

**W. K. KORIR,**

**JUDGE**