



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY COURTS
CIVIL CASE NO. 797 OF 2009

BUSINESS PARTNERS INTERNATIONAL
KENYA SME FUND LIMITED.....PLAINTIFF/RESPONDENT
- VERSUS -
ZINGO INVESTMENTS LIMITED.....1ST DEFENDANT/APPLICANT
ROBERT NJOKA MUTHARA.....2ND DEFENDANT/APPLICANT

RULING

Through a Notice of Motion dated 9th November 2011 brought under Section 3A and Order 42 Rule 6, Order 43 Rule 1 (2) and Order 51 Rule 1 of the Civil Procedure Act and Rules the Defendant/Applicant is seeking the following orders namely:-

- 1) That this application be certified urgent, the service be dispensed with and be heard ex-parte in the first instance due to reasons of urgency.
- 2) That pending the hearing and determination of the application this Honourable Court be pleased to grant an order of stay of execution of the Judgement/Decree dated 30th September 2011.
- 3) That the Defendants/Applicants be granted leave to appeal against the judgement/Decree dated 30th September 2011.
- 4) That there be a stay of execution of the judgement/Decree dated 30th September 2011 pending the hearing and the determination and the intended appeal in the court of appeal.
- 5) That costs of this application be provide for.

The application is supported by grounds on the face of the application viz:-

- 1) On 30th September 2011 this Honourable Court delivered a Ruling wherein it entered summary judgement in favour of the Plaintiff against the Defendants.
- 2) That the said ruling was delivered in the absence of the Defendant's advocates and no notice had been served on the Defendant's advocates informing them of the Ruling.

- 3) The Defendant's advocates only came to learn of the Ruling on 24th October 2011 when the Plaintiff's advocate sent them a letter enclosing a draft decree.
- 4) By the time the Defendants became aware of the ruling the time to file and serve a Notice of Appeal had elapsed.
- 5) The Defendants/Applicants were aggrieved by the decision dated 30th September 2011.
- 6) The Defendants/applicants have applied for certified copies of the proceedings and Ruling for purposes of an appeal and the same are yet to be supplied.
- 7) The Defendants/Applicants have already filed an application for leave to file a notice of appeal out of time in the court of appeal civil application number 252 of 2011 (UR 165 of 2011).
- 8) If the Ruling/Decree is executed, the Defendant's/Applicant's intended appeal shall be rendered nugatory and the Defendants will suffer substantial loss.

It is also supported by the affidavit of Robert Njoka Muthara dated 9th November 2011 together with its annexures.

The brief facts of the application are inter-a-alia that on 23rd October 2009 the Plaintiff/Respondent filed a suit in court claiming various sums amounting to over Kshs.23,000,000/= on various categories, with interests on account of loan facilities and on technical assistance facilities. These were secured partly by personal guarantee and indemnity by the 2nd Defendant. Soon thereafter, the Defendants ran into arrears and sometime in 2009, stopped repayment all together. The Defendants filed a defence and counter-claim to the suit. On 21st January 2010 the Plaintiff/Applicant by a Notice of Motion of the same day sought to have the said defence and counter-claim struck out and judgment be entered for the Plaintiff on account of admission by the Defendant. The said Notice of Motion was heard by Mr. Justice Muga Apondi who allowed the application for summary judgement as prayed in the Plaintiff.

The affidavit in support of the application merely narrates how the ruling was delivered in the absence of the Defendant's advocates, and how the Plaintiffs are already in the process of executing the order. The same line of argument is taken up by Mr. Ndurumo, counsel for the Applicant. He submits that unless a stay of proceedings is granted the intended appeal by the Defendants will be rendered nugatory. The counsel submits that the Defendants had made some payments amounting to over Kshs.6.0 million, and that the Plaintiff stands to suffer no prejudice since the Plaintiff holds a debenture over the assets of the Defendant and that by that fact alone there is enough security. He further submits that the issue of counter-claim is material and that if it succeeds then the Plaintiff's claim will fail.

The application is opposed by the Plaintiff/Respondent through grounds of opposition filed in court on 17th November 2011 the upshot of which is that the application has no merit and is legally untenable. This thinking has been adopted by Mr. Ogunde counsel for the Plaintiff/Respondent. Mr. Ogunde has submitted that there is no dispute that no appeal has been filed, and that the jurisdiction to entertain an application for stay pending appeal under Order 42 Rule 6 is only available if there is either an appeal filed or a notice of appeal filed. Other grounds for granting the orders sought include provision of adequate security which in the submissions of Mr. Ogude, has not been done.

Thirdly the counsel submits that equity would not allow this court to grant the orders sought as the Applicant has not made any payments since March 2009. Those payments were in respect of the agreement now being contested and this shows the Applicant knocking on the wrong side of equity. Lastly, it is submitted that this court cannot stand as an appellate court in respect of the Ruling dated 30th September 2011.

I will address the issues raised by the Respondent as they appear to be well meaning.

Firstly, it is clear to me that the Ruling of Mr. Justice Apondi dated 30th September 2011 is fair and well considered. In my view the Applicant's intended appeal does not have a chance. In that case, the Applicant is merely using the court process to delay and drag the matter. If that is so, which I believe it is, then the Applicant is abusing the court process.

Secondly, the applicant has come to this court with unclean hands. It is clear that the Applicant admitted owing the decretal sum, and has been making payments by instalments but stopped in March 2009. The instalment was at the rate of Kshs.460,000/= per month. That would today amount to over Kshs.15,000,000/=.

Thirdly, there is neither an appeal, nor a Notice of Appeal on record. On this ground alone, the application should be dismissed. However, the Applicant has stated the reasons for delay, and has indeed applied to this court for leave to appeal.

Fourthly, the Respondent has submitted that the Applicant has failed to provide any security to enable this court exercise its discretion and possibly grant the stay. Mr. Ndurumo for the Applicant has made some vague reference to a debenture security held by the Plaintiffs over the assets of the Applicant. However, no evidence has been shown to this court showing the existence of a debenture. In my view, there is no security worth talking about.

In the upshot, I am reluctant to grant the prayers sought in the application. However in the exercise of the discretion that this court has in this matter I grant orders and direct as follows:-

1) That the Defendants/Applicants be and are hereby granted leave to appeal against the order/ruling dated 30th September 2011.

2) That there be a stay of execution of the order/ruling dated 30th September 2011 pending the hearing and the determination of the intended appeal in the court of appeal on the CONDITION that the Defendants/Applicants pay to the Plaintiff/Respondent:-

(i) A sum of Kshs.460,000 per month with effect from March 2009 to January 2012 i.e. Kshs.15,640,000/= being the outstanding instalments to date, and continue to pay the monthly instalment of the same amount until the debt is fully repaid, or

(ii) The Defendants do deposit the entire decretal sum as per the Ruling dated 30th September 2011 in an interest earning account in the joint names of M/s Walker Kontos Advocates and Kanyi Ndurumo & Co. Advocates.

(The payments in options (i) and (ii) above must be made within 21 days from the date of this Ruling.)

3) Costs of this application, including auctioneers costs, if any, shall go to the Plaintiff/Respondents.

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI
THIS 19TH DAY OF JANUARY 2012.**

**E. K. O. OGOLA
JUDGE**

PRESENT:

Mr. Ogunde for the Plaintiff/Respondent

Kanyi Ndurumo for the Defendant/Applicant

Irene – Court clerk