

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 315 OF 2009

GEMINIA INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

SEDCO CONSULTANT LIMITED DEFENDANT

RULING

The Defendant's Notice of Motion dated 22nd June, 2012 is brought under Order 22 rule 22(1) of the Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act. It seeks an order to the effect that pending the hearing and determination of its application dated 22nd June, 2011, there be a stay of execution of the warrants of attachment issued in pursuance of that decree.

The grounds upon which the application is based are that on 22nd June, 2011 the Defendant had filed an application seeking, inter alia, to set aside or vary the consent Judgment entered on 16th April, 2010, that the Plaintiff's bill of costs took long to be taxed, that by the time the said costs were taxed the court file went missing due to the re-organization going on in the court registry, that when the same was retrieved, the Defendant's said motion was fixed for directions on 24th July, 2012, that in the meantime on 21st June, 2012 Galaxy Auctioneers proclaimed the Defendant's assets. That the amount of the claim is yet to be determined as the same is disputed, that if the execution is allowed to proceed, the operations of the Defendants will be paralyzed. It was therefore urged on the Defendant's behalf that the application should be allowed.

The Plaintiff opposed the application on the basis of the Grounds of Opposition dated 25th June, 2012. The Plaintiff contended, inter alia, that the application is an abuse of the Court process, that the application dated 22nd June, 2012 sought to set aside a consent judgment entered into in the presence and concurrence of the Defendant's director who had sworn in the Affidavit in support of the present application, that the consent covered all the issues in dispute, that the counterclaim by the Defendant was abandoned, the Defendant is guilty of laches and had not offered any security, that the parties had agreed on a stay period of 60 days which had already lapsed. It was submitted on behalf of the Plaintiff that there was no prejudice to be suffered by the Defendant if the application was declined. The Plaintiff urged that the application be dismissed.

The application as drawn in my view is not anchored on a proper provision under our rules. Order 22 Rule 22(1) which has been cited does not apply in the circumstances of this case. That Order in my view applies where a decree is passed by one court then it is sent to another court for execution. The decree sought to be stayed was made by this court and has not been sent here for execution purposes. For that reason Order 22 Rule 22(1) does not apply.

However, this being only a technicality, I propose to deal with the application on merit under Sections 3A and 63 of the Civil Procedure Act which were cited.

What is being sought is a discretionary remedy. The judgment being sought to be stayed by the Notice of Motion dated 22nd June, 2011 was passed by consent on 16th April, 2010, I am told that parties had agreed between themselves to a stay of 60 days. It would appear that one year and two months later the Defendant filed its said application of 22nd June, 2011 to set aside or vary the said consent. The Defendant proposed in that application that the consent judgment be varied and be confirmed at

Ksh.1,800,000/- out of the decreed sum of Kshs.5,456, 235/60. The Defendant also prayed that it should be allowed to liquidate the said sum by monthly sum of Kshs.100,000/-. As at the time the application dated 22nd June, 2012 was being argued before me, not a cent had been paid to the Plaintiff. To my mind, he who comes to equity must do equity. The consent decree is more than twenty six (26) months now. If the Defendant had started making payments from the time of the consent decree as it proposes in its pending application of 22nd June, 2011, it would have by now paid in excess of Kshs.2.5million or Kshs.1.2million from the date that motion of 22nd June, 2011 was made. The decree being executed is from a lawful judgment of this court, it is a right conferred on the Plaintiff by law as well as an obligation imposed upon the Defendant to satisfy. I see no good reason advanced as to why its enforcement should be interfered with.

The other thing that shows lack of bona fides on the part of the Defendant is that it has sought an order that execution of the decree be stayed pending the hearing of an application that was filed more than a year ago. Firstly, that application did not seek to stay execution of that decree. Secondly, the same has remained unprosecuted for an unreasonably long time. The record will show that when the alleged missing file was finally traced, we are not told when, on 4th June, 2012 a representative of the Defendant's firm of Advocates went to the registry and instead of fixing the application of 22nd June, 2011 for hearing, he fixed it for mention on 24th July, 2012 more than a month away. In my view, if the Defendant was serious with that application, it would have filed a certificate of urgency for its certification as such and hearing thereof. This it did not do.

For the foregoing reasons, I am satisfied that there are no good reasons that have been advanced to entitle the Defendant to the exercise of this court's discretion in its favour.

Accordingly, the Notice of Motion dated 22nd June, 2012 is dismissed with costs to the Plaintiff.

DATED and Delivered at Nairobi this 20th day of July, 2012.

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A. MABEYA

JUDGE