



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Appeal 31 of 2012

1. P.V. RAO.....1ST APPELLANT

2. K.V. S. SASTRY.....2ND APPELLANT

VERSUS

1. FARMERS CHOICE LIMITED.....RESPONDENT

RULING

1. This is the Appellant's application for stay of execution of the judgment and decree of the lower court in SRMCC Number 1136 of 2011, delivered on 13th January, 2012. It is brought under Order 42 Rule 6, Order 43 Rule 1 (s) Order 50 Rule 1 of the Civil Procedure Rules and Sections 79 G 63(e) and 3A of the Civil Procedure Act.
2. The grounds of the application are that summary judgment was entered in favour of the Respondent; that the Appellant did not have notice of the delivery of the said decision; that the Appellant intends to appeal against the said ruling and that unless the stay is granted the Appellant will suffer loss. The application is supported by the annexed Affidavit of P.V. Rao, the 1st Appellant.
3. The deponent annexed with the Affidavit, copies of a proclamation of the Appellant's property by ideal Auctioneers, and Warrant of Attachment for Kshs. 735,105.09 dated 8th June 2012. A temporary order of stay was granted by this court on 21st June, 2012.
4. The application is opposed by the Replying Affidavit of Iain Gibson, the Respondent's Managing Director, and Grounds of Opposition. In their grounds the Respondents *inter alia*, state that:
 - The Appellants have not satisfied the mandatory requirements for stay under Order 42 Rule 6.
 - There was inordinate delay in prosecution and service of the application.
 - The summary judgment was delivered on merit.
 - The application is made solely on the 1st Appellants own behalf as the 2nd Appellant did not give a letter of authority to act contrary to Order 1 Rule 13.
 - The filed Memorandum of Appeal does not raise triable issues.

5. The brief background and arguments in this action, as presented by counsel in their submissions, are as follows:

The Appellants were sued as Receiver Managers for an amount of Kshs. 579,961/50 for goods supplied to Nyali Beach Hotel while it was under receivership. The Respondent had an existing contract for supply of meat products. During the receivership, the hotel continued to receive supplies on authority of the receivers. The hotel defaulted in payments and, by 1st February, 2010 owed the Respondents Kshs. 579,961.50.

6. The Respondents consider that during the tenure of the Appellants as receiver managers, the Appellants were each singly and jointly liable for the entire debt and are estopped from denying their indebtedness. Following failure of the Respondents to enter appearance or file defence, judgment in default was entered against them.

7. The Respondents also argue that the application for summary judgment fight in the lower court was strenuously argued by the Appellants and the ruling date given in court on 9th December, 2011. In the Respondent's Affidavit he argues that deposit of a bank guarantee or deposit in a joint interest earning account as a security for due performance of the decree, though not offered by the Appellant, would be an appropriate security.

8. The Appellants argue that the suit was filed against the receiver managers in their personal capacity, whilst the law is that they are not personally liable as they are merely agents of the company. They rely on the case of **Toptime Enterprises vs P.V. Rao** HCCC 20/2010. There it was held in a similar application that pursuant to a debenture, the company alone shall be liable for the debt of the company, the receiver being merely an agent of the company.

9. The Respondents rely on **Mukuma vs Abuoga** [1988] KLR 645 and **Nandebekwa vs ICDC** [2010] 2 EA 386 where the court held, *inter alia*, that in granting stay, the question to be decided are: whether the application is made without delay and whether the Applicant has given security.

Reliance was also placed on a book "**Voluntary Liquidation and Receivership** by Ian S. Grier 4th Edition at Paragraph 14 - 04 where the authors point out that under the English Insolvency Act the administrative receiver of a company is personally liable on contracts entered into by him in carrying out his functions, except insofar as the contract otherwise provides.

10. The Respondents finally argued that the Applicants were dilatory. That the application was made under urgency but was acted upon four months later. As such, *Ex parte* orders were granted 4 months after the application.

11. After due consideration of the parties' submissions and documents submitted this is my view. Order 42 Rule 6 (2) requires that:

- a) the court is satisfied that substantial loss may be visited on the Applicant
- b) the application has been made without unreasonable delay
- c) the court may order security for due performance of the decree.

12. In the Affidavit of the 1st Appellant, he asserts that the Appellants were appointed on 22nd July, 2008 as receiver managers by Kenya Commercial Bank under a Debenture issued by Nyali Beach Hotel. He annexed to his affidavit an advertisement of the appointment notice. He deponed that at no time during the exercise of their function as receivers, did they enter into an independent contractual relationship with the Respondent.

13. I have also seen the Memorandum of Appeal filed on 4th February, 2012. I am satisfied it raises

triable issues in respect of liability, proof of accounts, and the question whether receivers had handed back the company, the subject of the suit in the lower court.

14. The warrant and proclamation have been made against the Appellants in their personal capacity. Execution against them would result in substantial personal loss to them, whilst the issue of liability is unsettled, and is a triable issue.

15. With regard to the delay in filing the application, I observe from the record that it was first brought under urgency of on 24th February, 2012. The court then declined to certify urgency on the ground that there was "**no evidence of execution in the offering to warrant a stay of the same**" There was no inordinate delay.

On 21st June, 2012, that Appellants, came back to court and exhibited the warrants. Mr. Juma, for the Appellants, stated in court that they were willing to abide by any conditions of the court.

16. Accordingly, I am prepared to grant a stay of execution on the following conditions:

(a) that the Appellants do place, as security the whole decretal sum on deposit in a joint interest earning account in the names of counsel for the parties.

(b) that such security shall be provided within fourteen (14) days of the date of this order. Costs of this application shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 27th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwango

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....