



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 2503 OF 1995
MACMILLAN KENYA (PUBLISHERS)
LIMITED.....PLAINTIFF

VERSUS

MOUNT KENYA SUNDRIES
LIMITED.....DEFENDANT

RULING

Coram: Mwera J.

Mrs Gachiri for Plaintiff

Opiny for Defendant

Court clerk Kajuju

On 17.11.08 the defendant company moved the court under the now repealed Order XXI rule 22 (1), Order XLI rule 4 of Civil Procedure Rules and Section 3A of Civil Procedure Act:

i) for a stay of execution of the decree following the judgement of 23.10.08 pending hearing of an appeal.

It was contended in the grounds that being aggrieved with judgement of 23.10.08 the applicant had filed a notice of appeal. The plaintiff would move to execute unless a stay was granted. And that the applicant would provide security ordered for due performance of decree. No hardship would befall the plaintiff in the event a stay was granted.

Kuldip Sapra, the defendant's managing director, swore a supporting affidavit more or less repeating what had been set out in the grounds but adding that the intended appeal was arguable and the applicant desired an opportunity to do just that.

May it be noted so far that other than offering security for due performance, the application has not

alluded to being brought without unreasonable delay, but more importantly whether the applicant stands to suffer substantial loss in the event the execution of the decree is not granted. Those are the 3 conditions to be taken in regard when an application of this nature is laid.

In the replying affidavit sworn by David Muita, the plaintiff company's managing director, the main orders flowing from the judgement of 23.10.08 were laid out that:

- i) the defendant was restrained from selling, exposing/offering for trade an item called Kenya Pictorial Tourist Route Map;
- ii) the defendant do deliver up all such maps in its possession; and
- iii) there be an inquiry as to damages or alternatively an account of profits and payments of all sums found due upon taking such inquiry.

And that a decree had been duly extracted and forwarded to the registry for signature. With that, the plaintiff/respondent saw no merit in the application.

A decree herein was issued on 18/11/10.

In a supplementary affidavit filed on 27.5.11 the defendant/applicant stated that it had since filed in the Court of Appeal CA No. 318/10 challenging liability as found by the High Court. That the plaintiff had changed identity to M/s Moran Publishers Ltd, a non-existent entity that cannot prosecute any suit or reap fruits of any judgement. Accordingly the applicant stressed the need for the stay:

“..... in term(s) of further proceedings and subsequent execution after assessment pending the determination of the appeal.”

At this juncture the court was thrown in a sort of confusion with the nature of averments by the applicant as restated immediately above. In one stroke it is claiming that with the name Moran Publishers Ltd, the plaintiff company is non-existent and therefore cannot prosecute any suit or reap fruits of judgement herein. In the next stroke the applicant desires a stay so that it can prosecute its appeal! Against a “non-existent entity?” But be that as it may. Parties were asked to submit.

The defendant/applicants referred to the law as applicable then Order XLIV rule 4(2), [not Order XLI?] (present Order 42 rule 6(2)) and correctly set out the 3 conditions which apply when a stay order is sought (see above). It is stressed that with the changed entity, the plaintiff cannot legally seek any claims from the defendant. That the stay must therefore be granted.

On its part the plaintiff/respondent filed a further affidavit and maintained that it was still a legal entity in Kenya by virtue of its incorporation under the Companies Act. At that time it was owned by Macmillan Publishers Ltd (UK). Then in 2010 the plaintiff's shares owed by the UK company were transferred to the local management in Kenya and that led to the change of name to reflect that. Then following due resolution the new name was registered as per the law. The plaintiff will legally and validly pursue its claims.

In this court's view and it is unnecessary to cite the many cases that touch on conditions for stay of execution. The applicant has not demonstrated what substantial loss it stands to suffer in the event the decree herein is executed. None at all. Is it financial or other loss to be suffered? It is not shown. This application was timeously filed on 17.11.08 following judgment of 23.10.08, it can be assumed, in anticipation of the decree that was issued on 18/11/10. And had the court been minded to issue a stay order and ordered security, the applicant has expressed a view to comply. But having failed to claim, let alone to demonstrate what substantial loss is to be suffered if the stay order is not granted, this application stands dismissed with costs.

Delivered on 29.6.11.

J. W. MWERA

JUDGE