



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 835 OF 2007

MOSES MUNYUI.....APPELLANT/ ORIGINAL
PLAINTIFF

VERSUS

RICARDA W MWANGIRESPONDENT/ ORIGINAL
PLAINTIFF

(Being an appeal against the entire judgement of the Resident Magistrate, Mr Kiema at Milimani Commercial Courts CMCC No. 1505 of 2004)

RULING

Application – Security of Costs
12th January 2011

I. INTRODUCTION

1. In this commercial matter, the parties had entered into an agreement to purchase a printing machine Gestner valued at Ksh. 150,000/= and operate the same in a partnership business.
2. Ricada W Mwangi, the respondent/original plaintiff sued Moses Murigu, the appellant/original defendant for selling the said machine without her consent. She alleged to have contributed Ksh. 135,000/= which the respondent had contributed Ksh. 15,000/= only. She only prayed the machine be returned to her, alternatively, the sum of Ksh. 135,000/= at the interest rate of 22% be made.
3. On being heard in the subordinate court and judgment was entered in favour of respondent/original plaintiff. Not having satisfied with this decision, the appellant original defendant filed this current appeal.
4. Nonetheless, execution in the subordinate court proceeded for hearing. There was objection proceedings taken out, at one point, by third parties represented by M/s Ongega & Co Advocate.
5. The appellant/original defendant filed an application dated 15th November 2007 for stay of execution pending appeal. The respondent filed an application two years or thereabouts later for orders that the decretal sum be deposited to court now amounting to Ksh. 401,055/75 inclusive of costs. The application was dated 23rd January 2009.
6. The Hon. Magistrate overruled the objection that the application of 15th November 2007 be heard

first on grounds that the plaintiff's application of 23rd January 2009 was conceding to the issue of stay of execution. Orders were accordingly made that the decretal sum be deposited to court (pending the hearing of the appeal.)

7. The appellant/respondent was unable to comply with the court's orders. He asked the new magistrate handling the execution proceedings, whether he could deposit Ksh. 30,000/= and pay by installments. This application would normally be made in writing through a formal application but appears not to have been so done. The Hon. Trial Magistrate then allowed the request but ordered a sum of Ksh. 30,000/= per month be paid on every 5th day of the month. The respondent defaulted in payment. From the High Court file, I see only a total of Ksh. 50,000/= had been paid and the said sum released to the respondent/original plaintiff by consent of the parties.

8. The appellant/original defendant claimed that he paid a sum of Ksh. 140,000/=. The issue now remaining was for Ksh. 248,000/=, that was an issue of interest.

9. The respondent/original plaintiff who had been acting in person engaged a new advocate and applied that security of costs be accordingly provided for, by the respondent original defendant on this appeal.

II SECURITY OF COSTS

10. It was argued and implied by the appellant/original plaintiff was unable to be successful in his appeal. He may be a man of straw and as such should be made to provide security of cost for this appeal.

11. This application was opposed on grounds that most of the decretal sum had been paid.

III FINDINGS

12. This application was opposed on grounds that most of the decretal sum had been paid.

13. The issue herein is not security for the "due performance of such decree that may be binding on the appellant" but security of costs. This was what the applicant specifically asked for, security of costs of the appeal in the event the appellant/original defendant is not successful in his appeal.

14. This court is alive to the fact that payment of the decretal sum by installment or otherwise isn't security of costs. It is also aware that such security of costs should not be so large as to put the appeal out of reach of the appellant.

15. The orders sought are discretionary.

"At anytime after the memorandum of appeal has been served, the court in its discretion may order the appellant to give security for the whole or any part of the costs of such appeal."

16. This court herein allows this application and orders that security for costs be partially provided by the appellant/original defendant to this appeal.

17. That a sum of Ksh. 20,000/- ordered paid in cash or bank guarantee within 60 days. Parties be at liberty to apply.

18. The costs of this application is awarded to the applicant/respondent/original plaintiff.

Dated this 4th Day of October 2011 at Nairobi

M. A. ANG'AWA

JUDGE

Advocates :

i) *D.O. Okindo instructed by M/s Rumba Kinuthia & Co Advocates for the appellant/ original plaintiff*

ii) *A.L. Karim holding brief for M/s Ramesh Patel & Co Advocates for the respondent/original defendant*