REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 381 of 2004

HON JAKOYO MIDIWO ……PLAINTIFF

VERSUS

NATION MEDIA GROUP & ANOTHER……...DEFENDANT

RULING

The defendant media company filed a chamber summons dated 16.02.10 under Order 41 Rule 4, Order 50 Rule 1 Civil Procedure Rules and section 3A Civil Procedure Act for the order that

1) there be a stay of execution of the judgement and decree dated 23.10.09.

The grounds relied on were that a judgement was entered in this cause on 23.10.09 for sh. 5m. a decision the applicant was appealing in the Court of Appeal. That in the meantime a stay should issue because the applicants goods had been attached and proclaimed and that constituted substantial loss. And that this application had been brought timeously; the applicant was ready to furnish security for due performance. A supporting affidavit was sworn by one Sekou Owino, the legal officer with the defendant Mr Mogere argued the application. He began by filing skeleton submissions followed by oral highlights Mr. Tiego similarly opposed the application.

The court heard that the judgement delivered on 23.10.09 did not have an order as to costs. Sh 5m was awarded as damages for defamation. Then this application followed on 16.2.10. That after the judgement each side filed a notice of approval against the entire judgement. The defendant did not anticipate steps to execute and so was surprised when its motor vehicles were proclaimed in the course of execution. There had not been an order for costs or an order to execute before costs were ascertained.

The judgment sum was considered so large by the defendant that it did not think that it could recover it once paid to the plaintiff and the appeal succeeded. And it had filed a guarantee for sh. 3.5m from Standard Chartered Bank Ltd to act as security for due performance ordered by Rawal J in earlier proceedings.

Mr Tiego told the court that after the judgement for sh. 5m was pronounced within an order costs, the defendant knew well that the plaintiff was poised to execute it. He did not need the court's order to do so before taxation because costs were not awarded (see S. 94 CPA) and none could be awarded to be ascertained. The big issue from the plaintiff's

side is that the defendant had not offered an explanation as to which it had delayed for 3 ½ months following the judgement of 23.10.09 to bring this application on 16.02.10 in the regard the stay sought was not warranted and no substantial loss likely to befall the defendant/applicant in the event the stay was not granted. The plaintiff would pay up the judgement sum being owner of property No. KSM MUN/BLOCK 6/601 valued on 26.1.09 at sh. 15m.

The court appreciates that the highlights by counsel were truly a reflection of the skeleton submissions filed, although here most of the cited authorities are not reproduced. No disrespect to counsel, though.

The judgment was delivered on 23.10.09. The court heard that each side filed a notice of appeal. There being no order as to costs, the same did not need to be ascertained before execution. So the plaintiff did not require dispensation by court under section 94 Civil Procedure Act to move to execute before taxation. And so he applied to execute for the judgement sum and on 12.2.10 that was granted and M/s Keysian Auctioneers proclaimed the defendants' motor vehicles and office furniture.

Then on 16.2.10 this application was filed. It could not have been brought before execution commenced unless of course it was done informally when judgement was given. But each side had filed and served a notice to appeal the whole judgement on 3.11.09 by the plaintiff and 4.11.09 by the defendant. In the circumstances of the case when execution started on 12.2.10 the defendant is considered to have timeously filed this application on 16.2.10.

Coming to substantial loss, the defendant did not appear to well demonstrate what this could be in money terms. The judgement sum was only described as being so large that, if paid and eventually the appeal succeeded, the applicant was apprehensive that the sum sh. 5m could not be recovered. Yet there was no demonstration of likelihood of actual and probable inability to recover the sum. It is not apprehension this court considers in such cases but the very probable inability to recover that should be demonstrated eg by laying before court the respondents' level of means say be way of affidavit. It is not enough to claim that the respondent appears one not well endowed to make a refund. In this case the plaintiff went a step further, actually more than required of him to show by replying affidavit that he owned a leasehold of parcel No. KSM MUN/BLOCK 6.601 worth sh. 15m as at 26.1.09. The court was not satisfied that the applicant demonstrated the substantial loss it is likely to suffer in the event it does not get the stay order. It added however that it had posted a bank guarantee of sh. 3.5m for security for due performance.

From all the above this court is minded to order that the stay sought is hereby granted but on condition that the defendant do pay the balance of the judgement sum sh. 1.5m to the plaintiff in the next 45 days and also maintain its bank guarantee of sh. 3.5m. At least that is fair to the plaintiff who feels that he is entitled to enjoy the fruits of litigation and the defendant gets an opportunity to appeal.

Orders accordingly. And for each side which has moved to appeal, each to bear it s own costs of this application.

Delivered on 24.3.10.

J. W. MWERA

JUDGE