



REPUBLIC OF KENYA

COURT OF APPEAL

CIVIL DIVISION

CIVIL SUIT NO. 1029 of 2003

GEORGE ONYANGO OLOOPLAINTIFF/RESPONDENT

V E R S U S

BARAZA LIMITED..... 1ST DEFENDANT/APPLICANT

ERICK GOR SUNGU.....2ND DEFENDANT/APPLICANT

R U L I N G

Before me is a Chamber Summons dated 17th December, 2009 filed by M/s Guram & company advocates on behalf of **BARAZA LIMITED** and **ERICK GOR SUNGU**, who are the defendants in the main suit. The respondent is the plaintiff in the mainsuit **GEORGE ONYANGO OLOO**.

The application was filed under Order XX Rule 11(2), and Order XLI Rule 4(1) and (2) of the Civil Procedure Rules, as well as section 3A of the Civil Procedure Act (*Cap. 21 laws of Kenya*) and section 1A(1) (2) and (3) of the Statute Law (*Misc. Amendment*) Act (*Act No.6*) 2009. The application has 6 prayers, three of which have been spent, as follows-

1. (spent)
2. (spent)
3. ***THAT this Honourable Court do order a stay of execution pending the hearing and determination of the intended appeal.***
4. (spent)
5. ***Any other order that this Honourable Court may deem just to grant in the interests of justice.***
6. ***THAT the costs of this application be costs in the cause.***

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn by **NELLY MATHEKA** the Company Secretary/Legal Counsel of the 1st defendant/applicant on 17th December, 2009.

The grounds of the application are as follows-

- (a) ***Interim stay of execution orally applied for in court will lapse on 18th December, 2009.***
- (b) ***Unless this application is granted, the plaintiff/respondent will levy execution against the defendants.***
- (c) ***The defendants/applicants intend to appeal against the whole of the said judgment delivered on 19th November, 2009 by the Honourable Lady Justice Abida Ali Aroni.***
- (d) ***The defendants/applicants have an overwhelming chance of success in the intended appeal and in the event of execution the same will be rendered nugatory.***
- (e) ***Substantial loss and untold embarrassment will result to the defendants/applicants in the event of execution of the judgment.***

(f) The 1st defendant/applicant's business will be adversely affected and irreparably damaged in the event of execution.

(g) The application has been presented to this Honourable Court expeditiously in the circumstances.

In the supporting affidavit, it was deponed, inter alia, that the judgment entered was in the sum of Kshs.2,500,000/= for general and aggravated damages plus interest and costs; that a notice of appeal dated 30th November, 2009 had been filed and a letter of same date requesting for proceedings sent; and that if stay of execution (**pending appeal**) was not granted, the defendants/applicants stood to suffer irreparable loss as the money paid might never be recovered if the appeal succeeds; and that the appeal would be rendered nugatory.

The application is opposed. A replying affidavit sworn by the plaintiff/respondents on 2nd February, 2010, was filed on the same date. It was deponed in the said affidavit, inter alia, that the defendants did not tender any evidence at the trial to rebut the evidence of the plaintiff; that the plaintiff was an advocate with a thriving law firm in Nairobi; that the plaintiff owns LR No. 12715/4124 Syokimau Nairobi whose current market value was Kshs.12,500,000/= and LR NO. 12715/4125 Nairobi whose current market value was Kshs.27,600,000; that the judgment debtor would not suffer any loss if the decretal amount was paid out; and that the judgment debtor was employing dilatory tactics to avoid complying with the court order.

On the hearing date Mr. Billing for the applicants and Mr. Weda for the respondent addressed the court.

Mr. Billing emphasized that the court had discretion to grant the request in prayer 3. Counsel submitted that currently the applicants had already filed an appeal, which was awaiting a hearing date. Counsel contended that the respondent did not demonstrate, in documents filed, that the plots he owned had clear titles. Counsel urged the court to grant the stay requested.

Mr. Weda for the respondent submitted that the applicants had not discharged the burden of showing that, if the amount was paid out, they would not be able to recover the same if the appeal was successful. Counsel contended that the respondent had demonstrated in the replying affidavit that he was an advocate practicing in Nairobi and owned two parcels of land, which have been valued by professional valuers, and that he was not a man of straw. Counsel also submitted that there was an application to strike out the appeal. The court was urged to consider that the applicants did not offer evidence at the hearing of the case.

I have considered the application, documents filed as well as the submissions made to court by counsel. This is an application for stay of execution pending appeal. Order XLI Rule 4(2) of the Civil Procedure Rules provides the considerations to be taken by the court in such an application. It reads as follows-

"4(2) No order for stay of execution shall be made under sub-rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

On the facts and circumstances of this case, I have no hesitation in finding that the application was made without unreasonable delay. A verbal application for stay was made when the judgment was delivered which was granted for a limited period of time. Before the expiry of the period of the initial stay, this application was filed. Therefore, in my view, there was no delay in making this application.

The second consideration is whether the applicants may suffer substantial loss, if stay is not granted. The applicants say so. The respondent contends that no such loss will be suffered if stay is not granted. The applicants state that they have a good appeal and that the respondent is a man of straw, while the respondent maintains that he has property, is a senior advocate and that there is no arguable appeal.

I appreciate that the trial Judge herself granted stay. In addition, that stay has been extended, till now. If the same judge who determined the matter and was aware of the evidence and issues at the trial granted stay, I find no reason to depart from that position myself. This is because the trial judge must have known the strengths and weaknesses of the case. The merits of the appeal will be determined by the Court of Appeal. I therefore find that the applicants will suffer substantial loss if the stay is not granted.

None of the parties has asked for any specific security to be provided for the stay. On my part, I find no reason for

ordering the provision of security by the applicants.

Consequently, and for the above reasons, I allow the application and grant stay as requested in prayer 3. Costs will follow the results in the appeal.

Dated and delivered at Nairobi this 24th day of September, 2010.

George Dulu
Judge.

In the presence of-

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Mr. Ogado holding brief for M. Billing for the defendants/applicants
Mr. Mulwa holding brief for Mr. Weda for plaintiff/respondent
Catherine Muendo – court clerk.