



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 59 OF 2010

BUDS & BLOOM

LTD.....APPELLANT

VERSUS

LAWRENCE EMUSUGUT

OBWA.....RESPONDENT

RULING

On 5/3/2010, Lawrence Emusugut Obwa, the plaintiff/respondent herein, obtained judgment/decree against the defendant/applicant for a sum of Kshs.70,000/- less 30% contribution in negligence attributed to the plaintiff, and costs. The defendant/applicant is dissatisfied with the decision of the trial court and has appealed. He has therefore brought this application under Order 41 Rule 4 of the Civil Procedure Rules seeking this court to stay the execution of the trial court's judgment and decree pending the hearing and determination of this appeal.

In support of the application, Joseph Apondi, the Transport and Security Manager of the defendant/applicant swore a supporting and further affidavit dated 26/7/2010 and 19/10/2010 respectively. Mr. Mbago urged the application on behalf of the defendant. The application was opposed and a replying affidavit was sworn by the plaintiff, who was represented by Mrs Mukira.

The defendant contends that after judgment was entered against it, on 5/3/2010, it moved quickly and filed this appeal on 19/3/2010. In the further affidavit, it was admitted that the defendant/applicant had earlier filed a similar application before the trial court which ordered that execution be stayed on condition that ½ the decretal sum was paid to the plaintiff and ½ deposited in court. According to the defendant that order was improper as the appeal is in respect of the whole judgment and that it was not necessary that the defendant appeal against the ruling of the trial court. It is the defendant's contention that it is likely to suffer substantial loss if stay is not granted.

The plaintiff urged that the defendant did not appeal against the trial court's order issued on 16/7/2010 that ½ decretal sum be paid to the plaintiff. It is the plaintiff's contention that by rushing to this court with a similar application, it is an abuse of the court process. Reliance was made on the decision of **HUNKER TRADING COMPANY LTD V. ELF OIL KENYA LTD CA 6/2010** where an order of stay was granted by the High Court on terms. Instead of complying with the terms, the applicant moved to the Court of Appeal for similar orders and the court held that it was an abuse of the court process and contravened the oxygen principle. In respect of substantial loss, the plaintiff exhibited the letter from the plaintiff's employer, Intra Speed Ltd, which indicates that he is a store keeper and earns Kshs.8,500/- per month and is able to repay the decretal sum in the event the defendant's appeal succeeds. Counsel also relied on **KESHRA KANJI LTD V CAROLINE KANUTHU KANIU & ANOTHER** where the court held that the proof of earnings had not been challenged by the defendant and stay was declined. Counsel

also urged that the defendant went ahead to deposit the whole decretal sum in court without a court order directing it to do so. It was his submission that the defendant is trying to dictate to the court and unduly influence the court to grant orders on its terms.

When the defendant/applicant moved this court for stay orders on 28/9/2010, it was very economical with its facts. It never disclosed the fact that it had filed a similar application before the trial court, where an order of stay was granted on terms. It is not until the plaintiff/respondent filed the replying affidavit dated 16/10/2010 that it was disclosed that there had been a similar application before the trial court where stay was granted on 16/7/2010 on condition that the defendant paid ½ the decretal amount to the respondent and deposited the other half in court within 21 days. It is also the plaintiff/respondent who exhibited the ruling of that court. It is obvious that the defendant did not make a full disclosure of the facts to the court which is evidence of bad faith. The defendant's hands are dirty, tainted with material non-disclosure and it would not be entitled to the exercise of this court's discretion. Despite the trial court's order of stay the defendant through its lawyers wrote to the court on 30/7/2010 forwarding a bankers cheque for the full decretal sum of Kshs.97,630/- pending hearing and determination of the appeal. In making the order of 16/7/2010, it was an exercise of the trial court's discretion and the defendant cannot be heard to say as is deponed, that it was an improper order. If the defendant was dissatisfied with that order, **Order 41 Rule 4** of the **Civil Procedure Rules** allows for an appeal and it should have appealed against the said order to the High Court but not dictate to the court by depositing the full decretal sum. I find that the defendant flagrantly disobeyed the court's order by so doing and it cannot be allowed to benefit from the exercise of this court's discretion. See **HUNKER TRADING CO. LTD** (supra).

From the ruling of the trial court, the application for stay was brought pursuant to **Order XLI Rule 4** of the Civil Procedure Rules seeking stay of execution. Similarly, this application is brought under the same provisions of law. I do adopt the decision of this court in **LUCY WAIRIMU MWAURAV ASWINCHAND SHAH & ANOTHER HCC 1130/96** where the court dealt with similar issues and held that it is well settled that res judicata applies to applications in the same suit. Section 7 of the **Civil Procedure Act** provides:-

“S.7: No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The defendant lodged an application for stay after the trial court gave judgment. The trial court granted stay on terms. It seems the defendant was not satisfied with the ruling of the trial court and with the subsistence of the trial court's order have moved this court for similar orders. This application amounts to an abuse of the court process and is barred by res judicata.

I do not need to delve into the merits of this application the same having been done by the lower court. The application dated 26/7/2010 is hereby dismissed with the defendant/applicant bearing the costs.

DATED and DELIVERED this 26th day of November, 2010.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ombogo for applicant

Mr. Magata holding brief for Mr. Githiru for the respondent

Kennedy: Court Clerk