REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 176B OF 2005

COSMAS KIPKOECH SIGEI……………………………..
……………………………PLAINTIFF
VERSUS
MADRUGADA LIMITED…………………………...
…………………………1ST DEFENDANT

JOHNTY BACKLEY………………………………...
……………………………2ND DEFENDANT

RULING

This Ruling relates to two applications, namely -

(1) A Notice of Motion dated 22nd September, 2010 filed on 23rd September 2010 (the 1st Motion).

(2) A Notice of Motion dated 28th September 2010, filed on 29th September, 2010 (the 2nd motion).

The first motion sought a stay of execution pending the hearing and determination of the Appeal in the Court of Appeal. Interim Orders were granted on 23rd September, 2010. However by the time those orders were served upon the Plaintiff-Decree Holder's Advocates, execution had already taken place on 14th September 2010. This necessitated the filing of the second application on 29th June 2010. That application sought three major prayers -

(a) an order releasing the Defendant/Applicant's vehicles which had been attached in execution.

(b) an order of a stay of further execution pending the hearing and determination of the motion.

(c) an order to strike out the decree issued on 14th June 2010 and stay of all execution proceedings.

Both applications were opposed by the Plaintiff/Decree Holders through the Plaintiff/Respondent's Replying Affidavit sworn on 12th October and filed on 13th October 2010 and a Preliminary Objection by the Plaintiff (Respondent's Advocates) Mr. Bosek & Co. Advocates dated and filed on the same day as the Replying Affidavit.

Both applications were argued before me on 19th October 2010 by Mr. Wamaasa *(for the*

Defendant/Applicant) and Mr. Bosek for the Plaintiff/Respondent. The Applications raised two issues for determination, ***firstly,*** whether the decree here should be struck out, and ***secondly*** whether a stay should be granted and if so on what terms.

On the first question whether the decree should be struck out, Mr. Wamaasa argued that the decree was irregular not because it did not follow the terms of the judgment but because it had not been approved by his firm representing the Defendant/Judgment debtor.

In my view provided the decree conforms with the terms of the judgment it will not be irregular. The practice of approving a decree by a party or his Advocate if he is represented is these days flouted by Advocates in order to shorten the time leading to execution. That in my view is sharp practice and should be discouraged by either striking out any such decree, or delaying it by requiring the party in breach to follow the practice as laid down by Order XX rule 7 of the Civil Procedure.

Rule 7(2) requires any party to a suit to prepare a draft decree and forward it for approval with or without amendment or reject it, without undue delay, and if the draft is approved by the parties, the party drawing will submit it to the Registrar, who again if satisfied that it is drawn in accordance with the judgment will sign and seal the decree.

Under rule 7(3) if no approval of, or disagreement with the draft decree is received by the drawing party within seven days after delivery to the other party or his Advocate, the Registrar, on receipt of notice in writing to that effect if he is satisfied that decree is drawn in accordance with the judgment, shall sign and seal it accordingly. If there is further disagreement, the decree may be referred to a Judge in Chambers for settlement *(of its terms).*

Judgment herein was delivered on 3rd June 2010. The Bill of Costs was filed on 24th June 2010, and were taxed at Shs 185,131.00 on 7th September, 2010. As a matter of both practice and above all, the law, the decree follows judgment for it comprises the formal expression of an adjudication which determines conclusively the rights of the parties. Subject to determination of any questions arising thereunder under Section 34 or restitution under S. 91 of the Civil Procedure Act.

What I see in this file is not a decree, but an application for execution filed on 14th September 2010, and a Warrant for execution issued on the same day. There is, at least, on the record, no decree which has been extracted or which can be struck out. Both counsel are in breach of Order XX rule 7 of the Civil Procedure Rules.

The first leg of the applicant's two motions therefore fails.

The second question is whether the execution generally should be stayed, whether wholly or partially.

Mr. Wamaasa for the Defendant/Judgment Debtor argued that execution proceedings should be stayed, that the judgment debtor is willing to deposit the entire decretal sum into respective Advocates joint interest earning account. Mr. Bosek for the Plaintiff/Decree holder was of the contrary view.

The principles for stay of execution are well settled and are set out in Order XLI rule 4 of the Civil Procedure Rules. For the High Court to stay execution, three (3) conditions must be met by the Applicant. These are -

(i) Substantial loss will be suffered by the applicant unless an order of stay is granted,

(ii) the application is made without unreasonable delay.

(iii) such security as the court may order for the due performance of such decree or order which may ultimately be binding in the judgment/debtor; has been given by the applicant.

A stay will not be made on the ground that the decree-holder is a pauper, and will therefore be unable to refund the decretal sum if paid to him. This court will also not grant a stay on the ground that the appeal would be rendered nugatory. There is no appeal to this court.

Adverting to the grounds upon which this court will stay execution. I do not think the applicant will suffer any loss at all if a stay of execution is not granted.

The judgment herein and therefore resultant decree was a matter of compromise and consent. Liability was apportioned @ 65% to the judgment/debtor *(applicant),* and 35% to the Respondent *(judgment/creditor).* So whatever the ultimate results on appeal *(if there is one),* will always reflect this ratio of liability. So the applicant will not suffer any greater loss than it has already agreed to.

There is no doubt as Mr. Bosek counsel for the decree holder submitted, the Defendant is guilty of laches. Judgment herein was delivered on 3rd September, 2010. No immediate or oral application for a stay was made, as is allow under Order XLI rule 5 of the Civil Procedure Rules. The first such application was made on 23rd September 2010 in reaction to the decree-holder's application for execution, and that is some 90 days after the judgment was delivered. Such a delay can neither be said to be made without unreasonable delay nor in good faith. I think it was as an afterthought, in bad faith because it was made pursuant to instructions by the judgment debtors insurers, a third party who have no *locus standi* in this matter. The application fails on this ground as well. Mr. Wamaasa submitted that the Defendant was ready and willing to deposit the entire decretal sum in a joint interest earning account. An order of this kind would still deny the Plaintiff the fruits of the agreed share of liability on the part of the Defendant. The Plaintiff has already by the judgment suffered 35% loss by the deduction of Kshs 1,218,000/= contributory negligence on his part. To deny him the nett balance or even a proportion thereof, would clearly be both unjust and un-proportionate to his share of liability.

I would for those reasons dismiss both applications with costs to the Plaintiff/Decree-holder, with a direction to both counsel to ensure that a formal decree is drawn and sealed by the Deputy Registrar. There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 5th day of November 2010

M. J. ANYARA EMUKULE
JUDGE