



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 697 of 2008

SPIN KNIT DAIRY LTD.....APPELLANT

VERSUS

JOSPHINE NJERI KIMANI (Suing for and on behalf of the Estate of

Stephen Kuria Kimani Deceased).....1ST RESPONDENT

REV. MOSES KINUTHIA WANJIKU.....2ND RESPONDENT

R U L I N G

1. Spin Knit Dairy Ltd (hereinafter referred to as the appellant), is dissatisfied with the judgment of the Chief Magistrate delivered on 11th December, 2008, in Thika CMCC No.956 of 2003. By a memorandum of appeal filed on 18th December, 2008, the appellant lodged his appeal in this court. On the same day, the appellant filed a notice of motion under Order XLI Rule 4(1) & (2) seeking an order for stay of execution of the decree in Thika CMCC No.956 of 2003, pending the hearing and determination of its appeal.

2. The application is supported by an affidavit sworn by Regina Kitheka, the Legal Manager of Kenindia Assurance Company. She depones that the appellant has an arguable appeal with overwhelming chances of success. The deponent further swears that the respondents' financial means are unknown, and since the decretal sum is more than Kshs.826,104/=, it is feared that, if successful in its appeal, the appellant would be unlikely to recover the amount from the respondents. The appellant has further indicated its willingness to furnish a bank guarantee as security for payment of the decretal sum.

3. The application is opposed through grounds of opposition filed on 21st January, 2009, in which it is maintained that the application is incurably defective, the supporting affidavit having been sworn by an unqualified person. It is further maintained that the application is an abuse of the court process, only intended to frustrate and delay the settlement of the decree in Thika CMCC No.956 of 2003.

4. Having considered this application, I find that the contention that the affidavit sworn by Regina Kitheka is defective cannot hold. It is clear from that affidavit, that Kenindia Assurance Company Ltd is pursuing this matter on behalf of the appellant under its rights of subrogation. As a legal manager of Kenindia Assurance company, Regina Kitheka is in a position to swear the affidavit as the person who has been coordinating this matter with the appellant's counsel.

5. Moreover, the authority of *Microsoft Corporation vs Mitsumi Computer Garage Ltd* (Supra), which was relied upon by the respondent's counsel is distinguishable. Unlike the present affidavit which is sworn by Regina Kitheka under Order XVIII Rule 2 of the Civil procedure Rules in support of an application, the affidavit in the Microsoft case was a verifying affidavit sworn in support of the plaint under Order VII Rule 1(2) of the Civil Procedure Rules. That rule specifically requires a verifying affidavit to be sworn by the plaintiff, which therefore means, that the verifying affidavit can only be sworn either by the plaintiff or his recognized agent under Order III Rule 2 of the Civil Procedure Rules.

6. It is apparent that the decretal sum currently stands at about Kshs.826,104/=. The 1st respondent being an administrator of the estate of the deceased and there being no evidence of the ability of the estate to repay this money should that become necessary, I find that it is appropriate that an order of stay of execution do issue.

7. In order to protect the interests of both parties, I do hereby issue an order of execution pending appeal on the following conditions:

(i) The appellant shall deposit a sum of Kshs.826,104/= into an interest earning account with a reputable financial institution in the joint names of the parties' advocates within 21 days from the date hereof.

(ii) The appellant shall file and serve a record of appeal within 90 days from the date hereof.

(iii) The appellant shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court.

(iv) Costs of this application shall be costs in the appeal.

Dated and delivered this 29th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Gicharu for the appellant

Muugu H/B for Gichachi for the respondent