



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 22 OF 2009

NEW KENYA CO-OPERATIVE CREAMERIES LTD....APPELLANT

VERSUS

ASSISCO PHARMACY LTD.....RESPONDENT

RULING

The Plaintiff has taken out a Notice of Motion under Order XLI Rule 4 of the civil Procedure Rules cap 21 of the Laws of Kenya praying inter alia, that

- (i)
- (ii)
- (iii) Pending the hearing and determination of the Civil Appeal preferred against the orders of this Honourable court delivered on 12th March 2009, the court be pleased to order stay of enforcement of the said orders.
- (iv) This Honourable court be pleased to set aside and/or vary the orders respecting security pending appeal.
- (v)

The application is grounded on the basis that an appeal has been preferred from the trial court's ruling dated 12th March 2009 and the applicant is aggrieved by an order of deposit of Kshs.300,000/= as security and unless a stay is ordered the appeal will be rendered nugatory. It is supported by the sworn affidavit of B.O.Manani Advocate for the Plaintiff/Applicant in which it is stated, amongst many other things, that a stay was ordered by the trial court on condition of the sum of Kshs.300, 000/= being deposited within three days of the order. This is said to be oppressive and inadequate time. Further the sum claimed in the plaint is Kshs.277, 564/= yet the court ordered a sum of Kshs.300, 000/= as security for the performance of the anticipated decree pursuant to an application for attachment before judgment.

The Application is opposed and some nine grounds of opposition are filed. These are that the application is incompetent, is conceived, lacks merit and is brought in bad faith amongst others.

At the hearing Counsel for the applicant submitted that the order complained of has the effect of rendering the appeal nugatory as the latter is preferred on the grounds, inter alia, that the said order was

made in total misapprehension of the law on security before judgment. He added that the grounds for attachment before judgment were not satisfied and so the order ought not to have been made. In opposition counsel for the respondent submitted that stay pending appeal will only be granted if it be shown that the intended appeal will be rendered nugatory if stay is declined. Counsel added that the provisions of order XXXVIII 5(1) of the Civil Procedure Rules were fully complied with by the trial magistrate before the order complained of was made. He added that the orders granted are in the interest of both parties herein and asked the court to take judicial notice of the prevailing worldwide economic downturn and/or recess.

I have carefully considered this application and taken into account all submissions by both counsel herein appearing. To my mind the issue for determination is one, whether or not the trial magistrate satisfied herself that the ingredients of order XXXVIII (5) (1) were satisfied before she gave the order that she did. The rule reads as follows:-

“Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him –

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant; within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.”

That is the power donated by that order and rule. And that power is not to be exercised lightly but on clear proof of the ill-advised intention of the defendant to do (a) or (b) above but not otherwise. That power is not to be exercised on account of even the impecunity of the defendant so that the argument of counsel for the Respondent that the world is going through economic recess is totally irrelevant and misadvised. So long as it was not shown that the defendant was about to remove its property from the jurisdiction or to dispose of the same so as to obstruct or delay the execution of any decree that may be passed against him, then the order for security before judgment could not issue. And it was not so shown. It is irrelevant whether or not the defendant could go insolvent, as counsel contended, and it was not so shown, that even is no ground upon which the order for providing security before judgment could be given. **See Kuria Kanyoko t/a Amigos Bar and Restaurant V Francis Kinuthia Nderu and others (1988) 2 KAR 126 and John Kipkemboi sum V Lavington Security Guards Limited CA. No.124/1998.**

What the court would take judicial notice of, in my view, is not just that the world economy was on a downturn but also that the defendant has indeed in recent years being posting profits. But as already said above, even that is irrelevant in matters under order XXXVIII Rule 5(1) of the Civil Procedure Code. Having said the above I consider it unnecessary to address my mind to the other issues raised in this application.

The upshot is that the application under consideration succeeds in its entirety.

There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF JUNE 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:

Court clerk.....

Advocate for the Applicant.....

Advocate for the Respondent.....