



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 255 OF 1995

SHARIFF MOHAMED A. OMAR.....1ST PLAINTIFF

BOUGANVILLAE COTTAGES LTD.....2ND PLAINTIFF

VERSUS

BONTEMPI LUIGI.....1ST DEFENDANT

BRUNO TURATO.....3RD DEFENDANT

ELIZABETH A. NGEGE.....4TH DEFENDANT

RULING

On 26th July 2007, Sergon J. allowed the plaintiffs' suit as prayed against the defendant and dismissed the 3rd defendant's counter-claim with costs. The plaintiff had sought various reliefs including calling for accounts, a declaration that plot Nos. 3074 and 3104 Malindi are held by the 1st and 4th defendants in trust for the 2nd plaintiff and an injunction restraining the 1st and 4th defendants from selling, transferring, charging or dealing in any other manner with the said property. That judgment provoked the filing of a Notice of Appeal and several applications by the plaintiffs and the defendants. One of the applications was for stay of execution and was lodged by the 1st and 4th defendants. In a considered ruling delivered by Sergon J on 29th November 2007, the 1st and 2nd defendants were ordered to deposit Kshs. 25,000,000/= and Kshs. 100,000/= respectively in an interest earning account with a reputable bank in the joint names of the parties' advocates within 15 days.

By their Notice of Motion dated and filed on 7th December 2007, the 1st and 4th defendants sought a review of the order requiring that they make

the aforesaid deposits within the appointed period. On 18th December 2007, the plaintiffs lodged a Motion on Notice in which they sought committal to civil jail of the 1st defendant for contempt of court for failing to comply with the judgment of the court and for an order directed at the Land Registrar to execute a transfer in favour of the 2nd plaintiff pursuant to the decree issued in the suit.

On 31st January 2008, the 4th defendant lodged an application by way of Chamber Summons seeking,

among other things, directions on the opening of a joint account as ordered by Sergon J on 27th November 2007.

Finally, on 25th August 2008, the plaintiffs lodged a Notice of Motion seeking, among other reliefs, that a temporary stay of execution granted to the 1st and 4th defendants on 30th November 2007 and 1st February 2008 be set aside; that both the 1st and 4th defendants be committed to prison for contempt of court; that one Esther Gachimu be appointed as a receiver in respect of the following properties Malindi plot Nos. 3074, 3104, 3043, 3044,3045 and subdivision 5650 Malindi and that damages caused to the said properties be assessed and the defendants be ordered to pay the same.

The four applications were argued together by consent and on the basis of both written and oral submissions. It is evident from the lodging of the applications that there is no love lost between the parties. However, the applications present no difficulty at all. They all revolve around the judgment of Sergon J of 26th July 2007 and the subsequent conditional order of stay of execution. The judgment is the subject of an intended appeal by the defendants. The conditional stay is now sought to be reviewed in the 1st and 4th defendant's application of 7th December 2007. The application has been brought under the provisions of section 80 of the Civil Procedure Act, Order XLIV of the Civil Procedure Rules and all other enabling provisions of the Law. The application is based on the primary ground that there is now new and important matter of evidence which was not produced by the 1st and 4th defendants at the time the order was made. In the supporting affidavit sworn by the 1st defendant, it is deponed *inter alia* that the said sum of Kshs.25,000,000/=is colossal and the defendant has no means of paying the same. To buttress that argument, the 1st defendant has annexed what he describes as an Auditor's Report of the 2nd defendant and avers that the 2nd defendant ceased operations over 10 years ago and has infact filed no returns with the Registrar of Companies.

The application is opposed and counsel for the plaintiffs has filed Grounds of Opposition. The gist of the grounds is that the 1st and 4th defendants have not satisfied the conditions for the grant of an order for review as no new matter which was not available at the hearing of the application has been exhibited.

Having considered the application, the supporting affidavit, the Grounds of Opposition and the submissions of counsel, I take the following view of the matter. It was incumbent upon the 1st and 4th defendants to show that there has been discovery of new and important matter or evidence which, after due diligence, was not within their knowledge or could not be produced at the time or that there is some mistake or error apparent on the face of the record or that there is any other sufficient reason. They had also to make the application without unreasonable delay. This application was lodged on 7th December 2007 slightly over a week after the order sought to be reviewed. There can be no dispute that the application has been lodged with dispatch. I do not detect any mistake or error apparent on the face of the record nor is the alleged auditors report a discovery of new and important matter or evidence which could not be produced at the time when the ruling was made.

With regard to whether there is any other sufficient cause to order a review of the conditional order of stay, I note that the 1st defendant has deponed that the order to deposit Kshs. 25,000,000/= negates the very purpose of his intended appeal in view of the current period of financial hardships. I note that the plaintiffs did not file a replying affidavit challenging the averment that these are indeed hard economic times. I have also noted that the decree in favour of the plaintiffs is not strictly a money decree. Potentially it may turn out to be so, but for now if the plaintiffs were to execute, they could not do so to recover a specific sum of money. I did not try the case but I have been persuaded that the order to deposit the sum of Kshs. 25,000,000 may operate to deny the 1st and 4th defendants their undoubted right to urge their intended appeal. In the premises, I find that there is sufficient reason to review the conditional stay of execution. In the result the order of 29th November 2007 is varied as follows: There will be stay of execution on the condition that the 1st defendant deposits shillings fifteen million (Kshs. 15,000,000) in an interest earning account with a reputable bank in the joint names of the parties' advocates within thirty (30) days from the date hereof. I further order that the time within which the 4th defendant was to deposit

Kshs. 100,000/= as ordered by the said order is hereby extended for a further 15 days from the date hereof. In default of the deposits within the period appointed, the order of stay will lapse and the plaintiffs will be at liberty to execute the judgment and decree of Seron J aforesaid as they deem fit.

This order in effect determines the rest of the applications lodged by the parties herein. The plaintiffs' Notice of Motion dated 18th December 2007 in the main seeks execution of the judgment and order of 26th July 2007 execution of which is now stayed on the terms reviewed above. The Notice of Motion is therefore spent. The 4th defendant's application lodged on 31st January 2008 sought extension of the period to make the deposit of Kshs. 100,000/=. The ruling herein has in effect granted the extension. Finally, the plaintiffs' application lodged on 25th August 2008 sought the setting aside of the orders of stay of execution herein and for execution. The plaintiffs further sought an assessment of damage to various buildings. The latter order would obviously not be available to the plaintiffs in the Motion on Notice and the former related to the execution upon which I have now pronounced a ruling. The application is therefore also spent.

With regard to costs, the plaintiffs' shall have the costs of the application for review and the 4th defendant's application for extension of time to make the deposit. With regard to the plaintiffs' applications, I order that each party bears its own costs.

Each party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY 2009.

F. AZANGALALA

JUDGE

Read in the presence of Mrs. Kairaria for the Plaintiffs and Dr. Khaminwa for the Defendants.

F. AZANGALALA

JUDGE

31ST JULY 2009