



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 16 of 2006

RIFT VALLEY PRODUCTS LIMITEDPLAINTIFF

VERSUS

PLEXUS COTTON LIMITED DEFENDANT

RULING

On 29th November, 2007, Maraga J. allowed the defendant's application to set aside a default judgment on condition that the defendant deposits the principal sum on an interest bearing account in the joint names of the parties' advocates within 30 days of the order, failing which the defendant's application would stand dismissed with costs. On 8th January, 2008, the learned Judge stayed the conditional order, pending interpartes hearing of the defendant's application for stay of proceedings and/or the conditional order which application he fixed on 6th February, 2008. On 6th February, 2008 the defendant's said application came up for hearing before Njagi J but on the plaintiff's application the application was adjourned to 20th February, 2008.

On 20th February, 2008 the advocates agreed to file skeleton submissions upon which they would rely. The application was then fixed for highlighting of the skeleton submissions on 7th March, 2008. It is on the basis of those submissions that I have prepared this ruling.

The applicant's primary prayer is for stay of proceedings and alternatively stay of the conditional order of stay made on 29th November, 2007 pending the hearing and determination of an intended appeal against the said order. The applicant argues that as the conditional order was stayed on 8th January, 2008, before the period limited by the order lapsed, the applicant is not in default and its application to set aside the default judgment is deemed to have been allowed. That argument with respect has no merit as the stay of the conditional order was only temporary pending inter partes hearing. The applicant further argues that unless the stay sought is granted, its appeal will be rendered nugatory. In the premises, the applicant prayed that its application be allowed.

The applicant took issue with the respondent's right to be heard on account of having filed its grounds of opposition out of time without leave. Using my discretion, I allowed the respondent to rely upon the said grounds notwithstanding their having been filed out of time. The respondent contends that the applicant has failed to comply with the conditional order and that being the case there is nothing to stay. In the respondent's view the defendant's application dated 11th November, 2002 stands dismissed for failure to comply with the terms for setting aside the default judgment and what the defendant should have applied for is stay of execution of the decree issued on 4th October 2002.

With regard to the prayer for stay of proceedings, counsel for the plaintiff argues that there are no proceedings to be carried out as all that remains is execution of the said decree and no application for stay of execution is before the court. On the premises, the plaintiff prays for the dismissal of the application with costs.

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions of counsel. Having done so, I take the following view of this matter. What will happen if the defendant's application is declined? The conditional order will be confirmed, the defendant's application will stand dismissed paving way for execution of the decree herein. If he executes and the defendant eventually succeeds on appeal, the execution and proceedings leading to the same will be set aside and proceeds of execution will be ordered to be refunded to the defendant. There is no allegation that the plaintiff will not be in a position to make the refund should the defendant succeed on appeal. I do not therefore see how the defendant's appeal will be rendered nugatory if this application is declined.

Maraga J, found that the default judgment entered against the defendant was regular. He however, found that the defendant had raised bonafide trouble issues and on that basis allowed the defendants' application conditionally as he was perfectly entitled to do.

I am not persuaded that the orders sought by the defendant are deserved. The defendant's application dated 24th December, 2007 and filed on 8th January 2008, is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL 2008.

F. AZANGALALA

JUDGE

READ IN THE PRESENCE OF

Okongo holding brief for Khanna for the Applicant and

Khagram for the respondent.

F. AZANGALALA

JUDGE

11TH April 2008