



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 51 of 2005

GIOVANNI GNECCHI-RUSCONE PLAINTIFF

VERSUS

HERMANUS PHILLIPUS STEYN DEFENDANT

RULING

There are two applications pending before me. The first is a notice of motion dated and filed on **18th September, 2007**. It is brought by the plaintiff under **Order XXV Rule 6 and 7(2)** of the Civil Procedure Rules and **section 3A** of the Civil Procedure Act, seeking orders that the security given by the plaintiff pursuant to the orders made by the court on **24th September, 2004** and invested in Barclays Bank of Kenya Ltd, be refunded to the plaintiff upon expiry of the term deposit.

The second application is a notice of motion dated and filed on **19th September, 2007**. It is a motion brought by the defendant under **section 3A** of the Civil Procedure Act and **Order XLI Rule 4** of the Civil Procedure Rules. It seeks an order of stay of execution of the judgment and the decree delivered on the **7th September, 2007**, pending the hearing and determination of the intended appeal.

In support of his application, the defendant relies on an affidavit sworn on **19th September, 2007** together with annexures thereto. It is the defendant's contention that he has an arguable appeal and that unless the stay of execution is granted, the appeal would be rendered nugatory. The defendant also contends that he is likely to suffer substantial loss as the decree currently stands at Kshs.214 million, and if paid to the plaintiff/decree holder who is a foreigner, the defendant may not be able to recover the money.

In a further affidavit sworn on **15th October, 2007**, the defendant has annexed evidence of properties which he owns and is indicating his willingness and ability to provide any security that may be ordered by the court. The defendant further objects to release of the security deposited by the plaintiff until the appeal is heard and disposed of.

The plaintiff objects to the application for stay of execution pending appeal. He has sworn an affidavit filed on **20th November, 2007**. An affidavit was also sworn by his advocate, Mandeep K. Nagi on **18th September, 2007** in support of the plaintiff's application for release of the security. It is the plaintiff's contention that a successful litigant is entitled to the fruits of his judgment and can only be deprived of

that judgment for a just cause. The plaintiff maintains that the defendant has not established sufficient cause for the court to order stay of execution pending appeal. Relying on the case of **Visram Ravji Halai & Ano. vs. Thorntorn & Tupin [1963] Ltd Civil App. No. NAI 15 of 1990** and **Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others, Civil Appeal No.291 of 1997**, it was submitted that the fact that the defendant intends to file an appeal is not sufficient cause for ordering a stay of execution.

It was also maintained that the defendant has not persuaded the court that the plaintiff is a man of straw from whom it would be difficult to recover the decretal amount. To the contrary, it was contended that the plaintiff had earlier provided security for costs for the sum of Kshs.216 Million. Relying on **HCCC No.1900 of 1995**, **Lalji Bhimji Sanghani Builders & Contractors vs. Nairobi Golf Hotels (K) Ltd**, it was submitted that the defendant has failed to establish that it was likely to suffer substantial loss if the order of stay of execution pending appeal is not granted.

Regarding the defendant's offer for security, it was submitted that the defendant's properties were only worth Kshs.1.7 Million which was totally insufficient for the decree which was for an amount over Kshs.214 Million.

Relying on the case of **Visram Ravji Halai & Ano. vs. Thorntorn & Tupin [1963] Ltd** (supra), it was submitted that the court ought not to place the plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered. The court was further urged to order immediate release of the security given by the plaintiff in view of the judgment which had been entered in the plaintiff's favour.

It was submitted that the security was for the hearing of the suit only and cannot be extended to the appeal. The plaintiff's advocate referred the court to the **Supreme Court Practice 1995** at pages 1010 and 430.

Order XLI Rule 4(2) of the Civil Procedure Rules is clear as to the circumstances in which an order for stay of execution pending appeal may be issued. The rule provides that such an order can only be issued if the following conditions are complied with:

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The defendant's main grounds for his application is that his appeal is likely to be rendered nugatory for two main reasons. First, that the plaintiff is a foreigner, from whom it may be difficult to recover the decretal sum if successful on appeal, and secondly, that the decretal sum is a substantial amount. The fact that the plaintiff is a foreigner has not been denied. Indeed that was the basis upon which the plaintiff was ordered to provide security for costs on the **24th September, 2004**. It is also clear that the decretal sum currently stands at a whopping figure of Kshs.214 Million. Under these circumstances, there is sufficient cause to order for stay of execution of the decree pending appeal as the defendant may suffer substantial loss if the order is not granted.

The interests of the plaintiff must however, also be taken care of by ensuring that the defendant does not simply use the appeal to deny or delay the plaintiff from realizing the fruits of his judgment. Although the defendant has given the impression that his resources may be limited, the decree herein is for a substantial amount and the defendant must demonstrate his ability to meet the decree. There is therefore, need for the defendant to provide adequate security to ensure that the plaintiff will be able to realize the fruits of his judgment if the appeal is unsuccessful.

As regards the security which was provided by the plaintiff pursuant to the order made on **24th September, 2004**, that order was for security for costs in respect of the suit in this court. The suit in this court having been finalized through the judgment in favour of the plaintiff, there is no further justification

for the continued holding of the security, as the intended appeal was not subject of that order.

In the light of the above, I make the following orders:

1. **That** the security given by the plaintiff pursuant to the order of the court made on **24th September, 2004**, and invested in Barclays Bank of Kenya Ltd in the joint names of the advocates for the parties under Certificate No.507380 be refunded to the plaintiff.
2. **That** there shall be an order for stay of execution pending appeal on condition that the defendant shall provide security in the sum of **Kshs.200 Million** either by bank guarantee or any other security acceptable to both parties within **thirty (30)** days from the date hereof.
3. **That** the costs of both applications shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 3rd day of April, 2008.

H. M. OKWENGU

JUDGE