



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

Civil Appeal 656 of 2006

CHUI MANUFACTURERS LTD.....1ST APPELLANT

MANUKANT MEMCHAND SHAH.....2ND APPELLANT

VERSUS

JUDY WARIARA MUNGAI.....RESPONDENT

R U L I N G

By a notice of motion dated 20th November, 2006, the appellant moved the court under Order XLI Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that the respondent be ordered to provide security for the decretal sum of Kshs.352,316/= and auctioneers charges of Kshs.82,940/=.

By a preliminary objection filed on 18th April, 2007, the respondent pleaded that the application dated 20th November, 2006 is incompetent, frivolous, vexatious and an abuse of the court process. It is submitted that under Order XLI Rule 5 of the Civil Procedure Rules, the court has only powers to order security where there has been execution or threat of execution and goods have either been attached or are in danger of being attached. It is maintained that in the absence of an application for stay of execution pending appeal, the court has no powers to make the orders sought under Order XLI Rule 5 of the Civil Procedure Rules.

For the appellant, it is maintained that the application is properly brought under Order XLI Rule 5 of the Civil Procedure Rules, as it is seeking security for restitution of the decretal sum. It is further argued that the appellant had in any case invoked Section 3A of the Civil Procedure Act.

Separately a preliminary objection was also raised by the appellant to the replying affidavits sworn on the 17th April, 2007 by Judy Wariara Mungai and Stephen Kimani Karuu. It is contended that the affidavits are incurably defective having been filed outside the time given by the court, and no extension of time having been sought or granted. It is also contended that the two affidavits are frivolous and vexatious as matters not within the knowledge of the deponent are deponed to. In response to that objection, the respondent maintained that there is nothing scandalous or oppressive that has been identified in the replying affidavits. It is submitted that if there are specific paragraphs which are offensive, it is those paragraphs which should be struck out. Regarding the delay in filing the replying affidavits, it is submitted that the court has inherent powers to deem the affidavit as properly filed as no prejudice has been caused to the appellants.

Addressing the latter objection, first, it is clear from the record that leave was granted to the respondent to file and serve further affidavits within 15 days from 22nd March, 2007. The affidavits of Judy Wariara Mungai and Stephen Kimani Karuu, filed on 18th April, 2007 were filed well after the period provided. No explanation has been given for the delay nor has any application been made to the court to either extend time for the filing of the affidavit or deem the affidavit as properly filed. The two affidavits are therefore improperly before the court.

Further, I have carefully examined the two replying affidavits, but I am unable to identify any paragraph that is either frivolous or vexatious. The replying affidavits have deponed to issues which are contentious. On the face of the affidavits, there is nothing to show that the matters deponed to are falsehood. There are several paragraphs in the affidavits which depone to matters of personal information of the deponents and others which are based on information from sources which have been disclosed. This is consistent with the proviso to Order XVIII Rule 3(1) of the Civil Procedure Rules which creates an exception allowing for inclusion in an affidavit of facts based on information, where the affidavit is deponed in an interlocutory application. I therefore find no substance in this limb of the objection.

As regards the objection raised by the respondent, Order XLI Rule 5(1) of the Civil Procedure Rules states as follows: -

“Where an order is made for execution of a decree from which an appeal is pending, the court which passed the decree or the court to which an appeal is pending in terms of rule 4 shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the court from whose decree or order such appeal shall have been brought..”

In my understanding, the rule gives the court powers to make an order for security for restitution of any property taken away in the process of execution or security for due performance of the decree or order of the court. The power is exercisable once an order has been made for the execution of a decree from which an appeal is pending. There is no requirement that there must be an application for stay of execution. Indeed, such an application would be overtaken by the order for execution of the decree. In this case it is apparent that there is an appeal pending against the judgment of the lower court. It is also evident that an order for execution of that judgment was made in the lower court and that the decree was in fact executed.

In the circumstances, the appellants' application for security by the respondent for restitution of the decretal sum is well founded under Order XLI Rule 5 of the Civil Procedure Rules. The preliminary objection in this regard is accordingly overruled.

The upshot of the above is that the appellants' objection is upheld to the extent that the replying affidavits sworn by Judy Wariara Mungai and Stephen Kimani Karuu are both struck out as being improperly before the court. The respondent's preliminary objection is overruled and the notice of motion dated 20th November, 2007 ordered to proceed to hearing.

Those shall be the orders of this court.

Dated and delivered this 13th day of June, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Odhaimbo H/b for Mbeya for the appellant

Wambua H/B for Ndurumofor the respondent