REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1590 of 1998

COMHARD LIMITED……..……PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR COMPANY……..DEFENDANT

R U L I N G

1. The Defendant is the Applicant in the Chamber Summons application dated 18/07/2008 and filed in court on the same day. The application is brought under Order 21 Rules 18, 19(1) and 22(1) of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law. The application which was filed under Certificate of Urgency prays for an order staying execution and also prays that the proclamation and warrants of attachment herein be set aside. The Applicant also prays for costs.

2. The application is premised on three grounds on its face and is also supported by the sworn affidavit of SAMUEL MAKORI, an advocate of the High Court of Kenya of the firm of Oraro & Company Advocates who have the conduct of this matter on behalf of the Defendant. The grounds on the face of the application are that (a) the notice to show cause served upon the Defendant indicated that the same was to be heard on 4/06/2008, (b) the notice to show cause was not listed for hearing on 4/06/2008 and (c) the Defendant was thus unable as a consequence of the foregoing to show cause why execution should not proceed against him when the same was heard on the 11/06/2005 and (d) it is only fair and just that this application be allowed.

3. Mr. Samuel Makori has deponed in the affidavit sworn on 18/07/2008 that the Defendant wrote to the firm of Oraro & Company Advocates on 27/05/2008 confirming that the NTSC was fixed for hearing on 4/06/2008 but that the NTSC was not listed for hearing as advised. Mr. Makori says that thereafter he wrote to the Plaintiff on 26/06/2008 bringing to the Plaintiff's attention the fact that the NTSC had not been listed for hearing on 4/06/2008 as had been indicated and that he requested the Plaintiff to agree to take new dates for the hearing of the NTSC. Subsequently, the NTSC was set down for hearing on 6/10/2008, but that in the meantime, according to Mr. Makori the Defendants were served with a Proclamation and that after he perused the court record he established that the NTSC had proceeded exparte on 11/06/2008. He also says that according to the details on the proclamation, the same was due to expire on 21/07/2008. Mr. Makori says that it was not the mistake of the Defendant that the Defendant did not attend on the date when the NTSC was listed for hearing, that is to say on 11/06/2008. Attached to the Mr. Makori's affidavit are copies of:?

(a) The Notice to show cause,

(b) The Defendant's letter dated 27/05/2008 forwarding the NTSC to M/s Oraro & Company Advocates;

(c) (i) A letter dated 26/06/2008 from Oraro & Co. Advocates to

the Defendant advising the latter that the NTSC had not been listed for hearing on 4/06/2008.

(iii) A letter dated 6/06/2008 by Oraro & Company Advocates

inviting the Plaintiff's advocates to attend court registry on 20/062008 to fix a date for the hearing of the Defendant's Chamber Summons dated 7/09/2005.

(c) Proclamation of Attachment dated 14/07/2008. The Proclamation was to expire on 21/07/2008.

4. The Defendant's application is opposed. The Replying Affidavit is sworn by HIREN PATEL and is dated 24/07/2008. Mr. Patel says that M/s Oraro & Co. Advocates have no locus standi in this matter; that Mr. Makori, as an advocate cannot swear an affidavit on contentious matters. That there is no explanation as to why M/s Oraro & Co. Advocates did not attend court on 7/05/2008 despite service; that the NTSC dated 12/03/2008 clearly showed that the same was scheduled for hearing on 11/06/2008; that the Defendant's application filed in court on 7/09/2009 has not been prosecuted todate and that the Applicant has all along been an indolent litigant and that as such he should not benefit from this court's exercise of discretion in his favour.

5. Both Mr. Makori (for the Applicant) and Mr. Momanyi (for the Respondent) made their submissions before me reiterating the averments contained in their pleadings. Regarding the issue as to whether or not M/s Oraro & Company Advocates are properly on record, I have found from the record that the said firm is properly on record and that the Plaintiff's counsel have recognized them as such and continued to serve them with process. Having resolved that issue are the Applicants entitled to the orders sought by this application.

6. The Applicants have cited to me two authorities:-

(i) Butt –vs- Rent Restriction Tribunal [1982] KLR 417 and

(ii) *Electroniwatts Ltd. –vs- Countryside Supplies Ltd. & Another [2006] e KLR*.

7. In the Butt case the Applicant's application to the High Court for stay of execution against an order for which he intended to make an appeal was refused for reasons founded in the provisions of the Rent Restriction Act (Cap 296 sections 8(2) and 35(2) and also on the ground that the position of the Applicant would not be irretrievably damaged neither would the appeal be rendered nugatory should the appeal succeed. On Appeal against the refusal under Order 41 Rule 4 of the Civil Procedure Rules, it was held:-

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting in merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstance in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. *The court in exercising its powers under Order XLI rule 4(2) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse*.

As Madan JA (as he then was) observed, there is absolute need on the part of the court to act conscientiously and judiciously. In doing so, this court will consider not only the provisions of Order 41 Rule 4 but will also consider if there are any special circumstances in this case to influence the exercise of my discretion. I agree entirely with these holdings.

8. In the Electronicwatts Limited case, the learned judge relying on the case of Pithon W. Maina –vs- Mugira [1982-88] KAR said that "*the discretion of the court, although unfetted should be exercised judiciously*".

9. Mr. Momanyi for the Plaintiff submitted that the Applicants have not only been indolent, but that they have nothing to suffer or to lose since the decree in this case is a money decree that is replaceable.

10. I have considered the application together with the affidavits both in support and against the Defendant's application. I have also equally weighed the submissions both for and against the application. From the above, the real issue for determination here is whether the Defendants deliberately failed to attend the hearing of the NTSC when the same came up on 11/06/2008. The Respondent says that the Applicants were aware that the NTSC was fixed for hearing on 11/06/2008 but unfortunately the Respondents have not availed to me any evidence to show that indeed this was the case. The evidence adduced by the Applicant clearly shows that the NTSC was not listed on 4/06/2008 when the same was supposed to come up for hearing. The Respondents have not disputed the fact that the NTSC was indeed not listed

for hearing on 4/06/2008.

11. The requirements for the grant of an order of stay of execution are well set out under Order 41 Rule 4(2) of the Civil Procedure Rules:-

"*2. No order for stay of execution shall be made under subrule (1) unless –*

(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."

12. In light of the above and the circumstances of this case, I am of the view that the Applicants were denied an opportunity to be heard on the NTSC when it came up for hearing on 11/06/2008 under circumstances that have not been made clear by the Respondent. What should have happened in this case was for the Respondents to write the Applicants to take fresh hearing dates for the NTSC Cause or take such dates exparte and serve an appropriable hearing notice after 4/06/2008. In the premises, it cannot be said that the Applicants were indolent as far as the NTSC goes. That may be so as concerns the application filed in court on 7/09/2005, but that is not the issue before me today. The Applicants had and still have a constitutional right to be heard on the NTSC. I therefore find that the hearing of the NTSC on 11/06/2008 was irregular since the Applicants had no notice of it.

14. In the result, I do hereby allow the Applicant's application dated 18/07/2008 and make the following orders:-

(1) That the proclamation and warrant of attachment herein be and is hereby set aside.

(2) That costs of this application shall be in the cause.

15. Orders accordingly.

Dated and delivered at Nairobi this 18th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

……..Plaintiff/Applicant

……..Defendant/Respondent