



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 131 OF 2005

ELLE TIS.RIPLAINTIFF

VERSUS

SAN GIORGIO LTD.DEFENDANT

RULING

By a motion taken out pursuant to order XLI rule 4 of the Civil Procedure Rules, the defendant, San Giorgio Ltd, sought for an order of stay of execution of the exparte judgment pending the hearing and determination of an intended appeal against the decision of this court of 20.7.2006. The motion is supported by the affidavit of Ceccagnoli Italo sworn on 27th July 2006.

ELLE-TIS.RI, the plaintiff herein, filed a replying affidavit sworn by Ivo Torazzi and grounds of opposition to resist the motion.

It is the argument of Dr. Khaminwa, learned advocate for the defendant that the orders of stay of execution pending appeal should be given because failure to do so would mean that the defendant would suffer undue hardship and substantial loss in that it would be required to settle a colossal sum which in turn may end up making it close its business.

It is the argument of Dr. Khaminwa that the defendant's appeal will be rendered nugatory.

On its part the plaintiff is of the view that the intended appeal has no chance of success. It is further the argument of Mr. Ochwa that the defendant is not entitled to any stay orders because the matter involves money decrees. This court was urged to order the defendant to deposit the decretal sum in court if it is inclined to grant order.

The brief background of this application started when judgment in default of defence was entered on 26.1.2006 against the defendant. An attempt to set aside the exparte Judgement was thwarted by this court when it dismissed the summons dated 23.2.2006 on the 20th day of July 2006. Being dissatisfied with that dismissal order, the defendant has now preferred an appeal to the court of appeal. An intimation

has been expressed in the notice of appeal dated 20th July 2006.

The principles for granting an order of stay of execution pending appeal under order XLI rule 4 are well settled. In other words such an order should not be granted

- (a) Unless it is shown that substantial loss may result.
- (b) The application has been made without unreasonable delay.
- (c) Such surety for the due performance of such decree.

To begin with, I am satisfied that the application was timeously filed. The order in dispute was made on 20/7/2006 and the motion was filed on 27th July 2006, about 7 days from the date of the order. I have considered the issue raised which is to the effect that if the applicant is ordered to pay the decretal sum which is way above Kshs.6,000,000/- the defendant may be forced to close its business hence it would suffer substantial loss. I agree the amount involved is colossal and hence if the applicant was required to pay it at once then it will substantially suffer great loss.

The only remaining ground is what form of security should the applicant give. The applicant says that this court should not make such an order. I regret to state that this court has no discretion to ignore this requirement. I have the discretion to fix what is sufficient security. I note that the plaintiff had sought for payment of Kshs.3,946,039/60 in the plaint on account of Shipping services and goods delivered plus interest. In my estimation I am of the view that an order for stay should be granted on condition that the defendant deposits a sum of Kshs.5,000,000/- in a joint interest earning account held by the advocates in this dispute within 30 days from the date hereof. In default thereof the motion shall stand dismissed. Costs of the motion is given to the plaintiff.

Dated and delivered at Mombasa this 19th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Dr. Khaminwa and Martin Tindi for the defendant and Mr. Ochwa h/b for Mutuku for plaintiff.