

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 9 of 2004

HEINZ A. THEISSINGPLAINTIFF

VERSUS

DIANI HOMES LIMITEDDEFENDANT

RULING

The subject matter of this ruling is the motion dated 21st February 2007. The motion is the offshoot of this court's order of 12th February 2007. The motion is strenuously opposed by the plaintiff who filed grounds of opposition in that regard.

In the motion, Diani Homes Ltd, the defendant herein seeks for an order of stay pending appeal. The defendant has offered to deposit a monthly sum of between Kshs.300,000/- and Kshs.500,000/- as security. Heinz Theissing has resisted the motion by alleging that the defendant is abusing the court process by seeking to sort out its financial difficulties through the court process instead of approaching the relevant financial institutions.

The history behind this motion is that interlocutory judgment was entered against the defendant in default of appearance on the 1st day of February 2005. The suit proceeded and came up for hearing as a formal proof and judgment was given on 16th December 2005. the defendant applied for the judgment to be set aside and its application was allowed on 13.4.2006 on condition that it deposited the decretal sum in an interest earning account in the joint names of the advocates involved in the dispute within 45 days. The defendant again came back to court seeking for an order varying the aforesaid order so that it could deposit two title deeds in court instead of depositing the decretal sum. This court substantively considered the application and dismissed the same in its ruling of 12th February 2007. the defendant has now filed a notice of appeal against the dismissal order. It is now asking this court to grant an order of stay of execution of the orders of 13th April 2006 and 12th February 2007. It is the argument of the defendant that it will suffer substantial loss if the order of stay is not granted. It has been alleged by the plaintiff that the defendant has kept on shifting goal posts.

This matter in any view appear to be straightforward. There is no doubt that if the defendant was to deposit the entire decretal amount at once its businesses will crumble. It has now come to court seeking to deposit in piecemeal the entire amount. It has proposed to deposit a monthly installment of between Kshs.300,000/- and Kshs.500,000/-. The plaintiff's complaint is that it is likely to take a long period of time before he realizes the fruits of his judgment. The plaintiff has proposed that the defendant can be given 6 months to deposit the entire sum. What comes out clearly from the defendant's application is that the defendant is now offering to provide security in form of Cash as opposed to the previous offer to deposit title deeds. Of course this court rejected the previous offer in its ruling of 12th February 2007 and that explains the change of heart on the part of the defendant. This court is impressed by the latest offer and I think the defendant should be given the prayers sought in the motion. The court is persuaded by the fact that the decree can easily be satisfied at the end of the appeal if any and that the plaintiff is likely to benefit from any interest that will be attracted by the deposits. Consequently, the motion dated 21st February 2007 is allowed on condition that the defendant deposited the decretal sum in an interest earning account held in the joint names of the advocates or firms of advocates in following manner: The defendant makes an initial deposit of Kshs.1,000,000/- on or before the 15th day of April 2007 and thereafter it deposits a monthly sum of Kshs.500,000/- on the 15th day of each succeeding month with

effect from 15th May 2007 until the entire decretal sum is paid in full. In default of any one installment the motion shall stand automatically dismissed. Costs of the motion is given to the plaintiff in any event.

Dated and delivered at Mombasa this 30th day of March 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Wameyo for the defendant/applicant and Mr. Kibara h/b Omondi Waweru