

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 143 of 2007

FELIX NDUNDA MWANIA

LUBSEHEM KENYA LIMITED.....APPELLANT

VERSUS

MARGARET KENYA LTD.....RESPONDENT

RULING

The lower Court gave judgment in favour of the Respondent on 2.3.2007. The appellant became aggrieved by those orderS and is desirous of appealing against the same. An appeal is already in place arising from the filing of the Memo of Appeal on 7.3.2007. It has six grounds of appeal.

The appellant sought stay in the lower court and the learned trial magistrate considered the issues raised in the Memo of Appeal and was of the opinion that the main complaint on appeal is the issue of contribution and not quantum. Justice demanded that a conditional stay be granted whereby half of the decretal sum was to be paid to the plaintiff and half to be deposited in an interest earning account in the joint names of Counsels of both parties within 15 days from the date of the said order. Further consideration was based on the fact that the appellant had offered to offer the entire decretal sum as security for stay pending appeal.

The appellant was dissatisfied with the said conditional stay and has come to this court seeking stay of execution pending the hearing of the application inter parties and then pending hearing of appeal and that costs be provided for.

The grounds in support are that the application was presented without undue delay, that they fear that if money is paid over it might be difficult to recover the same from the Respondent. That they have complied with the ingredients for granting stay and the reliefs should be granted to them.

The Respondents oppose the application on the grounds that the Respondent has a judgment in her favour, that the suit in the lower court remains un challenged as the suit was not defended, that the Respondent is not deceased, that this court should be inclined to grant stay on the same grounds as the lower court.

On the courts assessment of the facts herein, the court makes findings that the application is properly before this court as an aggrieved party who has sought stay in the Court appealed from can seek stay from the court appealed to. Whether sought in the court appealed from or the court appealed to, the ingredients to be satisfied are the same namely:-

- (a) presentation of application without undue delay.
- (b) Proof of substantial loss if stay is not granted.
- (c) Provision of security.

The learned trial magistrate considered these ingredients before arriving at the decision arrived at. This

Court is not bound by that decision although it cannot ignore the same. The Court has a right to re-evaluate the facts and arrive at its own decision. This court has considered all the relevant factors herein and finds that as found by the lower court if the evidence in the lower court was not contested and what they are complaining about is contribution and apportionment, it is doubtful that the entire judgment will be scrapped. That being the case there is no justification to keep the successful litigant out of the entire sum of the entire decretal sum. It is therefore the finding of this court that when the totality of factors herein are considered, the conditional stay granted by the lower court was appropriate in the circumstances of this case. Although this court on not supposed to sit on appeal over that conditional stay granted by the lower, court there is jurisdiction to exercise its discretion to grant stay pending appeal on the same terms.

For the reasons given stay pending appeal will be granted by this court on the same terms as those set by the lower court. They were fair and there is no justification to vary the same. The application is therefore refused with costs to the Respondent.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2007.

R. N.NAMBUYE

JUDGE