



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 559 of 1995

RYCE MOTORS LIMITED.....PLAINTIFF

VERSUS

JONATHAN KIPRONO RUTO.....1ST DEFENDANT

MIDWAY ASSURANCE INTERNATIONAL CO.....2ND DEFENDANT

RULING

This application by Notice of Motion dated 27.9.2006 seeks one principal order of the court that the sum of KShs.7.5 million deposit held as security in the joint account in the names of Shapley Barret & Company Advocates and Onsando Osiemo & Company Advocates at NIC Bank City Square branch together with the interest that has accrued thereon from 15.9.2005 be released to the applicants advocates forthwith.

The application is brought under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act by the applicant/1st defendant against the plaintiff/respondent and is based on the following main grounds:-

- (i) That on 29.5.2002 judgment was entered against the plaintiff in favour of the 1st defendant/applicant.
- (ii) That on 15.8.2005 Hon Kasango J ordered the plaintiff to provide the sum of KShs.7.5 million as security to be deposited in a joint interest earning account in the names of the advocates of the parties as a condition for stay pending appeal.
- (iii) That the said sum was subsequently deposited with NIC Bank City Square branch on 15.9.2005.
- (iv) That the plaintiff has to date not mounted any appeal against the said judgment having on 4.7.2006 withdrawn an application seeking extension of time within which to file the record of appeal and the time available for them doing so has since lapsed.
- (v) That the purpose for which the sums were deposited has since been overtaken by events as the time available for the plaintiff for lodging an appeal has since lapsed as it is more than 4 years since the judgment was passed in the 1st defendant's favour for the loss he has sustained way back in 1993 and the delay is causing him undue distress.

There is a supporting affidavit sworn by Onsando Osiemo Learned counsel for the applicant in which

are deponed matters elaborating the grounds of the application. To that affidavit are annexed 3 exhibits; a copy of the ruling of Hon. Kasango J of 15.8.2005 by which the plaintiff was ordered to provide the said sum of 7.5 million as security; a copy of a letter from the plaintiff's advocates forwarding a cheques for the said sum to NIC Bank City Centre Branch and a copy of the plaintiff's application to the Court of Appeal seeking extension of time within which to file the record of Appeal.

The plaintiff has opposed the application upon the following grounds:

- 1) That there is no decree in this case to be executed.
- 2) That the sum of Kshs.7.5 million was deposited as security pending appeal against a judgment and decree of this court.
- 3) That the order requiring the plaintiff to provide the said security was made under a mistake of fact and Law that there existed a valid judgment and decree capable of being executed.
- 4) That the existence or otherwise of a valid judgment delivered on 29.5.2002 is an unresolved issue and the subject of an intended Appeal to be filed in the Court of Appeal pursuant to a Notice of Appeal filed herein on 13.2.2007.
- 5) That if there was a valid judgment delivered on 29.5.2002, the applicant would have extracted a decree from that judgment.
- 6) That the applicant cannot enforce or execute the said judgment in the absence of a decree.

There is a replying affidavit sworn by Sailesh Pancholi the plaintiff's Financial Controller. It is deponed inter alia that at all material times all parties acted under the belief that there was a valid judgment given on 29.5.2002. That the record of proceedings accompanying the plaintiff's application for extension of time did not contain any record of such a judgment having been entered on 29.5.2002 hence the decision to withdraw the said application and lodge the application dated 24.11.2006 for review of the order of 15.8.2005. It is further deponed that the plaintiff has not slept on his rights and is still desirous of mounting an appeal as the validity or otherwise of the said judgment of 29.5.2002 will only be known after the Court of Appeal rules on the issue.

The application was canvassed before me on 15.6.2007 by Mr. Tiego Learned counsel for the 1st defendant/applicant and Mr. Oyatsi Learned counsel for the plaintiff/respondent. The advocates largely substantiated the positions taken by their clients in the said affidavits.

I have considered the application, the affidavits both in support of the application and in opposition thereto and the submissions of the Learned counsels appearing. I have also perused the record of the court. Having done so I take the following view of this matter.

On 15.8.2005, Hon. Kasango J allowed the plaintiff's application for stay of execution pending appeal on the conditions that the plaintiff was to provide KShs.7.5 million to the 1st defendant's counsel within 30 days of the order and that the said amount was to be deposited into an interest earning account of the parties' respective advocates.

The plaintiff then lodged an application for extension of time to file a Memorandum and Record of Appeal on 24.8.2005. As the plaintiff believed that there was no valid judgment to appeal against it withdrew the application for enlargement of time to file the Memo and Record of appeal from the judgment and decree of 29.5.2002. On the withdrawal of that application the plaintiff has nothing to show as evidence of its intension to pursue the appeal against the judgment of 29.5.2002.

On the validity of the judgment, it is my view that the plaintiff is being less than candid. The record reveals that as early as 25.11.2002 at the behest of the plaintiff, Osiemo J confirmed that judgment was delivered on 29.5.2002. Indeed it was after that confirmation that the plaintiff sought by its application

dated 27.11.2002 for extension of time within which to file and serve its Notice of Appeal against the same judgment. The plaintiff duly lodged the Notice on 19.12.2002 and should have filed its memorandum and Record of Appeal within 60 days of that date. As there was delay in obtaining a copy of the record the plaintiff did not lodge the said Memorandum and Record of Appeal within the prescribed time hence its application for enlargement of time within which to file the same documents dated 19.8.2005. That application was on 4.7.2006 withdrawn with costs to the respondent the present 1st defendant /applicant. With that application out of the way, there is now nothing in the way of the judgment of 29.5.2002. The Notice of Appeal lodged by the plaintiff dated 12.2.2007 is against the decision of Kasango J given on 6.2.2007 dismissing the plaintiff's application to review her conditional order of stay of execution. So as of now there is no substantive challenge to the judgment and decree given on 29.5.2002.

In the premises, the court would have no reason to deny the 1st defendant/applicant what it seeks in its application under consideration. The conditional order of stay of execution was made on the basis that the plaintiff would mount an appeal against the said judgment and decree of 29.5.2002. The plaintiff's attempt to so challenge the judgment and decree diminished with the withdrawal of its application for extension of time to file and serve its Memorandum and Record of Appeal. It is now more than 5 years since the judgment was given and decree issued and no appeal has been mounted. There is currently therefore no legitimate challenge to the judgment and decree. Accordingly, I will allow the application and grant the order sought in paragraph 2 thereof.

Costs of the application to the 1st defendant/applicant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Tiego for the applicant and Wananda holding for Oyatsi for the plaintiff/respondent.

F. AZANGALALA

JUDGE

5/7/07