



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 159 of 2003

BAIBA DHIDHA MJIDHO.....PLAINTIFF

VERSUS

VAN LEER EAST AFRICA LTD. (GREIF (K) LTD.).....DEFENDANT

(A BUSINESS OF GREIF BROS CO-OP)

RULING

On the 12th day of October 2005, this court gave judgment in favour of the plaintiff and against the defendant in the sum of Kshs.7,685,420/85 plus interest with costs of the suit. Being aggrieved, the defendant expressed its intention to appeal to the court of appeal by filing a notice of appeal.

The subject matter of this ruling is a notice of motion filed pursuant to order XLI rule 4 of the Civil Procedure rules. In this motion the defendant is basically seeking for an order of stay of execution of the decree pending appeal. The motion is supported by the affidavit of Juma Yusuf sworn on 17th October 2005.

The plaintiff on his part has resisted the motion by filing a replying affidavit he swore on the 22nd day of November 2005.

In support of the application, the defendant has put forward three grounds. First, the defendant is of the view that it has high chances of success in its intended appeal. It attempted to demonstrate the by outlining the grounds to be argued on appeal.

Secondly, it is the argument of the defendant further that if an order of stay is not granted it would suffer serious hardship and disruption of its operations.

Thirdly, that it would be extremely difficult to recover the decretal sum if the amount is paid to the plaintiff if at all the appeal succeeds.

The plaintiff's Counsel responded to each of these grounds. It is the submission of the plaintiff that the first ground cannot be considered by this court because it is a ground normally considered by the court of appeal when dealing with such applications. I think I agree with the plaintiff on this ground. It is not a matter for this court to consider whether or not the applicant has an arguable appeal. That is a matter which is within the province of the court of appeal pursuant to rule 5(2)(b) of the Court of Appeal Rules. The principles to be considered by this court are clearly set out under order XLI rule 4 of the Civil Procedure Rules. I do not need to reproduce the principles but it suffices to state that the remaining grounds argued in support of the motion are within those considerations set out under order XLI rule 4.

The defendant has stated that it would suffer serious hardships if the decretal sum is paid to the plaintiff before the appeal is heard and determined. It is said that it would be extremely difficult to recover that money and that if the amount is paid it may cause serious effects on the operations of the defendant company. The plaintiff said it would be risky for him if the money is not paid because the defendant company may go under. The plaintiff further averred that he was capable of refunding the money in view of the fact that he owned property in form of land known as L.R.No.Mombasa/Mambelegeza.831.

I have carefully considered the submissions of the parties vis-à-vis the provisions of order XLI rule 4 of the Civil Procedure Rules. One of the principles required to be satisfied before granting an order for stay is whether or not the applicant will suffer substantially. The judgment of this court requires the defendant to pay the plaintiff a cumulative figure of Kshs.7,685,420/85. That in my view is not a small figure. The plaintiff has shown that if the money is paid to him he can easily refund the same by selling his landed property. I agree he has shown he has assets which are capable of being sold. There is no valuation to show its value. It is also possible that the property may change hands in between before the appeal is heard. I am satisfied that the defendant is likely to suffer substantial loss if a stay is not granted because it could be extremely hard to recover the money from the plaintiff should the appeal succeed. The court of appeal took into account such an eventuality in the case of The Standard Ltd =vs= G.N. Kagia T/a Kagia & Co. Advocates C.A. No. 193 of 2003 in which the court of appeal said:

“If the applicant’s appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money, if paid, and if it has to institute other civil proceedings to recover the money. Such an eventuality should, in the interest of Justice be taken into account.”

I am of the view that the order for stay of execution should be given hence the remaining issue is what form of security should be granted. Under order XLI rule 4, the provision for security is mandatory. However, the form of security is entirely left at the discretion of the court to determine. The court of appeal in the case of Nduhiu Gitahi & Another =vs= Anna Wambui Warugongo [1988] 2 KAR 100 adopted the views of Parker L.J. in the English case of Rosengrens Ltd. =vs= Safe Deposit Centres Ltd [1984] 3 ALL E.R. P.198 to the effect that:

“The process of giving security is one which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is least disadvantageous to the party giving that security. It may take many forms. Bank guarantee and payment into court are but two of them so long as it is adequate, then the form of it is a matter which is immaterial.”

I have taken into account the circumstances of this case and I think the best form of security the applicant should give is to file a bank guarantee to secure the decretal sum within the next 45 days.

The end result is that an order of stay pending appeal is given on condition that the applicant provides a bank guarantee for Kshs.7,685,420/85 within 45 days from the date hereof. In default, the motion stands dismissed and the Respondent shall be at liberty to execute.

Dated and delivered at Mombasa this 16th day of June 2006.

J.K. SERGON

J U D G E

Weloba for the Defendant/Applicant and Mr. Sifuna h/b Sumba for plaintiff.