



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO.429 OF 1998

TIMOTHY WAFULA.....PLAINTIFF

VERSUS

SIETCO DEVELOPMENT (AFRICA) LTD.....DEFENDANT

RULING

The Application has been brought through Notice of Motion under Order XLI Rule 4 and Order L Rule 1 of the Civil Procedure Rules and Section 7 of the Appellate Jurisdiction Act Cap 9 and Rule 3 and 6 of the High Court (Practice and Procedure) Rules and all other enabling procedure of the law. The said application seeks the following orders:-

- That this Honourable Court do grant a stay of execution of the Judgment in Nakuru HCCC No.429 of 1998, delivered on the 18th February, 2004 pending the hearing and determination of this application.
- That leave be granted to the Applicant to lodge a Notice of Appeal out of time and the draft Notice of Appeal annexed hereto be deemed as properly filed and served.
- That there be a stay of execution of the Judgment in Nakuru HCCC No.429 of 1998 delivered on the 18th February, 2004, pending appeal.

The application has been supported by the affidavit of Janet Mbithe who has deponed that she is aggrieved by my Judgment. Besides the above, she has also deponed that there was delay in receiving instructions from her client to lodge the appeal – due to a communication breakdown. Apart from the above she has also deponed that they will be unable to recover any monies paid to the Plaintiff/Respondent should the intended appeal be successful since the latter's means are unknown.

Mr. Githinji submitted that the defendant is ready to furnish reasonable security as may be ordered by the Court.

On the other hand, Mrs. Odhiambo has opposed the application while relying on the grounds of opposition. According to her, the application is not meritorious and is only meant to delay, prejudice and prevent the Plaintiff from enjoying the fruits of the Judgment. In addition to the above, she submitted that there is a valid Judgment – portions of which had been obtained by the consent of both parties. That apart, the said consent was obtained without any element of fraud or misrepresentation. She urged me to dismiss the application since there has to be an end to litigation and that my discretion has to be exercised judiciously. Mrs. Odhiambo also submitted that this Court cannot grant Prayer No.3 since I, will be sitting an appeal in my own cause. She concluded by submitting that the affidavit has been sworn by Counsel who is not a part to the proceedings.

She also cautioned that the Counsel should not put herself in a position where she may be called to give evidence. In support of her submissions, she quoted the case of

Troton Petroleum Co. Ltd

vs.

Kirinyaga Construction Co. (K) Ltd.

Milimani Commercial Court Civil Case No.830 of 2003.

In the above case, the Applicant never showed how he was going to loose substantial amount of money. Neither did he show any evidence that the Plaintiff would not be able to refund the money. She concluded that the grounds of appeal did not have any chance of success.

This court has carefully perused the above submissions by Counsels. At the outset it must be stated that the filing of an appeal on its own cannot be a ground of granting a stay. In this case, my Judgment was delivered on 18th February, 2004. On the other hand, the present application was filed on 31st March, 2004. That was a delay of about a year. That delay was inordinate and unreasonable under the circumstances.

Secondly, though the Applicant/Defendant claimed that they would be unable to recover any monies paid to the respondent/Plaintiff – they have not proved the above by demonstrating his income and assets. Unfortunately, the Applicant left that point hanging in the air.

Thirdly, it is apparent that part of the Judgment had been entered by the consent of the parties. This is demonstrated by the consent that was entered on 15th August, 2003. Prayers No.1(i) and (ii) in that consent are very specific. On that basis I concur with the submission of Mrs. Odhiambo that the consent was not obtained fraudulently or with any misrepresentation.

Since the application has failed to show any sufficient cause, I hereby dismiss the application which was only meant to deny the Respondent an opportunity to enjoy the fruits of his Judgment.

Since costs follow the event, the Applicant will have to bear the same.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open Court in the presence of

Mr. Oduor for Plaintiff/Respondent

MUGA APONDI

JUDGE

20th April, 2005