REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 368 OF 1997

JUBILEE INSURANCE COMPANY ……... PLAINTIFF

VERSUS

MARIA FERNANDES ……. DEFENDANT

Coram: Before Hon. Justice Mwera

Okongo for the Plaintiff

Munyithya J for the Defendant

Court clerk – Sango

R U L I N G

The defendant filed the notice of motion dated 29-6-04 under O.41 r. 4 Civil Procedure Rules and S. 3A Civil Procedure Act. The main prayer therein is that:

1. This court be pleased to grant a stay of execution pending hearing and determination of (her intended) appeal.

The grounds on which the application is based include the following: That there are circumstances that made it impossible for the applicant to apply for a stay of execution; all the time she trusted that her previous advocates had prosecuted the notice of motion dated 30-7-2002 (not 2004). Further that, the applicant had learnt the other day (not specified) from M/s J.J. Weloba & Co. Advocates that that firm had withdrawn the said application dated 30.7.02 (again not 2004) and that she was keen to prosecute the intended appeal before the Court of Appeal. And that if the stay orders were not granted the defendant/applicant stood to be evicted from the suit premises after 30-6-04 thereby rendering her appeal nugatory.

The court has referred to the appeal as intended because ever since the notice of appeal was filed on 25-7-02 and certified copies of proceedings sought, neither has the actual appeal been filed nor further efforts put in hand to pursue the provision of certified copies of proceedings. Then of course it should be considered under O. 41 r. 4 Civil Procedure Rules that if stay orders do not issue the applicant would suffer substantial loss (not the appeal being rendered nugatory).

The defendant swore an affidavit in support and Mr. J. Munyithya presented the argument, mainly to the effect that if the order sought is not granted the applicant will have to be evicted from the suit premises and by that the whole substratum on which this suit and the intended appeal stand, will go. There will thus be nothing to litigate further about. That the defendant/applicant always had lawyers (two firms before Mr. Munyithya) who had full control of the pace at which things were done in this file. But

that they acted with lethargy and laxity all to the detriment of the applicant. That all the time she was desirous to prosecute the stay application dated 30-7-02 and the whole appeal which those lawyers did not do. That she did not instruct/consent to M/s J.J. Weloba & Co. Advocates' move to compromise (it was termed withdrawal) of the stay application dated 30-7-02 and even as that was done she still retained her right to lodge the present more or less similar stay application. That accordingly the court should use its discretion in her favour and grant the orders sought. That the question of res judicata did not arise in respect of the application dated 30-7-02 because no issue raised by it was determined on merits. That that application had been withdrawn. That the adjournment has all along paid her rents to the plaintiff and that should act as sufficient security in the terms of O. 41 r. 4 (2) (b) Civil Procedure Rules; and that there had been no delay in bringing this application at all.

Mr. Okongo opposed the application on several points. That the defendant's application dated 30-7-2002 which was based on the same grounds and sought the same reliefs as in the present application, had not been with drawn but was compromised by the litigants who filed a consent letter dated 1-4-04 which was endorsed by the registrar and due orders were extracted. The record has it that:

> "Upon reading your consent letter dated 1st April 2004 and filed in court on 6th April 2004 signed by both parties Kapila Anjarwalla & Khanna Advocates and J.J. Weloba & Co. Advocates for the defendant:
>
> It is ordered by consent that the defendant's application by way of notice of motion dated 30th July 2002 for stay of execution be and is hereby marked as settled with no orders as to costs.
>
> Signed
>
> Deputy Registrar"

That before the letter was endorsed the parties had been before the registrar on 2-4-04 and by consent agreed:

> "1. That the defendant be and is hereby given up to 30th June 2004, to vacate and hand over possession of the suit premises to the plaintiff and to pay the plaintiff's costs as taxed herein;
>
> 2. That in default the plaintiff to proceed with execution against the defendant."

That the order above having been extracted pursuant to the consent letter and consent before court, it could not lie in the mouth of the defendant to claim that the application of 30-7-02 had been withdrawn. In fact it had been compromised and no party was complaining about it. That it remained in force and because that application was in substance similar to the present one the defendant could not go round it and get stay orders while that had been already taken care of on 2-4-04 and 6-4-04. That no conflicting orders should issue from the same court, one compromising an application for stay and another following a similar subsequent stay application, granting the stay. That even if consent orders/orders do not fit squarely in the context of res judicata, in the situation we have here an estoppel features and the defendant should not be allowed to compromise one application, make to ignore that, and be allowed to bring a similar application whereon orders (already compromised) are granted. That that way litigation shall never end and such approaches cannot be countenanced in the administration of justice.

Mr. Okongo further told the court that assuming the applicant passed the bar of estoppel (above) she had taken a very long time to bring the present stay application. That judgment herein was handed down on 23-7-02 and yet the present application has come some 2 years down the line – on 29-6-04. That the inordinate delay has not been explained and an allegation that previous lawyers were lax cannot suffice. That in fact the applicant has not demonstrated whatever substantial loss she stands to suffer if stay orders are not given. That she occupies a residential flat (the subject matter) and if she vacates it she will go on to secure other accommodation elsewhere. That instead she has stuck in the flat in question making it impossible for the plaintiff to have vacant possession thereof for the purposes of converting it to some

office space. That it is the plaintiff who has not only suffered loss and damage in this regard but that the contractor who was supposed to convert its many flats in the subject building, did all except the one occupied by the defendant and has since slapped a bill of about Sh.546,870/- (Loss of opportunity to make profit) on the plaintiff, who has to store the building material that had to be used but which is going to waste.

The court heard that the plaintiff has, with all this been denied the fruits of its judgement. And that the defendant's conduct generally does not lend itself to this court's inclination to favour her with discretion of stay e.g. that when she put up the only defence that she was a protected tenant and she filed a rent restriction cause to determine that status, she simply abandoned or ignored to pursue that course to its end and like the intended appeal which has never been filed, that rent issue remains unprosecuted.

The main features of a stay application as set out under O. 41 r. 4 (2) Civil Procedure Rules are that:

i) an applicant must demonstrate that he/she may suffer substantial loss if the stay order is not granted, and

ii) an application for stay of execution must be made without unreasonable delay and

iii) security for due performance has been given by the applicant.

Beginning with the defendant's application dated 30-7-02 which she described as withdrawn, while the plaintiff see it as compromised, this court agrees with the latter position. That application was filed with a view to obtain orders to stay execution until an intended appeal was filed and finally determined. Between 2nd and 6th April 2004, the parties wrote a consent letter and or came to court saying that the application had been settled with no orders as to costs. The letter of consent was endorsed by the registrar. The same registrar had recorded a consent by which the parties agreed that the defendant would vacate the suit premises by 30- 6-04. All those orders remain on record and validly so. No party has complained about them either by filing an application to set them aside or impeach their validity in any way. They constitute a contract and signatories to it should abide by them.

That brings us to the present application. It also seeks stay of execution of the judgment herein until the intended appeal is finally determined. It has been noted that since the filing of the notice of appeal there appears to have been no effort to file the appeal itself. There is no evidence either that the defendant pursued the registry for the certified proceedings. In any case this court having accepted that another stay application had earlier appeared on the record whereupon the parties compromised it , it is disinclined to allow the defendant to bring another application based on the same grounds and seeking the same reliefs. It simply means going round and round with litigation brought by parties who have the propensity to have ordered here which they wish to walk away from and seek similar orders on another day – at a wish and whim. Litigation is meant to come to an end and not to accommodate parties like the defendant. If what she seeks were allowed litigation could never end and all would amount to a circus, in the theatre of administration of justice. At this point the defendant should be estopped from bringing more stay applications.

However if the forgoing be wrong, then without regard to the application of 30- 7-02 or whatever the defendant says of her former lawyers, since the day judgment was delivered in July 2002 up to 29-6-04, it has taken the applicant some 2 years to apply for stay of execution. There is no satisfactory explanation, and the court does not accept and indeed there is no evidence of the alleged laxity of her previous lawyers as to why it has taken the applicant this unreasonable delay to apply for stay of execution.

Besides, it has not been demonstrated before this court that this or that substantial loss is bound to befall the applicant unless the stay orders are given. It is said that the basis of litigation here will fall away with the eviction of the defendant thereby rendering further litigation here worthless. In the circumstances of this case such cannot constitute substantial loss. Not in any other case for that matter.

Having said what is above, this court is not inclined to order the applicant to offer security for due

performance. She offered continued payment of rents as such security. It sounded rather novel and curious a security. This court understands a security in these circumstances to be an asset or something of value which a respondent can fall back on to realize what is due to it/him in the event the applicant loses an appeal or the court gives orders in favour of the respondent. It is inconceivable that continued rent payments can be termed security for due performance.

In sum this application is dismissed with costs.

Orders delivered on 21st July 2004.

J.W. MWERA

JUDGE