

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 228 OF 2004

LAVINGTON SECURITY SERVICES LTD.....APPLICANT

VERSUS

THOMAS OKEYO.....RESPONDENT

R U L I N G

The applicant filed an application by way of a Notice of Motion seeking an order for stay of execution pending the hearing of an appeal. The application was supported by an affidavit sworn by the applicant's advocate, Mr. Stephen Orina. He deposed that the judgment in Nakuru CMCC No. 1210 of 2003 which was being appealed against, was delivered on 1st March, 2004 in his absence and on 23rd March, 2004 he was served with a Notice of entry of judgment, the matter having proceeded ex parte on 2nd February, 2004. The applicant then filed an application to set aside the ex parte proceedings and judgment but the same was disallowed and thereafter he advised the applicant to pay the judgment sum. On 22nd June, 2004 the applicant filed an application for stay of execution pending an intended application for leave to appeal out of time but the same was disallowed.

He further deposed that the respondent had already proclaimed the properties of the applicant and execution was imminent if the order sought was not granted. He feared that the appeal would be rendered nugatory if the application was not granted as the respondent will not be in a position to reimburse the decretal amount.

He also deposed that the applicant was willing to abide by any conditions that may be set by this court including depositing as security the decretal sum in court. The respondent opposed the said application. In his detailed 4 page affidavit sworn on 9th September, 2004 he deposed that the application was brought in bad faith, merely calculated to deny him the fruits of a just judgment. The applicant was accused of laches by the manner in which it conducted itself both in the lower court and in this court. In the lower court, the applicant was aware of the hearing of CMCC No. 1210 of 2003 on 2nd February, 2004 as well as the date of judgment on 1st March, 2004 but instead of seeking to set aside the judgment of 1st, 2004 as soon as it knew of the same, it waited until 5th April, 2004 when it filed an application.

The affidavit in support of the application was said to be incompetent because the applicant's advocate swore the same yet some of the issues that it contained were contested matters of fact. The respondents prayed that the same be struck out. He cited several authorities in support of that contention.

I have considered all the affidavits filed herein, the authorities cited by the respondent as well as the submissions made. In an application for stay of execution pending the hearing and determination of an appeal, the applicant has to show that substantial loss would result unless the order for stay is made and that the application has been made without unreasonable delay. Substantial loss is the corner stone of an application of this nature. There was no such averment or even allegation made by the applicant or even by his counsel. That omission is sufficient to cause the dismissal of this application. And where it is alleged that the applicant is likely to suffer substantial loss, that averment should be made by the applicant himself or his representative but not by the applicant's counsel.

Counsel for the applicant in swearing the affidavit in support of the application did not state that he had been authorised by the applicant to swear the affidavit for and on its behalf. He swore the affidavit on the

basis that he was in conduct of the suit and was well versed with the facts relating to the same. In paragraph 12 thereof, he deposed that:- “Unless stay is granted the appeal shall be rendered nugatory and the respondent will not be in a position to reimburse the decretal sum.” Counsel did not disclose the source of his information. The said averment was not based on the counsel’s belief but was expressed as a factual statement of a truth which was well within the counsel’s own knowledge. If that was so, counsel then failed to prove his allegation.

In Civil Appeal No. 121 of 1993 DAVID KINYANJUI & 2 OTHERS VS MESHACK OMARI MONYORO the Court of Appeal stated that it was not desirable that advocates swear affidavits in support of their client’s applications where the deponent could not be cross examined.

The same position was also taken by Justice Ringera in KISYA INVESTMENT LTD & OTHERS VS KENYA FINANCE CORPORATION LTD HCCC No. 3504 of 1993. In my view, the affidavit should have been sworn by the applicant itself through one of its employees or Directors.

The applicant’s main argument in its appeal is that the learned magistrate erred in law in proceeding with the matter ex parte and misdirecting himself in law and fact thereby finding the appellant to be 100% liable. However, there is no reason given as to why the applicant did not attend the hearing yet there is evidence that counsel for the applicant was aware of the hearing date. The applicant’s counsel was also aware of the date of delivery of the judgment because the record shows that he arrived in the court moments after the plaintiff had been heard. The judgment was delivered on 1st March, 2004 and there is no reason why an appeal could not be filed against the judgment immediately thereafter then proceed to make the application for stay of execution pending appeal. The applicant’s counsel has conceded that there was delay in filing the appeal and the present application and in my view that delay has not sufficiently been explained. The applicant’s counsel advised his client to pay the decretal sum and the applicant itself wrote to the respondent’s advocates on 2nd April, 2003 indicating that the compensation dues would be forwarded through the District Labour Officer – Nakuru who was said to be very much aware of the case. If the applicant changed its stand on the matter thereafter it should have explained its position clearly in an affidavit. That was not done. It would, in the circumstances, appear that the appeal was an after thought. All in all, the application is lacking in merits and I dismiss the same with costs. DATED, SIGNED & DELIVERED at Nakuru this 13th day of October, 2004.

DANIEL MUSINGA

AG. JUDGE

13/10/2004