



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 76 OF 2002

MARIA EYER FELSHIN.....PLAINTIFF

VERSUS

1. ZVUBDEB HIGB DAVID

2. BARANDUN VRENELI DEFENDANTS

R U L I N G

MARIA EYER FELCHIN (the plaintiff) instituted this suit through a plaint dated the 21st August 2001 through the law firm of M/s K. Lughanje & Co. advocates, against ZBINDEN JOHN DAVID (first defendant) and BARANDUN VRENELI (second defendant). The latter (defendants) are husband and wife and are represented by the law firm of M/s Muli & Ole Kina Advocates. The plaintiff is now represented by the law firm of M/s BEN OCHIENG & Co. advocates who filed a Notice of Change of Advocates on the 13th May 2003.

The claim of the plaintiff against the defendants has been that on diverse dates between the month of May 2000 and the month of July 2001 the first and second defendants asked for a friendly loan from her so that they could build a house. She agreed to do so and gave the defendants foreign currency equivalent to KSh.2,945,580/- and further sum of Kenya currency amounting to KSh.807,250/- all totaling to KSh.3,752,830/-. She pleaded that the defendants failed, refused or have neglected to pay back this money despite demand and notice of intention to sue. She prayed for judgment to be entered against the defendants in the sum of KSh.3,752,830/-, costs of the suit and interest.

A summons to enter appearance was drawn by the plaintiff and personally served upon the two defendants who individually proceeded to enter a memorandum of appearance in person on 21st January 2003 but failed to enter defence within the statutory period prescribed by law or at all.

Thereupon on the 13th May 2003 the plaintiff filed a request for judgment in default of defence pursuant to the provisions of Order IXA Rule 9 of the Civil Procedure Rules. Judgment for the plaintiff against the defendants was duly entered as prayed on that 13th May 2003.

On the 16th May 2003 the law firm of M/s Ben Ochieng & Co. Advocates took the liberty to write to the defendants and gave them particulars of the judgment which had been entered against them. This included the principal sum of KSh.3,733,830/-, advocates' costs amounting to KSh.215,484/-, court fees of Shs.70,520, interest at 12% on the principal sum and advocates' costs amounting to KSh.212,914/20, and other sundry expenses, all totaling KSh.4,257,088/20.

The defendants were further given notice in the same letter to pay the said sum of KSh.4,257,088/20 within ten days from the date of said letter (16th May 2003). In default of that payment execution would proceed against them.

The defendants received that letter but did not make any payments. Consequently on the 18th May 2003 the plaintiff filed an application for execution of the decree for the said sum of KSh.4,257,088/20, pointing out that the mode of execution was by attachment and sale by Public auction of the defendants' property being Plot Title No. GEDE/DABASO/517.

But on the 3rd June 2003 the defendants filed a Chamber Summons under Order IXA Rules 9, 10, and 11 of the Civil Procedure Rules for stay of execution pending hearing of the said application for the setting aside of the ex-parte judgment and leave to unconditionally defend the suit.

That summons was heard by Mr. Justice Joseph Serگون who declined to set aside the ex-parte judgment and dismissed it on the 12th June 2003.

Then on the 18th June 2003 the defendants filed a NOTICE OF APPEAL against the said decision of Mr. Justice Joseph Serگون. The defendants also filed the present Notice of Motion before me on the same 18th June 2003 under Order XLI Rule 4 of the Civil Procedure Rules for Stay of Execution pending the hearing and determination of the intended appeal to the Court of Appeal.

The defendants' grounds in support of this motion are endorsed on the motion itself essentially are that an application to set aside the ex-parte judgment entered against them has been dismissed, that a Notice of Appeal has been filed against that decision, that the filing of a Notice of Appeal is all that is required under Order 41 Rule 4 (4) of the Civil Procedure Rules for purposes of an application for Stay of Execution and that indeed the plaintiff has every intention of executing the judgment sought to be set aside and unless a stay is granted the attached property will be sold and the defendant will suffer irreparable loss and damage.

The motion is also supported by the first defendant's affidavit and submissions made on their behalf by Mr. Tukero Ole Kina Advocate who has highlighted the following facts; that the plaintiff has registered a prohibitory order against the suit property; this property is the only property owned by the defendants apart from a Toyota Corolla; the first defendant gets a monthly pension of Swiss Francs 800 which is about KSh.43,500/- on the current exchange rate; that the suit property comprises 2 bungalows, a restaurant, a kitchen, residential quarters for the defendants, an office and developed grounds; that the restaurant is admittedly currently running through a lean period due to its infancy and due to the current low tourist season, a phenomenon said to occur at the Coast Province on the onset of the rains; that the low business turnover has been exacerbated by the recent travel advisories issued by the countries where the majority of tourists visiting the restaurant come from. Despite the above, their local market share is growing very well.

The defendants commissioned M/s N.W. Realite Ltd., Valuers and Property Consultants, to prepare a valuation Report of this property. This was done and a valuation report dated 9th July 2003 was filed, giving the present value of KSh.4,500,000/- based on both comparable sales and replacement costs. This valuation does not, however, take into account the substantial good will generated by the business. By submitting so the defendants are telling the court that this property can fetch more than Sh.4,500,000/- in the open market.

They have, in fact, submitted that the property market in Kenya is recovering and the general economy in the country is now looking up due to the political changes in the country leading to a change of leadership of this country. The result is that there is renewed interest in Kenya and the first area to benefit from such resurgence is the property market. Unless therefore a Stay of Execution is granted, they will suffer the loss of their only property and source of substantial income.

The plaintiff has opposed this application and has denied the contention of the defendants that the suit property is worth much and denied that the defendants stand to lose substantial damages unless a stay of

execution is granted.

Mr. Ochieng submitted that, in the first place the defendants asked for a friendly loan from the plaintiff to develop their property and they were given KSh.2,945,580/-. Upon receiving that money the defendants started to build the house which is now the subject in the Valuation Report. The defendants went back to the plaintiff and asked for another loan. The plaintiff gave them a further Sh.807,250/-. Upon receipt of this further loan the defendants carried further improvements of their property until the stage where it is today. All the developments and improvements carried by the defendants to transform their property into a going concern which it is now were financed by the plaintiff. When the defendants were asked by the plaintiff to pay back the money advanced, they have refused to do so, resulting in the filing of this suit against them. The defendants failed to enter a defence and the plaintiff is now the holder of a valid judgment in her favour. If stay of execution is granted the defendants do not stand to suffer any loss and damage. The plaintiff, who will be stopped from recovering her money, will be the greater loser. Mr. Ochieng therefore submits that the defendants have not demonstrated that they will suffer any substantial loss if execution of the judgment is not stayed.

Mr. Ochieng then submitted that, in fact, the plaintiff commissioned M/s Tysons Ltd. to carry out valuation of the suit property. This was done and the open market value has been assessed at KSh.4,200,000/-. But even with this valuation in place it is virtually impossible to realize an open market value upon a forced sale, and a public auction is a forced sale. Therefore, according to Mr. Ochieng, the suit property is decidedly inadequate for purposes of securing the plaintiff's interests, more so should the defendants intended appeal be unsuccessful.

In any case, Mr. Ochieng further points out, the kind of developments on the suit property are popular only during periods of high tourism activity on the beaches. Currently the market is still depressed due to the slump in the tourism industry. There is no evidence that the economy is recovering despite the political changes in the country and Government.

I have given due consideration to these submissions. It is however trite law that no order for stay of execution pending the determination of appeal shall be made unless:

- (i) the court is satisfied that substantial loss may result to the applicant unless the order is made.
- (ii) That the application for stay of execution has been made without unreasonable delay and
- (iii) Such security for the due performance of the decree has been given by the applicant.

There was a submission before me made by Mr. Ochieng to the effect that at this stage the superior court is also bound to inquire whether or not there is an arguable appeal and if so, would the success of the appeal be rendered nugatory if the order sought is not granted? With due respect, this test is only applicable where the Superior Court is exercising appellate jurisdiction in considering an application for stay of execution from a decree issued by an inferior court. It is also applicable where the Court of Appeal is exercising its appellate jurisdiction and is considering an application for Stay of Execution filed under Rule 5 of the Court of Appeal Rules. It does not apply to an application filed in the Superior Court under the provisions of Order 41 Rule 4 of the Civil Procedure Rules when the Superior Court is considering whether or not to stay execution of its decree pending hearing and determination of an appeal against its decision. There is yet another matter, which is relevant to this application.

This is raised in the first defendant's affidavit in support of the Chamber Summons dated the 3rd June 2003 in which the defendants had sought the setting aside of the Ex-parte judgment and leave to defend the suit. Annexed to that affidavit was the defendant's draft written statement of defence which the defendants had placed before Mr. Justice Sergon to convince the learned Judge to give them leave to defend the suit. At Clause 4 thereof the defendants pleaded thus:

"4. The defendants admit that they received the sum of KSh.2,945,580/- from the plaintiff as averred in paragraphs 4 of the plaint but deny receiving the additional sum of Sh.807,250/- from

the plaintiff, and the plaintiff is put to strict proof thereof.”

I believe I am entitled to consider this averment by the defendants. Straightaway, therefore, there is an admission by them that they received Sh.2,945,580/- from the plaintiff. It means the plaintiff would at least be entitled to judgement in that sum. Further denial to the plaintiff to realise even that which is admitted would result in substantial loss and damage to her. It would not be fair and just to the plaintiff. For these reasons I find favour with Mr. Ochieng's submissions and uphold them.

Consequently I hold that the defendants have failed to satisfy the court that substantial loss may result to them unless the order of stay of execution is made. The defendants have come to court by this application without an amount of delay. Therefore they have satisfied the second condition.

With regard to the third condition, the defendants have offered to deposit the Title Deed of the suit property into court as security. But I note that the plaintiff has already registered prohibitory order against this property.

The defendants have thus failed to bring this motion within the ambit of Order 41 Rule 4 (2) of the Civil Procedure Rules. This notice of Motion dated the 18th June 2003 is hereby dismissed, with costs to the plaintiff.

I order that any interim orders of stay be and are hereby vacated forthwith. It is so ordered.

Dated and delivered this 31st July 2003.

A.G.A. ETYANG
JUDGE