



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1930 OF 1995

NGOTHO ARCHITECTS.....PLAINTIFF

VERSUS

DEPARTMENT SECRETARY

MINISTRY OF EDUCATION SCIENCE

& TECHNOLOGY & ANOTHER.....DEFENDANT

RULING

This is the defendants application for an order that the execution of the decree herein be stay pending the hearing and final determination of an intended appeal.

The application is supported by the affidavit of Mr. Wilfred K. Kimalat - Permanent Secretary in the Ministry of Education. From the affidavit the application is grounded on the following facts:

- (i) The decretal sum is colossal and has not been budgeted for
- (ii) Applicant may not be able to recover the sum from Respondent should the intended appeal succeed
- (iii) If the decretal sum is paid the intended appeal will be rendered nurgatory

Mr. Antony Athanas Ngotho – deposes inter alia that he has accumulated wealth and that if the appeal succeeds he will be able to refund the decretal sum. He specifies the properties he owns 15.5 acres in Karen worth about 60 million, studio house along Argwings Kodhek Road worth shs 50 million and other assets.

Respondents says that those properties are registered in the name of Antony Athanus Ngotho and not in the name of the plaintiff company.

From the documents annexed by Mr. Ngotho it is true that plaintiff Ngotho Architects is company registered in the companies registry. Mr. Ngotho is the majority shareholder owning 203 shares ehile Mr. A.C Vicgas owns one share. It is also true that none of the properties mentioned by Mr. Ngotho are registered in the name of the company. They are registered in his own name.

The application is brought under order XLI Rule 4 CP Rules.

Although government is not required to provide security for satisfaction of the decree the applicant has still to show that it will suffer substantial loss if stay of execution is not granted. I agree that if applicant pays the decretal sum and appeal succeeds and respondent is not capable of refunding the decretal sum,

applicant will suffer substantial loss.

But Mr. Ngotho the majority shareholder and director of the plaintiff company has shown that he is a man of substantial means. It is true that properties registered in his name are not necessarily the properties of the plaintiff company. But as a director of the plaintiff company he can provide a guarantee for refund of the money in the case the appeal succeeds.

Moreover, the circumstances of this case show that plaintiff is still owed other monies by defendant as he is still working on the project. Para 7(b) of the Amended plaint show that judgment sum cover period from 15.7.86 to 21.2.95 plaintiff was filed 20.6.95 Mrs Madahana for the defendant informed court on 24.2.98 in the course of defending the application which resulted in the judgment that plaintiff is still doing work for defendant under the 1987 agreement. I am informed by plaintiffs counsel that defendants to date still working on the project. Prima facie therefore defendant still owes plaintiff some other monies and if the appeal succeeds defendant can set off the decretal sum from the amount that is eventually payable to the plaintiff. The dispute in the decided application was whether or not plaintiff is entitled to charge fees on pro rates basis . Although defendant contends that the method of charging fees has not been agreed it agreed it still allows the plaintiff to continue with the project instead of stopping works until the remuneration is agreed. That raises the question whether defendant has a genuine interest in an appeal.

The record shows that although Notice of Appeal was given on 30.11.99 applicant has not made genuine efforts to get to the proceedings and compile the record of appeal. In order to remove any fears that defendant will suffer substantial loss should appeal succeed and as it is public money which is involved it is just to require Mr. Ngotho to execute appropriate guarantee for refund.

For above reasons the application has no merit and is dismissed with costs to the respondent save for the following order.

That the decretal sum be paid to the plaintiff against an irrevocable guarantee to be executed by Mr. Anthony Athanas Ngotho binding him to refund the decretal sum to the defendants in event of the defendants intended appeal succeeding.

E. M. Gthinji

Judge

3.11.2000

Mr. Wachira holding brief for Mr. Machira present

Miss Odingo holding brief for Mrs Madahana present

Miss Odingo

I apply for leave to appeal.

Court: There is no need for leave to appeal as applicant has a right to file a fresh application for stay of execution in the court of Appeal

E. M. Githinji

Judge