



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 289 OF 2015

PARAGON ELECTRONIC LIMITED1ST PLAINTIFF/APPLICANT

TECHNO SERVICE LIMITED2ND PLAINTIFF/APPLICANT

GET MOBILE LIMITED3RD PLAINTIFF/APPLICANT

VERSUS

VELOS ENTERPRISES LIMITED.....1ST DEFENDANT/RESPONDENT

JOSEPH MWAURA NDEGWA AUCTIONEER T/A

J.K NDEGWA AUCTIONEERS LIMITED.....2ND DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 13th January 2020 taken out by the 1st Plaintiff/Decree Holder in which it sought for the following orders:

i. THAT the Honourable Court be pleased to vacate the orders of stay of proceedings made on 16th November 2018

ii. THAT the costs of this Application be borne by the Judgment Debtor on full indemnity basis

The motion is supported by the affidavit of Clemence Wakio.

2. When served, the Defendant/Judgment Debtor, filed the replying affidavit sworn by Rameshchandra Jayantilal Sheth to oppose the motion.

3. It is the submissions of Mr. Ataka, learned advocate for the

Plaintiff/ Decree Holder, that the Judgment/Debtor did not provide security as ordered by this court on 16th November 2018 as a condition for the grant of the order for stay of execution of the decree pending appeal.

4. It was pointed out that the bank guarantee that was provided by the Judgment/Debtor was defective. First, it is said that it was provided by I & M Bank which is bank conflicted in that it was a garnishee in these proceedings and is a Respondent in HCCA no 274 of 2018. It is also stated that I & M Bank is a Defendant in litigation with the Decree Holder in H.C.C No 8 of 2017.

5. The Decree Holder further argued that the guarantee document prompting to change the terms of the order of stay by imposing a 30 days stay on payment of the decretal sum from the time it falls due by placing a condition that the bank can only pay the decretal sum after being served with a notice.

6. It is further argued that the guarantee places a caveat and encumbrance on payment of the decretal sum by prompting to subject the same to counter claims rights of set off and defences against the Decree Holder. The learned advocate argued that the order issued on 16/11/2018 did not envisage such caveats or encumbrances on the security benefit.

7. The Plaintiff further argued that the guarantee is for a limited period of twelve (12) months without a guarantee of renewal yet the order envisages the guarantee to last until the appeal is heard and determined.

8. It was also alleged that the bank guarantee is not signed by the directors of the bank and that there is no power of attorney authorizing those who signed the guarantee provided by I & M Bank. It was also pointed out that the bank guarantee which was provided has already expired.

9. In response to the plaintiff's arguments, Mr. Muchiri learned advocate for the Judgment/Debtor opposed the motion stating that the same lacked merit. The learned advocate pointed out that the order issued by this court on 16th November 2018 did not prescribe the banks and or insurance companies that should provide the bank guarantee and or Insurance Bond.

10. It is also argued that the court did not prescribe how the aforesaid securities should be written or wound. It is further argued that the Decree holder having been served with the bank guarantors in the year 2018 did not raise any objection but waited until two years lapsed then purports to do so.

11. The Judgment debtor stated that it complied with the court order by providing a bank guarantee as security for the due performance of the decree. It is also argued that the Judgment debtor has already secured an extension of the bank guarantee for a period of a year hence it is not true that there is no valid bank guarantee.

12. The Respondent's advocate further pointed out that I & M Bank was only cited in this suit as a garnishee hence it cannot be said to be a party to the main dispute therefore the assertion that it is conflicted cannot arise.

13. Having considered the rival submissions, it is not in dispute that this court issued an order for stay of execution of proceedings pending appeal on 16th November 2018 on condition that the Judgment debtor provides a bank guarantee or in the alternative an insurance bond for Ksh. 55,365,644/75.

14. It is also not in dispute that he Judgment debtor secured a valid bank guarantee for the aforesaid decretal sum from I & M Bank lasting for a period of 12 months.

15. The Applicant has urged this court to find that the bank guarantee is provided by a bank which is conflicted because it is a party to this suit.

16. With respect, I do not think the submission can hold. It is apparent that I & M Bank has merely been cited as a garnishee. That in itself does not convert I & M Bank to be a main player in this dispute. I find no evidence that I & M Bank is conflicted, therefore it can competently issue a bank guarantee.

17. The other argument which was put forward by the applicant is that the bank guarantee issued by I & M Bank is said to be subject to payment to counter claims, rights to set off and defence against the decree holder.

18. I have carefully perused and analyzed the contents of the bank guarantee issued by I & M Bank and I am convinced that I & M Bank has expressly bound itself to pay the decretal sum of Ksh. 55,365,644/73 upon demand. The wording of the bank guarantee in my view appear to lay no conditions that will hinder the Decree Holder from accessing the guaranteed sums when required.

19. It has been stated that the bank guarantee has not been signed by the directors of I & M Bank but was instead extended by persons who may not have authority to do so. A cursory look at the bank guarantee dated 10.12.2018 will reveal that the same is executed by Winnie Hunja and A.E Odhiambo, both being acting corporate Banking. However the letter extending the validity of the bank guarantee dated 15.11.2019 was signed by Irene Situma, a Relationship Manager and Gilbert Banda a senior manager, Corporate Banking. It is clear that the aforesaid signatories are not directors of I & M Bank. What is apparent is that, those signatories are senior employees of I & M Bank who are normally authorized to execute documents binding the Bank on behalf of the corporate entity and its directors.

20. In my humble view, it is not a must for the directors to execute bank guarantees, the same can be signed senior officials who are duly mandated by virtue of their employment. In any case the applicant took an inordinately long period to challenge the bank guarantee on this ground. The applicant is guilty of laches.

21. In order to determine the question as to whether or not the signatories of the bank guarantee had authority to sign , it was incumbent upon the applicant to serve the application upon I & M Bank which the applicant failed to do. I therefore, find the ground to be without merit.

22. The Applicant had also argued that I & M Bank is a Respondent in **CA No 274 of 2018** and that it has monetary interest in the outcome of the Appeal. It is also alleged that I & M Bank is a Defendant with the Decree Holder in **H.CCC NO 8 of 2017** therefore it is conflicted. A cursory look at the annexures relating to C.A no 274 of 2018 will reveal that I & M Bank is not a Respondent as alleged. However, it is apparent that I & M Bank is a Defendant/Respondent in H.CC No 8 of 2016 where the Plaintiff Decree Holder is the Plaintiff. In my view, the aforesaid suit is separate and distinct from this instant suit. The Applicant has failed to demonstrate the prejudice it would suffer by I & M Bank giving a guarantee as it has done in this instant suit. It cannot be said by any sketch of imagination that I & M Bank is conflicted.

23. In the end, I find no merit in the Plaintiff/Applicant's motion.

The same is dismissed with costs abiding the outcome of the suit.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 6th day of May, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant