



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1034 OF 2004

BRAEBURN LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

NAIROBI CITY COUNCIL.....1ST DEFENDANT/RESPONDENT

NATION MEDIA GROUP LTD.....2ND DEFENDANT/RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 8th November 2018 taken out by Braeburn Ltd, the plaintiff/applicant whereof it sought for *inter alia* an order for stay of proceedings pending the hearing and determination of Civil Appeal no. 275 of 2018. The motion is supported by the affidavit of Mafrick Munene Ireri. When served, Nation Media Group Ltd, the 2nd defendant/respondent filed the replying affidavit of Anthony Akelo Okulo to oppose the motion. Nairobi City Council the 1st respondent herein, failed to file any response to the motion.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and the replying affidavit together with the rival oral submissions. The background of this matter can be discerned from the material placed before this court. The plaintiff/applicant filed an action against the respondents seeking for damages for defamation. The defendants filed a defence to deny the plaintiff's claim. This court heard the suit and eventually had it dismissed on 6th April 2018. The plaintiff being aggrieved by the dismissal order appealed against the decision.

3) The defendant have now filed a Bill of Costs seeking to tax their costs.

4) The plaintiff/applicant is now before this court seeking to stay proceedings pending appeal. It is the submission of the plaintiff/applicant that it would suffer substantial loss and damage if the taxation of the Bills of Costs are not halted. It is argued that the defendants may execute against the plaintiff/ applicant to recover the taxed costs.

5) In response, the 2nd defendant/respondent stated that the orders sought cannot satisfy the conditions set out in Order 42 rule 6 of the Civil Procedure Rules. The 2nd defendant further argued that the plaintiff/applicant had failed to demonstrate that it would suffer substantial loss if the order for stay of execution is denied. It was also pointed out by the 2nd defendant that the application for stay of proceedings was not filed expeditiously while the Bill of Costs was filed on 8th May 2018 whereas the notice of Appeal was filed on 5/8/2018 while the current motion was filed on 12.11.2018.

6) The 2nd defendant further pointed out that the plaintiff/ applicant did not offer any form of security for the due performance of the decree.

7) This motion is taken out pursuant to the provisions of Order 42 rule 6 of the Civil Procedure Rules. In the aforesaid

provision, the principles to be considered in determining an application for stay are set out. **First**, that an applicant must show the substantial loss it would suffer if the order for stay is denied.

Secondly, that the application for stay is made without unreasonable delay.

Thirdly, that the court should determine the security to be provided for the due performance of the decree.

8) The plaintiff/applicant has stated that it would suffer substantial loss if the order for stay of proceedings is not granted in that the defendants would have taxed their Bills of Costs and thereafter proceed to execute. It is apparent that the plaintiff/applicant is basically seeking to stay the process of taxation under Order 42 rule 6 of the Civil Procedure Rules.

9) There is no dispute that the defendants having been awarded costs of the suit and that each have filed their Bill of Costs to assess costs. The plaintiff/applicant has asked this court to halt the taxation process so that the defendants are prevented from executing to recover taxed costs. The plaintiff/applicant avers that unless the taxation proceedings are stayed it would suffer substantial loss. In my humble view, I do not think the plaintiff/applicant has clearly shown the substantial loss it would suffer if the taxation process is not halted.

10) It is clear in my mind that the plaintiff/applicant has an opportunity to participate in the taxation process and if it is unhappy with the outcome it still has a chance to challenge the same by way of a reference.

11) At the end of the process of reference, the plaintiff/applicant can still seek for an order for stay of execution to recover taxed costs pending the outcome of the appeal before the Court of Appeal. It is therefore obvious that the plaintiff/applicant will not suffer substantial loss if the order for stay of proceedings is denied.

12) The second question is whether the application for stay was filed without unreasonable delay. The 2nd defendant/respondent is of the submission that the application was filed after an unreasonable delay. It is not in dispute that the 2nd respondent filed its Bill of Costs on 8th May 2018 while the plaintiff/applicant filed the application for stay on 12th November 2018. The appeal was filed on 8th August 2018.

13) The delay appears to be about 6 months. In my view, the delay is not inordinate therefore it cannot be said to be unreasonable. The provision for security for the due performance of the decree is dependent on whether the order for stay is granted. Since the order for stay has not been granted then I will not belabor considering the issue.

14) In the end the motion dated 8th November 2018 is found to be without merit. It is dismissed with costs to the 2nd defendant/respondent.

Dated, signed and delivered at Nairobi this 12th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent