



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 36 OF 2019**

**AIA ARCHITECTS LTD FORMERLY ADVENTS**

**IN HOUSE LIMITED.....PLAINTIFF**

**VERSUS**

**YOOSHIN ENGINEERING CORPORATION.....DEFENDANT**

**R U L I N G**

1. On 22/10/2019, the Defendant approached the court pursuant to the Notice of Motion dated the 17/10/2019, under certificate of urgency, and was granted an interim order of stay of proceedings pending the hearing and determination of an application before the Court of Appeal for stay of proceedings pending the hearing and determination of the appeal from the ruling of this court dated 23/09/2019.
2. The next day, 23/10/2019 the applicant attended at the Registry and had the matter fixed for *inter partes* hearing today, 4/11/2019. From the records, it appears that the Respondent/plaintiff was served and on the 29/10/2019 filed the Replying Affidavit by Mohammed Manyanya. That Affidavit is said to have been served upon the Defendant/Applicant on 31/10/2019.
3. Today when the parties attended court to hear the Application the Applicant applied for an adjournment on the basis that they needed time and leave to file a supplementary Affidavit to highlight further development in the file which he said included the fact that the Application in the Court of Appeal has been fixed for hearing on 25/11/2019, Record of Appeal has been duly filed and the fact that subsequent to filing of the application the plaintiff/respondent has applied for and obtained a judgment in default of defence. He also prayed that in case of adjournment interim order be extended.
4. The Application was opposed by the plaintiffs' counsel on the basis that the application for stay pending the appeal, having been filed subsequent to another one filed before the Court of Appeal, was an abuse of the court process. On the merits it was said that the alleged developments are not developments to affect the proceedings here on the merits and that the Applicant was intent on delay.
5. In response to the said opposition the defendants counsel pleaded with the court his client merely seek protection for the time being before the Court of Appeal decides on the Application for stay of Proceedings pending appeal. In fact the counsel stated that there are more stringent requirements in the Court of Appeal as to suggest that here there is some laxity.
6. Being an application for adjournment, the court's discretion has been invoked. The reason advanced should show me that an adjournment if granted will enhance the ends of justice while a refusal will serve towards the ends of justice.
7. In my view the application for stay of proceedings upon which the Applicant convinced the duty judge to grant interim orders is the smoke screen while the real issue should be the application to set aside. If that is an objective observation then the new development as pointed out by the applicant have no bearing or relevant to that application and should not be the reason to adjourn this matter for another period of 28 days as proposed by the applicant. I do doubt if this court need to give orders dependent upon the proceeding before the court of appeal without being seen to overstep its mandate date. I understand this courts mandate to grant stay pending appeal to be just that, not stay pending an application.
8. I call it the smoke scream because it was the only window through which *ex parte* order could be sought and were obtained. To grant the adjournment sought would not serve the best interests of the parties who should know whether the default judgment should stand or be set aside. That should be done without undue delay. An adjournment can only result in delay.
9. I hold and find that the reasons advanced do not merit an adjournment and I therefore refuse the adjournment and direct that the matter proceeds if the counsel are ready to proceed.

**Dated and delivered at Mombasa this 4th day of November 2019.**

**P.J.O. OTIENO**

**JUDGE**