



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 14 OF 2018

SYOKIMAU BRIGHT HOMES.....APPLICANT/APPELLANT

VERSUS

VIRGINIA MWELU MUSEMBI.....RESPONDENT

R U L I N G

1. The Appellant/Applicant herein Syokimau Bright Homes Ltd has filed a Notice of Motion dated 14-2-2018 seeking for the following reliefs:

1) Spent

2) Spent

3) An order do issue suspending, lifting and/or staying execution of warrant of arrest issued against the directors of the applicant company Syokimau Bright Homes Ltd and staying execution of the decrees issued in CMCC at Machakos Numbers 502/2016, 495/2016, 501/2016, 497/2016 and 499/2016 pending the hearing and determination of the appeal against the order of the trial court being appeal number 14 of 2018 filed herein.

4) Costs be provided.

2. The application is supported by the affidavit of Wilson Munguti a director of the applicant sworn on even date and further on the following grounds:

i. The applicant has since preferred an appeal against the order of arrest by the lower court.

ii. The appeal raises high chances of success.

iii. The applicant is at danger of serving civil jail term and hence render the appeal nugatory.

iv. The appeal raises serious legal issues.

v. The constitutional rights of the applicant's directors are threatened.

vi. The applicant will suffer substantial loss if execution proceeds.

vii. The application has been made without inordinate delay.

viii. The interest of justice demands that the application be allowed.

ix. The applicant being a separate legal entry it was erroneous for the respondent to issue arrest warrants against the applicant's director without first establishing proof of fraud against it so as to call for the lifting of the corporate veil.

3. The application was strenuously opposed by the respondent who raised the following grounds of opposition:

i. The application is an abuse of the court process.

ii. The judgment against the applicant had been properly entered after it failed to enter appearance or file defence.

iii. The respondent duly followed the requisite procedure and had the applicant's corporate veil lifted and hence notice to show against its directors were subsequently issued but ignored by the directors prompting the issuance of arrest warrants.

iv. That upon execution of the arrest warrants the applicant herein admitted the respondent's claim and made a proposal on payment of the decretal sums.

v. That the applicant through its advocates issued a cheque towards settlement of the decretal sums but which bounced.

vi. The respondent maintains that she is not a member of an outfit called Kataki Holdings Ltd which entered into a venture agreement with the applicant.

4. Learned counsels for the parties agreed to canvas the application by way of oral submissions. It was submitted by Mr. Muema for the applicant that the applicant requires an order of stay of execution of the warrants of arrest pending the determination of appeal filed herein. It was submitted that the process leading to issuance of warrants of arrest was flawed and that the applicant should be allowed to prosecute its application pending before the lower court for setting aside the decree without a warrant of arrest hanging over the applicant's director's necks. It was finally submitted that the applicant is ready to abide by conditions to be imposed and already the applicant has made a deposit of security and hence an order of stay be allowed pending the determination of the appeal. It was finally submitted that the alleged admission of the debt by the applicant was obtained under duress.

Mr. Kamanda for the respondent submitted that the appeal herein is one against an order to arrest the appellant but not an appeal against a ruling declining to set aside an ex parte judgment and hence as far as the respondent is concerned, the judgment is still valid as it has not been challenged. It was further submitted that the applicant had filed application for setting aside the decree but same is still lying before the lower court unprosecuted.

It was finally submitted that the order of warrants of arrest was properly obtained since the respondent had moved the trial court for the lifting of the corporate veil and that the warrants were issued after the applicant's cheque bounced which cheque had been issued in pursuance of a proposal by applicant's directors.

5. I have given due consideration to the application and the submissions tendered in support of each party's case. The applicant's application basically seeks for an order of stay of execution of warrant of arrest pending the determination of the appeal. The same therefore is premised on Order 42 Rule 6 of the Civil Procedure Rules which specifies the circumstances under which this court may order stay of execution of a decree or order pending an appeal.

Rule 6 (2) lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending an appeal. The applicant must satisfy the court that he or she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he/she is willing to offer such security as may be ordered by the court.

6. As regards the time taken by the applicant to lodge the application, it is noted that the applicant's director was arrested on 21-1-2018 pursuant to a warrant of arrest issued after a notice to show cause was claimed to have been served. Upon the applicant's arrest aforesaid a proposal on payment of the decretal sum was reached and a cheque made in that regard but which later bounced forcing the trial court on the 6-2-2018 to issue a warrant of arrest against the applicant. The applicant filed the present application on 15-2-2018 simultaneously with the Memorandum of Appeal. It is therefore quite clear that the application has been made timeously as it was filed in less than three weeks. Hence I find the application was filed without unreasonable delay.

7. As regards the issue of whether the applicant stands to suffer substantial loss if stay is not granted, I note that the applicant has averred that it has already filed an application before the trial court seeking to set aside the decree and further that it has filed a Memorandum of Appeal which has high chances of success. The applicant further avers that it should be allowed to prosecute the application to canvass the appeal without a warrant of arrest hanging on the necks of the applicant's directors.

The applicant further is worried that its directors might end up being sent to jail yet as far as it is concerned the whole process leading to execution was flawed. From the memorandum of appeal, one of the grounds raised is that the lower court erred in law when it issued warrants of arrest against the applicant's directors without first lifting the corporate veil and further that vital statutory steps in the execution of the decree have not been complied with. On the other hand it is the view of the respondent that the issue of lifting of corporate veil as well as the entry of judgment all the way upto execution was properly followed. The said issues could be arguable grounds in the appeal and hence I find the merits or otherwise of the same could be properly determined during the hearing of the appeal.

As to whether the appeal has high chances of success, I need not delve into the same at this juncture but leave it for the hearing of the appeal. The applicant has also averred that the proposal on the payment of the decretal sums had been arrived at under duress and that it declined to honour the same upon learning that the process had been flawed. All these issues would best be determined in the appeal. I find that in the event of the appeal succeeding and without an order of stay of execution of warrants of arrest, there is high likelihood that the applicant will suffer substantial loss.

8. On the issue of security, the applicant has indicated its willingness to abide by all terms and conditions to be imposed and is ready to furnish security. Prior to the hearing of the application, this court ordered the applicant to deposit a sum of Kshs. 100,000/= into court as security. The same was duly complied with. This then signifies the applicant's readiness to offer such security as may become binding upon it for the due performance of the decree. This court made the order at the time so as to assuage the concerns of the respondent. As the applicant has already abided by the initial conditions I find the said conditions sufficient and be maintained pending the determination of the appeal.

9. In view of the foregoing, I find the applicant has satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules. The applicant's application dated 14-2-2018 is allowed vide prayer 3 thereof in the following terms:

- a) **The security of Kshs. 100,000/= earlier deposited into court be maintained pending the determination of the appeal herein.**
- b) **The costs shall abide in the appeal.**
- c) **As the only issue for determination in the appeal is about the process under which the warrant of arrest had been issued, the parties are hereby directed to set down the appeal for hearing on priority basis.**

Dated, signed and delivered at Machakos this 4th day of April, 2018.

D.K. KEMEI

JUDGE

In the presence of:

Nduva – for Muema for Appellant

Nagwere – for Kamanda for Respondent

Kituva – court Assistant