



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 126 OF 2015

TERRA CRAFT LIMITED.....APPELLANT

- V E R S U S -

BEN MUSUNDI WALIUBAH.....1ST RESPONDENT

BENSON IFEZA ANYUMBA.....2ND RESPONDENT

RULING

1. This ruling is the outcome of two motions. The first motion is dated 25.11.2015 taken out by Terra Craft Ltd, the appellant, in which it sought for *inter alia* an order for stay of execution of the order issued by Hon. Ole Keiwua, learned Principal Magistrate on 27.2.2015 vide C.M.C.C. no. 4223 of 2011. The second motion is the one dated 21.6.2016 taken out by the appellant/applicant whereof the appellant is praying for the following orders:

1. THAT this application be certified as urgent and heard ex-parte in the first instance.

2. THAT the 1st respondent be ordered to return the property of the appellant/applicant in its possession pending the hearing and determination of the appeal on such conditions as to security as the court will impose.

2. When both motions came up for interpartes hearing, this court gave directions to have the two motions disposed of together by written submissions.

3. On the first motion dated 25.11.2015, I have already stated that the main order the applicant is seeking is an order for stay of execution of the order issued by Hon. Ole Keiwua on 27.2.2015. The motion is supported by the affidavit of Moses Gicharu Kimotho. When served, the defendants namely, Ben Musundi Waliubah and Benson Ifeza Anyumba filed the replying affidavit of Ben Musundi Waliubah to oppose the motion.

4. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions. It is the submission of the appellant/applicant that exparte judgment in default of appearance was entered against it yet it was not aware of the existence of the suit because it was not served with the pleadings.

5. The appellant aver that when it was served with the decree, it moved without unreasonable delay to file an application to set aside the exparte judgment and also sought for leave to defend. The application was

heard by Hon. Ole Keiwua who allowed it on condition that the appellant deposits the decretal amount. Being dissatisfied, the appellant filed this appeal. The appellant is now apprehensive that unless the order for stay is granted the respondents may execute the decree to his detriment.

6. The respondents vehemently opposed the motion claiming that the appellant intended to use the order to avoid settling the judgment/decree with the intention of frustrating the 1st respondent from enjoying the fruits of his judgment. It is also argued that the appellant has not demonstrated the substantial loss it would suffer if the order for stay is denied.

7. There is no dispute that if the order for stay is denied the respondents will execute the decree thus rendering the appeal superfluous. This in my view will amount to a substantial loss because the appellant will have lost the chance to impugn the order giving it a conditional right to defend the suit.

8. In the circumstances I am satisfied there is need to grant an order for stay. Consequently the motion dated 25.11.2015 is allowed in terms of prayer 4 and if attachment has to take place there be a stay of sale pending appeal. Costs of the motion shall abide the outcome of the appeal.

9. The second motion is the one dated 21st June 2016 in which the appellant/applicant seeks for an order directing the 1st respondent to return the property to the appellant/applicant in its possession pending appeal. The motion is supported by the affidavit of Moses Gicharu Kimotho. The respondent filed grounds of opposition to resist the motion.

10. It is the submission of the appellant/applicant that the respondents moved with speed to attach the appellants property when it failed to provide the deposit and while the appeal against the order is pending. It is argued by the appellant that the goods attached contain sensitive information which if auctioned will lead to irreparable loss. The respondents have urged this court to find that the appellant/applicant is abusing the court process by filing this application which is near similar to the one dated 25.11.2015. With respect, I agree with the respondents that this motion amounts to an abuse of the court process. The orders sought herein are obtainable through the motion dated 25.11.2015. The motion is dismissed with costs abiding the outcome of the appeal.

Dated, Signed and Delivered in open court this 10th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent