



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 80 OF 1999

NELSON MUGUKU NJOROGE.....PLAINTIFF/RESPONDENT

- V E R S U S -

FURNCON LIMITED.....DEFENDANT/APPLICANT

RULING

1) This ruling is the outcome of the motion dated 22.11.2016 in which the defendant/applicant herein seeks for following orders *inter alia*:

1. THAT there be a stay of execution of the decree and of any further proceedings herein pending the hearing and determination of this application.

2. THAT there be a stay of execution of the decree and of any further proceedings herein pending the hearing and determination of the appeal filed in the Court of Appeal at Nairobi.

3. THAT the costs of this application be provided for.

2) The motion is supported by the affidavit of Solomon Njoroge Kiore sworn on 22nd November 2016. The plaintiff/applicant opposed the motion by filing the replying affidavit of Leah Wanjiku Muguku, the administratrix of the Estate of Nelson Muguku Njoroge, deceased.

3) When the motion came up for inter partes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

4) I have considered the rival written submissions and the grounds set out on the face of the motion and the facts deponed in the rival affidavits plus the authorities cited. The main order sought by the applicant is the order for stay of execution and further proceedings under Order 42 rule 6 of the Civil Procedure Rules, 2010.

5) In deciding such an application, the applicant must show that he/she filed the application without unreasonable delay. Secondly, that an applicant must also show the substantial loss he/she would suffer if the order for stay is declined. Thirdly, the court should consider the sort of security to be provided by the applicant for the due performance of the decree.

6) Before considering the merits or otherwise of the motion, I think it is appropriate to set out in brief the history behind the application. The defendant herein took out the motion dated 18.12.2015 in which it sought for inter alia, an order for review of this court's decision delivered on 11.12.2015. On 16.8.2016 this court dismissed the application for review. Being aggrieved, the defendant filed a notice of appeal expressing its intention to challenge the dismissal order in the Court of Appeal. The defendant has now

approached this court for a temporary order for stay of execution and proceedings pending appeal vide the motion dated 22.11.2016.

7) The record shows that the late Nelson Muguku Njoroge, had sued the defendant to recover ksh.610,843/60 in lieu of unpaid rent arrears, electricity and water bills. The defendant entered appearance and filed a defence in person.

8) The suit proceeded for hearing *ex parte* when the defendant failed to turn up in court despite having been served with a hearing notice. In the end judgment was delivered in favour of the plaintiff as prayed in the plaint.

9) I have already set out the principles to be considered in an application for stay of execution pending appeal. The first question is whether the motion dated 22.11.2016 was filed without unreasonable delay. It is the submission of the defendant/applicant that the aforesaid motion was timeously filed. The plaintiff/respondent is of the view that the motion was filed after unreasonable delay.

10) It is pointed out by the plaintiff that the contested decision was delivered on 16.8.2016. The defendant filed a notice of appeal on 22.8.2016 against the whole decision. The defendant by a notice of motion dated 22.11.2016 sought for a temporary order for stay of execution pending appeal in the Court of Appeal. The plaintiff pointed out that the defendant took long before filing an application for stay of execution of this court's judgment delivered on 23rd September 2002. In the circumstances of this case, it cannot be said that the defendant has filed an application for stay after an unreasonable delay. The fact is that the defendant has engaged the plaintiff with a plethora of applications with each application seeking for an order for stay of execution. I am convinced that the application was timeously filed.

11) The next issue to determine is whether or not the applicant has shown the substantial loss it would suffer if the order for stay of execution is denied. It is the submission of the defendant that it would suffer substantial loss if the order is denied because the plaintiff is likely to execute the decree forcing the defendant to pay the decretal sum yet the plaintiff's means, resources and assets are unknown to the defendant. The defendant is apprehensive that should the decretal sum be paid to the plaintiff there is no evidence that the plaintiff would be in a position to refund the same.

12) The plaintiff has instead stated that the entire decretal sum should be deposited in an interest earning account in the joint names of learned advocates or in court.

13) I have considered the rival arguments and it is clear in my mind that the plaintiff does not deny that it intends to execute the decree if the order for stay is not given. The plaintiff has not deemed it fit to explain its financial capability to refund the decretal sum should the appeal succeed. The defendant has said that the decretal amount is a substantial sum which if paid to the plaintiff may not easily be recovered from the plaintiff without undue hardship. In my humble view, I think the defendant/applicant has shown that it may suffer substantial loss if the order for stay of execution is denied.

14) The final principle which this court must consider is the provision of security for the due performance of the decree. The plaintiff has proposed that the decretal sum be deposited in court or in an interest earning account in the joint names of the advocates or firms of advocates. The defendant was not averse to the plaintiff's proposal.

15) In the end, I find the motion dated 22.11.2016 to be well founded. Consequently, an order for stay of execution of the decree pending appeal is given on condition that the decretal sum as of 18.11.2002 i.e ksh.757,445/20 be deposited in an interest earning account in the joint names of the advocate or firms of advocates within 30 days from the date hereof. In default, the motion dated 22.11.2016 will be treated as having been dismissed. Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 2nd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant