



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 608 OF 2015

SENTRIM CONTRACTS LTD..... APPLICANT

- V E R S U S -

JOSEPH MUTINDA MENYA.....RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 23rd February 2016 taken out by Sentrim Contracts Ltd, the Appellant/Applicant herein, whereof it sought for inter alia, an order for a temporary order FOR stay of execution of the judgement delivered on 23rd November 2015, before the trial magistrate vide Nairobi C.M.C.C no. 2476 of 2012 pending appeal. The aforesaid motion is supported by the affidavit of Paul Kibet. Joseph Mutinda Menye, the Respondent herein, filed a replying affidavit to oppose the motion. When the motion came up for inter partes hearing, learned counsels from both sides recorded a consent order to have the application disposed of by written submissions.
2. I have considered the grounds set out on the face of the motion plus the facts deponed in the supporting and opposing affidavits. I have further considered the rival written submissions. The history behind this motion can easily be deduced from the material placed before this court. The Respondent herein had filed a compensatory suit against the Appellant before the chief magistrate's court. The Respondent averred that on 20th day of January 2014, he sustained injuries in the course of employment of the Appellant. He claimed that he worked as a mason at the Appellant's site at Kangemi near Safaricom when an excavation wall for a building under construction collapsed causing soil to fall onto a metal flat form he was working from and entrapped his legs against the flat form thus inflicting injuries. The Respondent stated that the accident was caused by the negligence or breach of contract or statute by the Appellant. The Appellant filed a defence denying the Respondent's claim. The action eventually proceeded to hearing. Judgement was delivered in favour of the Respondent on 23rd November 2015 in which the Appellant was found to be 99% liable. The Appellant was awarded ksh.720,000/= covering both special and general damages. The Appellant being dissatisfied filed this appeal to challenge the decision on liability and quantum. The Appellant is now before this court seeking for an order for stay of execution pending appeal.
3. It is the submission of the Appellant that it has a meritorious appeal which may be rendered useless if the order for stay is not granted. The Appellant argued that if the judgement sum is paid to the Respondent, the possibility of getting a refund should the appeal succeed is nil because the Respondent has not explained the source of his income. This averment is stated in the supporting affidavit and is repeated in the written submissions. The Appellant has expressed its willingness to have the judgement sum deposited in an interest earning account.

4. The Respondent on the other hand has vehemently opposed the motion. He argued that if the order for stay is granted the Respondent would be denied the enjoyment of the fruits of his judgement. He also pointed out that since the case was based on the doctrine of res ipsa loquitur the chances of the appeal succeeding is minimal. The Respondent has further stated that since he will provide a bank guarantee for the judgement sum the appeal will not be rendered nugatory.
5. The principles to be considered when deciding an application for stay of execution pending appeal are well settled. First, an Applicant must show the substantial loss he would suffer if the order for stay of execution is not given.

Secondly, the Applicant must show that the application was filed without undue delay.

Thirdly, the court must take into account the provision of security for the due performance of the decree.

6. On the question as to whether or not the Applicant would suffer substantial loss if the order is denied, it is clear that this is a contested point. However, the view I take is that there is a reasonable apprehension by the Appellant that if the judgement sum is released to the Respondent, it may become extremely difficult to recover the money if the appeal succeeds. In my view should this take place, the Appellant will have suffered a substantial loss. In my humble view, the Respondent's inability to repay the decretal amount is a sufficient reason to justify a grant for stay of execution of the decree pending appeal.
7. On the second principle, it is clear to me that the motion, the subject matter of this ruling was filed without undue delay, therefore the Appellant cannot be accused of laches.
8. On the question relating to the provision of security for the due performance of the decree, I am satisfied by proposal of the Appellant to deposit the judgment sum in an interest earning account.
9. In the end, I find the motion dated 23rd February 2016 to be well founded. I grant the order for stay of execution of the decree of the trial court pending appeal on condition the Appellant deposits in an interest earning account in the joint names of the advocates a sum of ksh.694,980/= within a period of 30 days. In default, the motion shall be deemed to have been dismissed. Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 13th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent