REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 85 OF 2014

SENACA EAST AFRICA LIMITED...................... 1ST APPLICANT

JOHN WAWERU.. 2ND APPLICANT

VERSUS

DENNIS MATUNDURA CHOTI................................RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 27.03.2015 taken out by Senaca East African Ltd and John Waweru, the 1st and 2nd Appellants respectively in which the Duo sought for an order for stay of execution of the judgement/decree given by Chief Magistrate's court, Milimani vide Milimani, C.M.C.C 595of 2013 pending the hearing and determination of this appeal. The motion is supported by the affidavit of SElina Musungu Okwisya, the Appellants advocate and the supplementary of John Waweru, the 2nd Appellant. Dennis Matundura Choti, the Respondent herein, filed a replying affidavit to oppose the motion. When the motion came up for interpartes hearing, leaned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions which learned counsels duly filed and exchanged.

2. Before considering the substance of the motion, let me set out in brief the case which was before the trial court. The Respondent sued the Appellants before the Chief Magistrate's court Milimani in which he sought for damages for the injuries he allegedly suffered while in the course of the 1st Appellants employment. The appellants instructed their advocate to file a defence to deny the respondents claim. It would appear the Appellants' advocate did not file the Appellants' defence as instructed prompting the respondent to request for judgment in default of appearance and defence. The appellants advocate made an application to have the interlocutory judgment set aside. According to the Appellants advocates the application came up for interpartes hearing before the trial court on 1.10.2014 the same dates the substantive suit had been fixed for formal proof. Come 1.10.2014, the Appellants aver that the application to set aside exparte judgement was not in the court file hence the suit proceeded for hearing as a formal proof as scheduled. The Appellants being unrelenting, further instructed their advocates to file an application for review which application was heard and finally dismissed on 9.2.2015. Being aggrieved, the Appellants preferred this appeal. Pending the hearing and determination of this appeal, the Appellants are beseeching this court to grant the appellants an order for stay.

3. In the motion dated 12.3.2015 the subject matter of this ruling, the Appellants have urged this court to grant them the order for stay of execution of the decree. It is the submission of the appellants that unless the order is granted they stand to suffer substantial loss because if the Respondent is paid he will not be in a position to refund the money in case the appeal succeeds.

The Appellants also aver that they filed the motion without unreasonable delay. In paragraph 14 of the supporting affidavit, the Appellants stated they are ready and willing to abide by any conditions given by this court.

4. The Respondent on his part opposed the motion by attacking the competency of the affidavits fIled in support of the motion. It is the Respondent's submission that the supplementary affidavit of John Waweru does not indicate the true place of abode and the postal address hence it is fatally defective. The Appellants responded by stating that the objection is a mere technicality which is curable under Article 159 of the Constitution. It would appear the Appellants have admitted that the supplementary affidavit of John Waweru does not have the place abode and the postal address. I find the objection not to be merely technical nor formal. The legal position as held in **Premachand & Anor Ltd =vs= Quarry Services & others (1969) E.R 514 has not changed.** In the foresaid decision, it was held interalia

   "That the affidavits in support of the application did not disclose the source of the information contained in them and should have been disregarded."

5. However, the supplementary affidavit of John Waweru clearly states that the deponent resides or works for gain at Safari Park Hotel. If a deponent has given the physical address that is sufficient. I find no serious defect in the affidavit. The preliminary objection is overruled.

6. The Respondent has argued that the Appellants have not shown that they have an appeal with any prospect of success. With respect, I do not think is a requirement under Order 42 rule 6 of the Civil Procedure Rules.The Respondent further argued that there was an inordinate delay in filing the motion and that the Appellants have failed to offer security for costs but have instead instructed their advocate to make an undertaking. The first limb of the Respondents' argument in my view cannot stand because although there was a delay in filing the motion, the same in my view cannot be said to be unreasonable nor inordinate. The second limb of the Respondent's submission is that the Appellants have not made an offer on what forum of security they offer. I do not think this ground can be used to defeat the application fortwo reasons:

   <u>First</u> when it comes to providing security for the due performance of the decree, the court has a wide discretion to determine what sort of security to be given even where none is offered.

   <u>Secondly</u>, it is clear in paragraph 12 of the supporting affidavit that the appellants are willing to abide by any conditions imposed by this court.

7. Having dealt with the competing submissions, it is now important to determine the question as to whether the motion meets the requirements stated under Order 42 rule 6. It is a requirement that the applicant must show the substantial loss it would suffer if the order for stay is denied. The Appellants have said that if the decretal sum is given to the respondent he will not be in a position to refund if the appeal is successful. In his replying affidavit, the Respondent does not deny the allegation.The record shows that the Respondent has proclaimed the Appellant's properties in execution of the decree to recover kshs.380,865/=. This is a colossal amount of money which cannot easily be recovered. I am satisfied that if the order for stay is denied the Appellants will suffer substantial loss in the circumstances of this case. Consequently, I grant the Appellants the order for stay of execution of the decree pending appeal on condition that the decretal sum of ksh.380,865/= is deposited in an interest earning account in the joint names of the advocates firms of advocates within 60 days from the date of this ruling, in default, the motion shall stand automatically dismissed thus opening the way for the Respondent to execute without further reference to this court. Costs of the motion to abide the outcome of this suit.

Dated and delivered in open court this 2nd day of July 2015

J. K. SERGON

JUDGE

In the presence of:

N/A for the Appellant

Miss Kabita for the Respondent