



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL DIVISION

CIVIL SUIT 342 OF 1997

AZAD GULAMHUSSEIN ESMAIL.....PLAINTIFF

VERSUS

SPICERS (EASTERN AFRICA) LTD.....DEFENDANT

RULING

This is an application by the defendant, Spicers (Eastern Africa) Limited made under the provisions of Order XLI Rule 4 of the Civil Procedure rules seeking to be granted stay of execution of the decree of this court pending the hearing and determination of Court of Appeal Civil Appeal Case No. 28 of 2003. The application is supported by the annexed affidavit of John Thyaka and is based on the grounds stated on the face of the application. The application is opposed. The plaintiff has filed grounds in opposition to the application. Pravin Bowry has further sworn a replying affidavit in opposition to the application. At the hearing of this application, I heard the able submissions made by Mr P. K. Njoroge, Learned Counsel for the defendant/applicant and Mr Tariq, Learned Counsel for the plaintiff/respondent.

The facts leading to this application by the defendant are not in dispute. On the 3rd of July 2003, judgment was entered in favour of the plaintiff against the defendant for the sum of Kshs 2,300,000/=, interest and costs. For some reason, the defendant did not file the application for stay of execution soon after the delivery of the said judgment. It however appears that the defendant being aggrieved by the judgment and the decree of this court had filed an appeal against the said decision. The appeal which has already been filed is yet to be heard by the Court of Appeal. In the submission made before court and the affidavit sworn by John Thyaka, the defendant has contended that the sum of Kshs 2,300,000/=, if paid to the plaintiff before the hearing of the appeal, would render the appeal filed nugatory. The defendant has further contended that if it were to succeed on its appeal, it would not be able to recover the amount ordered to be paid to the plaintiff as the plaintiff has relocated to Canada and was no longer resident within the jurisdiction of this court. The defendant further contended that the appeal proposed to be filed by defendant to the Court of Appeal had high chances of success.

In response Mr Tariq argued that the defendant had brought the application under the wrong provisions of the law. He submitted that from the plain reading of the application, the applicant had made the application as if he was invoking the provisions of rule 5(2)(b) of the Court of Appeal rules. Learned Counsel argued that the application filed by the defendant did not fall within the ambit of Order XLI Rule 4 of the Civil Procedure Rules. He further argued that the defendant had filed the application after undue delay and therefore did not deserve to be granted the orders of stay of execution. He further argued that the defendant had not proved that it would suffer any substantial loss if the amount ordered in the decree is paid to the plaintiff. It was further contended on behalf of the plaintiff that the defendant had not made any offer to deposit security if stay of execution were to be granted. Finally Learned Counsel submitted

that the defendant had deponed that it had a strong financial base, therefore if they were ordered to pay the decretal amount, its operations would not be affected. The plaintiff urged the court to dismiss the defendant's application.

I have considered the rival arguments made before me by the counsel for the plaintiff and the defendant. I have also carefully read the pleadings filed by the parties to this application. I have also considered the decided cases that were relied on by the counsel for the plaintiff. The conditions governing the grant of stay of execution of a decree or order is provided for under Order XLI Rule 4 of the Civil Procedure Rules. In summary the applicant is, in the first instance, required to establish sufficient cause to warrant the court to grant stay of execution. The applicant is also required to fulfil certain conditions as set out in Order XLI Rule 4(2) of the Civil Procedure Rules which provide that;

“No order for stay of execution shall be made under sub rule(1) unless

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay: and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

In the current application, the applicant has argued that he would suffer substantial loss if the amount ordered in the decree is paid to the plaintiff. The defendant is justifiably apprehensive that if the said sum is paid to the plaintiff, the likelihood of recovery of the said amount over Kshs 5,000,000/=, (which the defendant argues that is a colossal sum) would be remote as the plaintiff is no longer resident within the jurisdiction of this court. The plaintiff's counsel has not denied the assertion by the defendant that the plaintiff has relocated to Canada. I therefore hold that the defendant has established that he would suffer substantial loss due to the relocation by the plaintiff to his new place of abode. As it were, the plaintiff is not within the jurisdiction of this court. If no stay of execution were granted, the appeal filed by the defendant would be rendered nugatory as it would be impossible to recover the sums paid to the plaintiff who is already out of the jurisdiction of this court.

Having held that the defendant has established that it would suffer substantial loss, the other issue left for the determination by this court is whether the defendant should be ordered to deposit a security for the due performance of the decree of this court. As stated earlier in this ruling, the defendant has conceded that it did not file the application for stay of execution without undue delay as required by the provision of Order XLI rule 4(2)(a) of the Civil Procedure rules. The explanation offered by the defendant does not wash. It seems that the defendant took no action in the misguided belief that the plaintiff would not execute against it, just because the defendant had filed an appeal to the Court of Appeal. The defendant did take action even after the plaintiff had issued several notices. The defendant was galvanised into action only when the plaintiff proclaimed its properties in execution of the decree of this court. The defendant has been indolent, and in the normal course of things, this court should have declined to grant the order of stay of execution.

However for the interest of justice to the parties to this case, I will grant stay of execution of the decree of this court pending the hearing of the appeal filed at the Court of Appeal under the following conditions:-

(i) The defendant shall deposit the sum of Kshs 5,197,883/= in a fixed deposit account to be maintained in a reputable bank in the joint names of the plaintiff's and the defendant's advocates on record within twenty one (21) days of today's date.

(ii) The defendant shall pay the Auctioneers charges to be agreed or taxed. This is because the execution process was commenced and effected due to the defendant's indolence.

(iii) The defendant shall pay the plaintiff the costs of this application which I assess at Kshs 15,000/=. The said amount shall be paid within twenty one (21) days of today's date.

In default of the defendant depositing the said sum ordered in (i) and paying the sum ordered in (iii) above, the stay granted herein shall automatically lapse and the plaintiff shall be at liberty to proceed with execution against the defendant without further reference to this court.

It is so ordered.

DATED at NAKURU this 1st day of July 2005.

L. KIMARU

JUDGE