



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 102 OF 2015

GITONGA KITHINJI MURIUKI.....PLAINTIFF

VERSUS

ELEONORA COZZI.....1ST DEFENDANT

SUNPALM LIMITED.....2ND DEFENDANT

RULING

1. By this application dated 9th November 2017, the Defendants herein pray:-

4. That the proceedings in this matter be stayed pending the hearing and determination of the Appeal of the Ruling made by (this Court) on 19th September 2017.

5. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by Gicharu Kimani Advocate and is premised on the grounds:-

i) That the Plaintiff had filed an application dated 2nd December 2016;

ii) That the said application was allowed on 19th September 2017 in the following terms:-

a) Judgment is hereby entered against the Defendants jointly and severally for a sum of Kshs 2,600,000/- with costs.

b) The rest of the Plaintiff's claim to proceed to full hearing in the usual manner.

iii) That being dissatisfied with the said Ruling, the Defendants have filed an appeal against the same; and

iv) That it is in the interest of justice that the application be granted.

3. Responding to the said application, the Plaintiff has by a Replying Affidavit filed herein on 21st November 2017 termed the application as one that is unmerited, ill-advised and misconceived. It is the Plaintiff's case that the present application is made in bad faith and that it is solely aimed at delaying payments due to the Plaintiff.

4. The Plaintiff avers that Judgment was only entered for a sum of Kshs 2,600,000/- which sum was not in dispute and the remainder of the Plaintiff's claim is to be subjected to full hearing. The Plaintiff further avers that the Defendants have delayed payments of the sums due for more than five years and that the delay has come at a great cost to the Plaintiff.

5. The Plaintiff therefore submits that the grant of the orders sought herein would be unjustifiable as the same would greatly prejudice and disadvantage the Plaintiff.

6. Both parties herein filed Written Submissions. I have considered the same. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless:-

a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delays; 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.

7. In the matter before me, the Defendants/Applicants are aggrieved by the decision of this Court made on 19th September 2017 wherein the Court directed them to pay a sum of Kshs 2,600,000/- to the Plaintiff pending the hearing and determination of the rest of the Plaintiff's case. According to the Defendants, they are dissatisfied with the said Ruling and have, on 27th September 2017 filed a Notice of Appeal in Court. It is accordingly their position that it would be in the interest of justice that the proceedings herein be stayed.

8. The facts leading to the Ruling delivered on 19th September 2017 were rather simple and straightforward. The Plaintiff claims that he lent a friendly loan of Kshs 2,000,000/- to the Defendants sometime on 29th February 2012. The said sum was to be paid back within 20 days with interest of Kshs 600,000/-. To secure the said loan, the 1st Defendant offered the Plaintiff two security titles in the name of the 2nd Defendant for land Parcel No. Kilifi/Jimba/670 measuring approximately 1.69 Ha. In addition the 1st Defendant issued the Plaintiff with a Post-dated cheque of Kshs 2,600,000/-.

9. In the application dated 2nd December 2016 leading to the impugned Ruling, the Plaintiff had sought for a sum of Kshs 12,800,000/- being the aggregate sum of the money said to have been loaned to the Defendants plus an additional accrual of interest at 5% per annum. In the alternative, the Plaintiff sought Judgment to be entered for the sum of Kshs 2,600,000/- being the sum said to be admitted by the Defendants as shown by the cheque they issued to the Plaintiff dated 20th March 2012.

10. Upon hearing the parties, it was my finding that the Defendants admitted receiving the loan from the Plaintiff and issuing the said cheque hence the decision to enter Judgment for the sum of Kshs 2,600,000/- pending the hearing of the rest of the claim.

11. As it were, the Defendants do not state anywhere in their application that they will suffer any substantial loss if the stay is not granted. Nor do they allude to the possibility of the appeal being rendered nugatory if the orders sought herein were not granted.

12. From the record, I note that the Defendants were represented by Counsel on 19th September 2017 when the Ruling sought to be appealed was delivered. They did not request for a stay nor file their request for stay until the 9th of November 2017, almost some two months late. There was no explanation given why it took that long to file the application. I think in the circumstances of this case that was unreasonable delay. As the Plaintiff narrates in his affidavit, it is apparent that the Defendants are bent on delaying the payment for an indefinite period to the Plaintiff's prejudice and detriment.

13. Accordingly and for the foregoing reasons, I did not find any merit for the application dated 9th November 2017. The same is dismissed with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE