



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E663 OF 2021

DIRECTLINE ASSURANCE CO. LIMITED.....APPELLANT/APPLICANT

-VERSUS-

SHADRACK ITUMO MUTUKU.....RESPONDENT

RULING

1. The appellant/applicant has taken out the Notice of Motion dated 8th November, 2021 supported by the grounds laid out on its face and the facts stated in the affidavit of Kelvin Ngure, the Deputy Claims Manager of the applicant. The order being sought is for a stay of execution of the judgment and decree and consequent orders arising from CMCC NO. E7134 OF 2020 pending the hearing and determination of an appeal against the ruling delivered on 17th September, 2021 in the abovementioned suit.
2. The respondent swore a replying affidavit on 18th November, 2021 in retort to the Motion.
3. The Motion was canvassed through brief oral arguments made by the parties' respective advocates, where they mostly relied upon the averments made in the supporting and replying affidavits.
4. I have considered the grounds laid out on the body of the Motion; and the facts deponed in the supporting and replying affidavits.
5. As noted earlier on, the substantive order sought is that of a stay of execution pending appeal. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions in determining an application for stay.
6. The first condition states that the application must have been made without unreasonable delay. Kelvin Ngure states in his supporting affidavit that the instant Motion has been brought without unreasonable delay, whereas the respondent retorts by stating that the applicant has been indolent in bringing the application.
7. From my study of the record, it is apparent that impugned ruling was delivered on 17th September, 2021. I note that there has been a lapse of about two (2) months between the date of delivery of the ruling and the bringing of the instant Motion. I am therefore satisfied that there has been no unreasonable delay here.
8. The second condition concerns the substantial loss likely to be suffered by an applicant if the order for stay is denied. In his supporting affidavit, Kelvin Ngure states that unless an order for a stay of execution is granted, the respondent is likely to proceed with execution of the decree thereby rendering the appeal nugatory and resulting in irreparable loss to the applicant.
9. The deponent further states that upon execution, the applicant may not be able to recover the decretal sum in question from the respondent.
10. The respondent on his part states that the applicant has not demonstrated the substantial loss it stands to suffer and that the instant Motion is purely aimed at delaying his entitlement to enjoy the fruits of his judgment and hence no substantial loss has been demonstrated by the applicant.
11. The legal position on who has the burden of proof on the issue of refund of the decretal sum was considered by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it reasoned as follows:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential

burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

12. In the absence of anything to indicate or ascertain the respondent’s financial capabilities and upon considering the competing interest of the parties as well as the interest of substantive justice, I am satisfied that the applicant has shown to the satisfaction of this court the likelihood of substantial loss occurring should the order for a stay of execution be denied.

13. Under the final condition which is the provision of security for the due performance of such decree or order, the applicant has indicated its readiness and willingness to comply with the conditions to be set by this court, whereas the respondent urges that 2/3 of the decretal sum be paid to him while the remainder be deposited in a joint interest earning account.

14. In making an order on the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondent has not shown by way of credible evidence, any pressing need that would require payment of part of the decretal amount to him at this stage.

15. In the end, I will allow the Motion dated 8th November, 2021 and hereby order that there shall be a stay of execution of the judgment delivered on 30th April, 2020 in Milimani CMCC no. 6309 of 2017 and giving rise to the ruling delivered by the trial court on 17th September, 2021 in Milimani E7134 of 2020 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties’ advocates/firm of advocates within 30 days from today, failing which the order for stay shall automatically lapse. Costs of the Motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

.....for the Respondent