



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E192 OF 2020

DIRECTLINE ASSURANCE COMPANY LIMITED....APPLICANT

-VERSUS-

WILSON WANYOIKE NJOROGE.....RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated 12th January, 2022 supported by the grounds set out in its body and the facts stated in the affidavit of Julius Orege. The applicant sought for an order for stay of execution of the judgment/decree delivered by the court on 30th December, 2021 and amount of Kshs.1,025,600/= deposited in joint interest earning account continues to be as security pending the hearing and determination of an intended appeal.

2. The respondent put in a replying affidavit sworn by advocate Joseph Makumi on 24th January, 2022, to oppose the Motion.

3. When the Motion came up for interparties hearing before this court, the parties respective advocates chose to rely on the averments made in their respective affidavits.

4. A brief background of the matter is that the respondent instituted a suit against the appellant seeking mandatory injunction compelling the appellant to pay the entire amount in HCC 193 OF 2016 and in effect refund the respondent the sum of Kshs.1,025,600 plus costs which led to the appeal HCCA No.192 of 2020.

5. The said appeal was dismissed with costs and being aggrieved by part of the aforementioned judgment, the applicant desires to challenge it on appeal with the Court of Appeal.

6. The guiding provision in considering an application seeking an order for a stay of execution is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for stay:

- a. The application should have been brought without unreasonable delay;**
- b. The applicant must demonstrate the substantial loss to be suffered; and**
- c. There must be provision of security for the due performance of the decree or order being appealed against.**

7. On the first condition, the applicant avers and submits that the Motion has been timeously filed. From my study of the record and the impugned judgment, I note that it was delivered on 30th December, 2021 which is barely two weeks prior to the filing of the instant Motion. I therefore find that there has been no unreasonable delay in bringing the Motion.

8. Under the second condition on substantial loss, it is apparent from the Motion that the applicant is anxious that unless an order for a stay of execution is granted, the respondent will execute and the applicant's application will be rendered nugatory and they will stand to suffer irreparable loss and damage.

9. The applicant avers that they stand to suffer substantial and irreparable loss and damage as there is a likelihood that they may be proclaimed yet they have appealed to this court which appeal has a likelihood of success.

10. On the other hand the respondent states that the applicant has failed to demonstrate what substantial and irreparable loss it will suffer if the decretal amount is settled as mere averment without any evidence does not amount to loss.

11. I am also alive to the reality that unless the applicant is granted an opportunity to defend its case, it stands to be condemned unheard, thereby undermining the dictates of substantive justice and violating the applicant's constitutional right to be heard.

12. From the foregoing, I am convinced that the applicant has reasonably shown the substantial loss it may suffer should the order for a stay of execution be denied.

13. In respect to the third and final condition, the applicant avers that the amount Kshs.1,025,600/= being the decretal sum deposited by the applicant in a joint interest earning account continue to be held as security for intended appeal in the Court of Appeal.

14. In the end therefore, the Motion dated 12th January 2022 is found to be meritorious thus giving rise to issuance of the following orders:

i. There shall be a stay of execution of the ruling delivered on 28th April, 2020 and all consequential on the condition that the amount of Kshs.1,025,600/= deposited in a joint interest earning account continues to be held as security for this appeal and the intended Appeal in the Court of Appeal.

ii. Costs of the Motion to 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 Applicant

..... for the Respondent