



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E566 OF 2021

ZEBRA LOUNGE LIMITED.....1ST APPELLANT/APPLICANT

PETVENKATA SATHYA

NARAYANA ABOTULA.....2ND APPELLANT/APPLICANT

SRUNGARAPU RAJA SEKHAR.....3RD APPELLANT/APPLICANT

-VERSUS-

MODWAY INVESTMENT LIMITED.....RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 11th February, 2022 taken out by the 1st, 2nd and 3rd appellants/applicants and supported by the grounds set out on its body and the facts stated in the affidavit of the 2nd applicant. The order being sought is for a stay of execution of the judgment delivered on 16th August, 2021 in Milimani CMCC No. 9318 of 2017 pending the hearing and determination of the appeal against the aforesaid judgment.
2. The respondent opposed the Motion by putting in the replying affidavit sworn by Catherine Wanderi on 21st March, 2022.
3. At the interparties hearing of the Motion, the parties' respective advocates relied on the averments made in the respective 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 respectively.
5. I reiterate that the sole order being sought in the present instance is that of a stay of execution of the decree pending appeal.
6. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for stay.
7. The first condition provides that the application must have been made without unreasonable delay. On the one part, the applicants are of the view that the instant Motion has been brought without unreasonable delay, while the respondent on the other part states that there has been inordinate delay in bringing the Motion.
8. From my perusal of the record, it is apparent that the impugned judgment; a copy of which is annexed to the Motion; was delivered on 16th August, 2021 while the Motion was filed about six (6) months later on the 11th day of February, 2022. In my view, while there has been a clear delay, I do not find the same to be unreasonable in the circumstances.
9. The second condition touches on the subject of substantial loss to be suffered by an applicant.
10. On the part of the applicants, it is stated that unless an order for a stay of execution is granted, the respondent will likely move to execute the decree, thereby rendering the appeal nugatory.
11. The respondent retorts by stating that no substantial loss has been demonstrated by the applicants and further states that being the registered owner and landlord of Capital Centre, it will be in a position to refund the decretal amount to the applicants in the event that the appeal succeeds.

12. Upon my perusal of the record, I note that the decretal sum which stands at Kshs.12,586,387.58 is quite colossal in nature. In the absence of any credible evidence tendered to indicate or ascertain the respondent's financial standing and ability to refund the aforementioned decretal sum, I am satisfied on the likelihood of substantial loss resulting to the applicants if 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 applicants have indicated their readiness and willingness to comply with the conditions to be set by this court. The respondent did not touch on this condition.

14. Upon considering the decretal amount in question and in the absence of any suggestions by the parties, I am of the view that an order for deposit of the same in a joint interest earning account would constitute the most suitable security.

15. Consequently, the Motion dated 11th February, 2022 succeeds, giving rise to the following orders:

i. There shall be an order for stay of execution of the judgment delivered on 16th August, 2021 on the condition that the applicants deposit the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 60 days from today, failing which the order for stay shall automatically lapse.

ii. Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
1ST DAY OF APRIL, 2022.**

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st, 2nd and 3rd Appellants/Applicants

..... for the Respondent