



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 270 OF 2013**

**BONIFACE NGURE NDUNGU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BESTLADY COSMETICS SHOP LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. Before this court is the notice of motion dated 18/12/2019 brought pursuant to *Order 42 Rule 6 (1) (2) of the Civil Procedure Rule 2010 and Section 3A and 63(e) of the Civil Procedure Act* seeking the following orders:

**a) Spent**

**b) That the honorable court be pleased to stay execution of the judgement and subsequent decree arising out of this matter until the appeal filed by the defendant/applicant at the court of appeal is heard and determined**

**c) That costs of this application do abide the outcome of the appeal.**

2. The application is based on the grounds stated on the face of the motion and the facts deponed in the supporting affidavit of Peter Njoroge Karanja. It is stated by the defendant/applicant that judgement in this case was delivered on 29/11/2019 in favour of the plaintiff and against the defendants/applicant in the sum of Ksh. 23,118,300.

3. Being dissatisfied by the judgement, the defendants lodged a notice of appeal dated 9/12/2019 expressing its intention to challenge the decision before the court of appeal.

4. The motion is opposed by the plaintiff/respondent who filed a replying affidavit. In the replying affidavit he swore that the defendant had not met the ingredients of Order 42 Rule 6 (2) of the Civil Procedure Rules. The Plaintiff/respondent is of the submission that for the broad interest of justice the order for stay should be granted on condition that the decretal sum should be deposited in an interest earning account in the joint names of the advocates and/or firms of the advocates within 30 days.

5. I have considered the rival depositions and the submissions together with the authorities cited thereof. The application is brought pursuant to the provisions of Order 42 Rule 6 which states as follows;

**“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) 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 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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.**

6. In view of the foregoing provisions of the law, it is important to note that stay of execution of the decree pending appeal is conditional.

7. In the case of **Antoine Ndiaye vs. African Virtual University [2015] eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006** Gikonyo J. held inter alia;

**“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:**

**a) The application is brought without undue delay;**

**b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and**

**c) 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”.**

8. On the first issue on whether the application was brought without undue delay. On perusal of the record judgement was entered in favour of the plaintiff/respondent on 29/11/2019. The applicant/respondent filed a Notice of appeal on 9/12/2019 and thereafter filed this motion seeking for an order for stay of execution on 18/12/2019. The applicant therefore filed his application timeously and therefore fulfilled the first ingredient.

9. On substantial loss it is the defendant/applicants submission that if the order sought herein is not granted and with the present economic disruption facing the world he faces a real risk of suffering a huge financial loss. He is of the view that the decretal sum which stands at Ksh. 23,118,300 is immense and execution of the same would disrupt business operations. It was his argument that the appeal touches on the substratum of the case including cost therefore it would be unreasonable for the defendant/applicant to settle the decretal sum before the determination of the appeal.

10. In **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331** Ogola J held that;

**“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”**

11. Similarly, in **Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto** it was held that:

**“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”**

12. It is possible that if the appellant/applicant is required to pay the decretal sum at once, the applicant may go under since the amount is colossal. I am satisfied that the applicant has shown the substantial loss it would suffer if the order for stay is not granted.

13. On the final issue of security, it was the plaintiff/respondent argument that the defendants/applicant should be called upon to secure the due performance of the decree by depositing Kshs 40,000,000 to an interest earning account with reputable bank in the joint names of the parties' advocates.

14. The court in **Kenya Tanzania Uganda Leasing Co. Ltd v. Mukenya Ndunda (2013) eKLR** stated as follows on the issue of security:

**“As I stated in the case of KENYA COMMERCIAL BANK LIMITED vs. SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced...”**

15. After balancing the competing interest of the parties in this matter, I think it is fair to grant the order for stay on condition that the

defendant provides tangible security for due performance of the decree. The upshot is that the application is allowed and I make orders as follows:

- a) **There be stay of execution of the judgement dated and delivered on 29/11/2019**
- b) **On condition that the applicants deposit the sum of Kshs 23,000,000 in a joint interest earning account to be held by advocate for the applicants and respondents with a bank of repute within 30 days from the date of this ruling.**
- c) **In default the orders for stay of execution granted shall stand automatically vacated**
- d) **Costs shall abide the outcome of the appeal.**

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 19<sup>th</sup> day of March, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant