



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.1 OF 2013

DISNEY INSURANCE BROKERS.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

1. After delivery of a **Ruling** in respect of an application dated **19th May, 2021** and **11th June, 2021**, **Mr. Gikandi** Counsel for the Plaintiff applied for stay of orders granted in relation to the said Ruling.

2. According to **Mr. Gikandi**, the Plaintiff intends to file an appeal against the Ruling hence the need to preserve the subject matter of the appeal, being the monies held in the three accounts. He argues that if stay is not granted, the Defendant is going to withdraw all the monies in those accounts, and the intended appeal will therefore be rendered nugatory.

3. In response thereof, the Defendant's Counsel, **Mr. Mbogo** opposed the application and submitted that the court delivered a negative Ruling for which all orders for stay cannot issue hence incapable of being stayed. It also argued that the Plaintiff has not met the threshold for the grant of stay as provided under **Order 42 rule 6** of the **Civil Procedure Rules**. He submitted that no substantial loss will occur if stay is not granted and neither will the intended appeal be rendered nugatory since the Defendant is a constitutional body and its accounts will continue to be in existence and subject matter will not be lost as the County Government will continue to receive monies from the National government.

4. In regard, **Mr. Gikandi**, Counsel for the Plaintiff submitted that in the alternative the Defendant be allowed to operate the subject accounts with a reservation of Kshs.118,460,325 or be directed to furnish security in the sum of the accounts of the decretal sum, since they have been unable to pay the Plaintiff since then.

5. Having set out the respective parties positions, I take the view that the Ruling which was delivered by the court merely involved the Plaintiff's application dated **19th May, 2021** and none of the parties was directed to do or refrain from doing something. It is trite and going by precedents an application for stay of execution pending appeal requires that there be a positive requirement or order that is capable of being stayed. In the case of In the case of **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR**, the Court of Appeal (Kantai J.A) held as follows: -

“...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose’ (emphasis supplied)”

6. Further, in the case of **Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah [2008] eKLR**, whilst considering whether an order of stay of execution can be granted in respect of a negative order the Court of Appeal held as follows:-

“...The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only...”

7. What I understood from the Plaintiff's advocate to be saying in his application is that the garnishee order nisi should be held in subsistence pending the intended appeal.

8. In my view, were the court to hold as such, the garnishee order nisi would not have any legs to stand on. The dismissal of the application is a negative order as opposed to a positive order which imposes a certain obligation on either party. It therefore follows that a negative order is incapable of being stayed as the Applicant seeks. The application for stay is therefore declined.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 28TH DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gikandi counsel for the Plaintiff/Decree Holder

Mr. Mbogo Counsel for Defendant/Judgment Debtor

Court Assistant - Bancy