



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.E072 OF 2021

DIRISA NAGARA KEJELA.....APPELLANT

VERSUS

JEWAR HOLDING LIMITED.....RESPONDENT

RULING

The application dated 13th August, 2021 seeks the following orders:-

1. Spent

2. Spent

3. Spent

4. THAT the Honourable Court be pleased to review and/or vary the orders of 6th July, 2021 requiring the deposit of the entire Decretal sum of Kenya shillings Three Hundred and Twenty Five Thousand (Kshs.325,000/-) in a joint interest earning account in the name of the parties Advocates on record within Forty five (45) days and in place be pleased to allow the deposit of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) or an alternative security in the nature of a Personal Guarantee to satisfy the Decree pending the hearing and determination of the Appeal.”

The applicant’s affidavit sworn on 13th August, 2021 supports the application. The respondent filed grounds of opposition to the application on 18th August, 2021. Counsel for the applicant urged the court to review the earlier orders which granted conditional stay of execution. The applicant has already deposited Kshs. 100,000 and would like that amount to be the security pending the hearing and determination of the appeal. The court was convinced that the orders of stay were merited. The applicant has already applied for the typed proceedings. He is unemployed and the sum of Kshs.325,000 ordered by the court to be deposited as security is quite high.

Counsel for the respondent opposed the application. It was submitted that the applicant is a foreigner who was collecting rent from fellow Ethiopians in the respondent’s premises and was charged in court for stealing. The decree is for over Kshs.490,000. According to the respondent, the security was imposed so as to ensure that the decree holder is not left babysitting a barren decree as such the security is not a matter of concessions on discounts.

Analysis and determination

Essentially, the applicant contends that he is not able to raise the security of Kshs.325,000 ordered by the court. The applicant in his supporting affidavit indicate that he is a man of straw and is not financially well endowed to easily raise the security. He annexed a one-month translation agreement with the international organization for migration (IOM) office whereby he was to earn Kshs.400 per hour.

This is a second application. The applicant filed the first application dated 19th February 2021 seeking orders of stay of execution pending the determination of the appeal. That application was supported by the applicant’s affidavit sworn on the same date. Paragraph 8 of that affidavit reads:-

“THAT I am ready to abide by any conditions as to security that this Honourable court may deem fit and just to impose in the circumstances.”

The trial court ordered the applicant to pay the respondent Kshs.325,000. The applicant is a foreigner and has no known assets in Kenya. It is not the intention of the court to make it difficult for the applicant to pursue his appeal. The respondent contend that the debt accrued because the appellant took the rent from the respondent's tenants but failed to remit it. The applicant is seeking the court's discretion to review its earlier orders. The nature of the dispute calls for the imposition of the security. The applicant is a judgment debtor. He cannot call upon the court to impose what he can afford as security. What if the appeal is dismissed? Would that mean he will not settle the decretal sum due to his weak financial position. The orders to pay the sum of Kshs.325,000 were made on 6th July, 2021. It's now over five months yet only 45 days were granted.

I do appreciate the applicant's financial difficulties but the court has to weigh the interest of both the appellant and the decree holder. The respondent contend that it is in a position to refund the money should the appeal succeed. The money is not being paid to the respondent but will be deposited in a joint account. I do find that the applicant's right to pursue his appeal will not be defeated if he deposited the sum of Kshs.325,000 in the joint account. He has deposited Kshs.100,000 and should deposit the balance.

The upshot is that the application dated 13th August 2021 lacks merit and the same is hereby dismissed. Costs shall follow the outcome of the appeal.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2021

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S. CHITEMBWE

JUDGE