



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 440 OF 2013**

**KELVIN KINYUA MACHARIA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**AISHA MOTORS DEALERS LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**WASHINGTON NJOGU WARUGURU.....2<sup>ND</sup> DEFENDANT**

**FRANCIS NJOROGE.....3<sup>RD</sup> DEFENDANT**

**FAMILY BANK LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 6<sup>th</sup> May, 2019 taken out by the 1<sup>st</sup> defendant/applicant in which it sought for the substantive order for a stay of execution of the judgment delivered by this court on 4<sup>th</sup> April, 2019 pending the lodging, hearing and determination of an intended appeal to the Court of Appeal.
2. The Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of the applicant's Managing Director, *Safaraz Mohamed*.
3. The deponent asserted that being aggrieved by the aforesaid judgment, the applicant desires to challenge the same on appeal and has filed a Notice of Appeal in that regard.
4. The deponent further contended that following an oral application made by the applicant's advocate, this court granted a stay of execution for 30 days which lapsed on 4<sup>th</sup> May, 2019.
5. He went on to explain that unless the order for stay being sought is granted, the applicant will suffer substantial loss in the sense that it may not be able to recover the decretal sum from the plaintiff/respondent in the event that the appeal succeeds, thus rendering the appeal nugatory.
6. The deponent also stated that the applicant is ready and willing to abide by the orders that this court may give concerning the provision of security for the due performance of the decree.
7. In opposing the Motion, the respondent put in a replying affidavit contending that he is a man of means and therefore capable of refunding the decretal sum. On this note, the respondent explained that he is a Software Engineer and a shareholder and director at Fortis Innovation Limited which company deals with medical and health software. The respondent further contended that the company has a turnover profit of Kshs.300,000/ per month translating to a yearly profit of Kshs.3,600,000/.
8. It was also the respondent's assertion that he owns a Subaru Legacy KBK 781F.
9. Finally, the respondent maintained that the application is an abuse of the court process and ought not to be granted.
10. *Safaraz Mohamed* rejoined with a supplementary affidavit stating that the respondent has not availed any evidence to support the profits, if any, made by the aforementioned company, adding that the value of respondent's motor vehicle mentioned hereinabove would not sufficiently cater for the decretal amount.
11. The deponent also stated that the applicant has offered to give a bank guarantee for half the decretal sum as an act of goodwill.

12. The Motion was canvassed by way of written submissions which were later highlighted before this court. On its part, the applicant submitted that the application has been brought without unreasonable delay.
13. It was also the applicant's reiteration that it stands to suffer substantial loss unless an order for stay of execution is granted, given that the respondent has not demonstrated his capability to refund the decretal amount should the need arise and further considering that the decretal sum is of a colossal nature. In this respect, the applicant placed reliance on *inter alia*, the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** where the court held that in a case involving a money decree, substantial loss would arise where the respondent is unable or incapable of refunding the decretal sum should the appeal succeed.
14. It was also the applicant's submission that in considering whether to make an order for the provision of security, this court ought to take into account the position held in **Sheila Akinyi Marco & 2 others v Michael Chege Njoroge [2012] eKLR** to do with whether the respondent can have recourse against the appellant in the event of an unsuccessful appeal, maintaining that since the applicant is a well-established motor vehicle dealer, the respondent will be able to pursue it for the decretal sum.
15. The above submissions were echoed by the applicant's counsel, *Miss Muriranja* save to restate that the applicant is ready and willing to give a bank guarantee as security.
16. On his part, the respondent argued that while the application has been timeously filed, the applicant has not shown the substantial loss it stands to suffer and that in any case, the respondent has already demonstrated that he is a man of means hence able to repay the decretal sum if required.
17. The respondent further contended that pursuant to the reasoning adopted in the case of **Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR**, the essence behind the provision of security is to guarantee the due performance of the decree. In this respect, it was the respondent's prayer that should this court grant the order for stay of execution being sought, then the applicant should be ordered to deposit the decretal amount in a joint interest earning account.
18. *Mr. Mummia* learned advocate for the respondent reaffirmed the submissions above, adding that the proposal by the applicant concerning the mode of provision of security stands opposed by his client.
19. I have carefully considered the grounds set out on the face of the Motion, the affidavits supporting and resisting the same, the contending submissions both written and oral, and the authorities relied upon.
20. The guiding provision in considering an application seeking an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions in determining an application for stay.
21. The first condition is that the application must have been made without unreasonable delay. It remains uncontroverted that the Motion, having been filed barely one (1) month from the date of delivery of judgment, was timeously filed.
22. Under the second condition, the applicant must show to this court's satisfaction the substantial loss it would suffer if the order for stay is denied. In actual fact, substantial loss is taken to be the cornerstone in an application of such nature.
23. I have considered the respective positions taken by the parties on this subject. The courts have rendered that where a party has raised an issue of the opposing party's likely inability to refund the decretal sum, the evidential burden shifts to the opposing party to demonstrate his or her financial capability to repay the decretal sum. More specifically, the court in the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** rendered itself thus:
- “So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. in other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed.”***
24. In the present instance, I have taken into account the applicant's apprehension that it may not be able to recover the decretal amount from the respondent should the appeal prove successful. I likewise noted the respondent's averment regarding his ability to refund the decretal amount. Further to this, I have looked at the documents annexed to his replying affidavit concerning his directorship and shareholding in the company Fortis Innovations Limited as well as the copy of records indicating that as at 17<sup>th</sup> September, 2019 he was the registered owner of the motor vehicle mentioned hereinabove.
25. Suffice it to say that, the respondent did not adduce any evidence to show the financial standing of his company or to verify that the profits made are as stated in his affidavit. Similarly, no valuation report in respect to the motor vehicle in question was availed to this court to ascertain the value of the said vehicle. As it stands therefore and considering the fact that the decretal amount of Kshs.5,399,350/ is colossal in nature, there is no way of telling whether the respondent is in a position to repay the said amount should the appeal succeed.
26. In the premises, I am therefore satisfied that the applicant has demonstrated that it stands to suffer substantial loss.
27. The final condition is on the provision of security for the due performance of the decree or order. On its part, the applicant indicated its readiness to abide by the conditions that will be imposed by this court. However, I observed that the mode of provision of such security is in dispute between the parties as indicated hereinabove.
28. As the respondent aptly put it, the purpose of security is to ensure the due performance of the decree.

29. In considering an application seeking to stay execution of a decree and/or order, the court should take into the interests of both parties in that the applicant has a right of appeal whereas the respondent has a lawful decree. The court, therefore, should strive to balance the interests of both parties in exercising its discretion to either grant or dismiss the application.

30. In the end, the Motion is allowed on the condition that the applicant deposits half the decretal sum in an interest earning account in the joint names of the parties' advocates/firm of advocates and the other half be secured by way of a Bank Guarantee. The two conditions to be met within 30 days of this ruling, failing which the stay order shall lapse. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this **30<sup>th</sup>** day of **January, 2020**.

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1<sup>st</sup> Defendant/Applicant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant

..... for the 4<sup>th</sup> Defendant