



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 89 OF 2007**

**GABRIEL MUTISO MAANDA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DAVANIS SUPPLIES LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**DAVID K. MUNDUI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**EVANS MATUNDA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**THE COMMISSIONER OF LANDS.....4<sup>TH</sup> DEFENDANT/RESPONENT**

**EXPORT PROCESSING ZONE.....5<sup>TH</sup> DEFENDANT/RESPONENT**

**RULING**

1. The subject application herein is dated 19<sup>th</sup> November 2008 brought under the provisions of Order; XLI Rule of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21) of the laws of Kenya.

2. The Applicant is seeking for orders;

*(a) That there be a stay of execution of the ruling and order of the Honourable court made on 3<sup>rd</sup> November 2008 pending the hearing and determination of the instant application or further orders of the court;*

*(b) That there be a stay of execution of the ruling and order of the Honourable court made on 3<sup>rd</sup> November 2008 pending the hearing and determination of the intended appeal against the same;*

*(c) That costs of the application be provided for.*

3. The application is also supported by an affidavit by David K. Mundui the director of the 1<sup>st</sup> Applicant in which it is averred that it intends to appeal against the decision of the court and if the decretal sum is paid and the appeal succeeds, the applicants will suffer irreparable loss as they may not recover the sum paid. The applicant has offered a property L.R. No. 209/4943 as a security. The property is slated to be valued at Kshs. 7,000,000 as per the valuation report annexed to the affidavit.

4. However, the application was opposed by the plaintiff/respondent through a replying affidavit sworn by the plaintiff; Gabriel Mutiso Maanda dated 24<sup>th</sup> November 2008. He averred that he has enough property to repay any sum involved herein. He annexed copies of title deed to property valued at Kshs. 45,000,000, which are as follows;-

*(a) Title No. Nairobi/Block 134/45 together with a valuation of Kshs. 5,500,000;*

*(b) Title No. Embu/Municipality/1204 together with a valuation of Kshs. 12,000,000;*

*(c) Title No. Mombasa/Block XI/851 and 850 together with a valuation thereof of Kshs. 9,000,000;*

(d) Title No. Mombasa/M.S/Block 1/242 together with a valuation thereof of Kshs. 10,000,000

5. The Respondent averred that in the alternative, if the court grants the orders sought, the decretal sum of Kshs. 4,243,500 together with interest at 12% per annum be deposited in an interest earning account in the names of parties' advocates. He calculated the subject amount to accrue in the sum of Kshs. 8,062,640.

6. The parties were heard orally on the application whereby it was agreed that, three issues be addressed, namely;

(a) whether the application herein was filed without due delay;

(b) Whether the applicant has offered sufficient security for stay;

(c) Whether, the applicant will suffer irreparable harm if the orders sought are not granted.

7. The parties agreed that, the issue of delay in presenting the application was caused by the death of the plaintiff before the prosecution of the application. Therefore, it is not contested. However, on the issue of substantial loss, the applicant reiterated that, the Respondent may not repay the sum if paid and the appeal succeeds, as the Respondent has not demonstrated financial ability to repay the debt. In response, the Respondent reiterated the five titles given are more than adequate to cover the debt.

8. Finally, the applicant argued that, it has offered the title deed as security for the stay but the Respondent argued that, the title deed was offered over ten (10) years ago and there is no evidence that, it still exists.

9. I have considered the entire application in the light of the arguments advanced. The provisions that deal with stay of execution, pending appeal are found under order 42 Rule 6(2), which states:-

*“(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.”*

10. In the light of the above, I find that, the Respondent has provided proof of 5 title deeds valued at Kshs. 45,000,000 and will be able to repay the decretal sum if the appeal succeeds. Taking into account the period taken since the judgment was entered in favour of the Respondent, I make the following orders. There shall be a stay of execution on condition the applicant;-

(a) deposits the total decretal sum of Kshs. 4,243,500 in an interest earning account in a reputable bank in the joint names of the Advocates of the parties within thirty (30) days of the date of this order;

(b) in default of compliance, the order of stay to automatically lapse;

(c) no order as to costs.

11. It is so ordered.

**Dated, delivered and signed in an open court this 21<sup>st</sup> day of February 2020.**

**G.L. NZIOKA**

**JUDGE**

In the presence of;

Mr. Mugo holding brief for Ms. Muzina for the plaintiffs

Mr. Oonge holding brief for Mr. Omoti for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup>

Defendants/Applicants

Dennis -----Court Assistant