



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL SUIT NO. 1 OF 2019

EMIDAN ENTERPRISES COMPANY LTD.....PLAINTIFF/RESPONDENT

VERSUS

KENNETH NYAGA GATAWERU.....DEFENDANT/APPLICANT

RULING

A. Introduction

1. This is a ruling for the application dated 18th December 2019 seeking orders for stay of execution of the judgement of the court delivered on the 10th December 2019 pending hearing and determination of the intended appeal.
2. On the 10th December 2019, this court entered judgment in favour of the applicant for Kshs. 22,000,000/= after striking out the defence in this suit.
3. It is the applicant's case that the decretal amount of Kshs. 22,000,000/= is substantial and that the applicant is apprehensive that the respondent may move to execute judgment before the applicant exercises his right to appeal.
4. The applicant further states that the instant application has been made without unreasonable delay and that substantial loss will be occasioned on the applicant if the orders sought are not granted whereas the orders if granted will not be prejudicial against the respondent. The applicant further states that he is ready to comply with any conditions as the Court may deem fit to make in granting the application.
5. In rejoinder, the respondent filed grounds of opposition to the application on the grounds that the application is an abuse of court process merely meant to delay the matter. The respondent further states that the applicant has not shown or proved that he will suffer substantial loss if the application upon dismissal or that the appeal will be rendered nugatory.
6. The respondent further states that the applicant has not shown that the respondent cannot repay the decretal sum in the event that the appeal succeeds or even that the intended appeal is merited.
7. When the matter came up for hearing on the 29/01/2020, Mr. Kathungu for the respondent who was present in court submitted that the hearing date was taken by consent of both parties and that since the advocate for the applicant was absent, the application ought to be dismissed for want of prosecution.
8. The court, in the interests of justice chose to rely on the pleadings of the parties to prepare its ruling rather than dismissing the application for non-attendance of the applicant.

B. Analysis & Determination

9. This application seeks for stay of execution of judgment delivered on 10/12/2019. In the cases of **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others [2012] eKLR** and **Kenya Shell Limited vs Benjamin Karuga Kibiru [1986] KLR 410**, the common thread on the decisions of the respective courts was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.
10. **Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. **Substantial loss may result to the applicant unless the order was made;**
2. **The application was made without unreasonable delay; and**
3. **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.**

11. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word used is “**and**” which connotes that all the three (3) conditions must be met simultaneously.

12. As regards substantial loss, it is sufficient if the applicant seeking orders for stay of execution demonstrates that he/she would have to go through hardship in recovering the decretal sum paid to a respondent upon execution of judgment in the event that the appeal is successful. The failure to recover such decretal sum would render the appeal nugatory should he or she be successful in the appeal.

13. By any standards, the sum of Kshs. 22,000,000/= is a colossal sum. It is noted that there is no affidavit of means by the respondent demonstrating his ability to refund the decretal sum if it is paid to him. This situation leaves the court in a quagmire as regards the ability of the respondent to refund the decretal sum in the event the applicant is successful in his appeal. The respondent has a legal obligation to show that he is capable of refunding. If he does not make any effort to discharge this burden, then his application may risk dismissal.

14. Having considered the foregoing, I am satisfied that the applicant would suffer substantial loss if the appeal is successful.

15. As regards delay, I do note that judgment against the applicant was delivered on the 10/12/2019 and that the instant application was filed on the 20/12/2019 which was only ten (10) days after delivery of the judgment.

16. In my considered view, I find that there was no undue delay in filing this application.

17. The applicant in his supporting affidavit has demonstrated his willingness to furnish security by stating that he is ready to abide with any other orders that this court may make in this application.

18. Although the applicant has not indicated the amount of security he is offering, this court has the power to determine the amount of security for the due performance of the decree.

19. In the case of **Ujagar Singh v Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus: -

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

20. In the case of **Siegfried Busch vs MCSK [2013] eKLR**, it was held: -

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

21. Accordingly, having considered the parties’ pleadings and the applicable case law, it is the considered view of this court that as the applicant has demonstrated that he deserves consideration of his application to avoid a situation where his appeal may be rendered nugatory.

22. Consequently, I find the notice of motion dated 18th December 2019 merited and it is hereby allowed in the following terms: -

a) That there shall be a stay of execution of judgment delivered on the 10th December 2019 in Embu HCCC No. 1 of 2019 pending hearing and determination of the intended appeal on condition that the Appellant shall deposit into an interest earning account in the joint names of his advocates and those of the parties half of the decretal amount within the thirty (30) days from the date hereof.

b) In default on the order of deposit, the conditional stay of execution shall automatically lapse.

c) If the applicant has not filed the appeal by now, he has fourteen (14) days to do so failure to which these orders will automatically lapse.

d) Costs of the application herein shall be in the cause.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF MAY, 2020.

F. MUCHEMI

JUDGE

Ruling sent to the parties through their respective emails