



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. E011 OF 2020

BETWEEN

MAHESH HARA KHCHAND DODHIA.....APPLICANT

AND

EDDY NICHOLAS OMBUNDO ORINDA

T/A ONE AND ASSOCIATES ADVOCATES.....RESPONDENT

RULING

1. The appellant's application for consideration is the Notice of Motion dated 19th May 2020 under **Order 42 rules 6** and 7 of the **Civil Procedure Rules** seeking a stay of execution pending hearing and determination of the appeal. The appeal is against an order of the subordinate court dismissing the appellant's application seeking to set aside default judgment entered against him. Following dismissal of the application, the appellant is now liable to settle the decree for Kshs. 18,263,757.80.

2. The application is supported by the appellant's affidavit sworn on 19th May 2020. The application is opposed by the replying affidavit of Eddy Nicholas Orinda sworn on 2nd June 2020.

3. The appellant's application is anchored on **Order 42 rule 6** of the **Civil Procedure Rules** which provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order. Further **subrule 2** provides that the following conditions are to be considered while granting stay of execution:

1 Applicant will suffer substantial loss unless the orders are made.

2. The application should be made without unreasonable delay.

3. Sufficient cause must be shown.

4. Such security as the court may order be provided.

4. The application has been brought without unreasonable delay. The issue as I see is whether the appellant has established substantial loss and consideration of the nature of the security offered by the appellant. It is worth noting that the likelihood of success of the appeal on merits is not one of the considerations for granting an order of stay under **Order 41 rule 6** of the **Civil Procedure Rules**.

5. Under the first condition, the applicant must state clearly and demonstrate what loss, if any, he stands to suffer. In **Kenya Shell Ltd v Kibiru & Another**, CA CIVIL APPL NO. NAI 97 OF 1986 [1986] eKLR, the Court of Appeal stated as follows:

The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money."

6. The deposition filed by the appellant merely states that he will suffer irreparable harm if the orders for stay of execution are not issued urgently, as he may never recover the decretal sum. The applicant does not demonstrate or show by evidence how he may never recover the decretal amount. Nevertheless, he accepts that he will be in a position to comply with an order of security should the court order. The appellant has already deposited Kshs. 500,000.00 in court but he does not state how and in what manner and to what extent he proposes to secure the entire decretal sum.

7. The respondent does not object to the appellant providing security but insists that the appellant provide security for entire decretal sum as the court may direct. I find that the interest of justice, in this case, requires that such stay be conditional to ensure the respondent is afforded certainty that if the intended appeal does fail it will be paid its judgment.

8. The Notice of Motion dated 19th May 2020 is allowed on the following terms:

- (a) The sum of Kshs. 500,000.00 deposited in court shall remain in court pending the hearing and determination of the appeal.
- (b) The balance of the decretal sum shall be secured by a bank guarantee from a reputable bank within 30 days.
- (c) The costs of this application shall be in the appeal.

DATED and DELIVERED at NAIROBI this 30th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Cheboi instructed by Cheboi, Kiprono Advocates for the appellant.

Mr Orinda with him Mr Indimuli instructed by One and Associates Advocates for the respondent.