



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 733 OF 2019**

**SUNNY HAULIERS LIMITED.....APPELLANT**

**VERSUS**

**JOSPHAT MUSYOKA MULINDI.....RESPONDENT**

**RULING**

- 1) The appellant herein took out the motion dated 16<sup>th</sup> December 2019 in which it sought for inter alia an order for stay of execution of the decree arising of the judgement of **Hon. D. O. Mbeja delivered on 13<sup>th</sup> December 2019 in Nairobi CMCC No. 400 of 2019.**
- 2) In the aforesaid judgment, the respondent was awarded a sum of ksh.2,203,550/=. The motion is supported by the supporting and supplementary affidavits sworn by Awour Maureen Nelly.
- 3) When served, the respondent filed grounds of opposition and a replying affidavit he swore to oppose the motion. The motion proceeded for hearing ex parte when the respondent failed to appear virtually to oppose the same. However this court is enjoined by law to consider the contents of the replying affidavit despite the respondent's failure to virtually appear in court.
- 4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the oral submissions made by Miss Awuor, learned advocate for the appellant/applicant.
- 5) It is the submission of Miss Awuor, that the appellant's appeal has high chances of success. She further argued that if the respondent proceeds to execute the decree, the appeal will be rendered nugatory and that the appellant will suffer irreparable loss.
- 6) The learned advocate further stated that the respondent has not demonstrated that he is capable of refunding the decretal sum in the event the appeal succeeds therefore unless the order for stay is granted the appellant will suffer irreparable loss.
- 7) The appellant averred that it is ready to abide by any conditions set by this court as to the provision of security for the due performance of the decree.
- 8) On the other hand, the respondent averred in the replying affidavit he swore to oppose the motion that the appellant has failed to meet the conditions set before an order for stay is granted.
- 9) The respondent further deponed that the appellant's appeal lacks merit in that the appellant did not adduce evidence to controvert the respondent's evidence tendered in support of his case.
- 10) It is also pointed out that there is no threat of execution on the part of the respondent hence the appellant will not suffer substantial loss.
- 11) The principles to be considered in determining an application for stay of execution pending appeal are well settled. **First**, an applicant must show that the application seeking for stay of execution was timeously filed. Both the appellant and the respondent did not address this court over this issue. A perusal of the record reveals that the appellant filed this appeal and the motion contemporaneously a month after the delivery of the judgment sought to impugned. A delay of such a period in my view is not inordinate. I am therefore convinced that the motion was timeously filed.
- 12) The **second** principle is that an applicant, must show the substantial loss he would suffer if the order for stay is not given. The respondent has stated that there is no threat to execution of the decree. The respondent has not however controverted the averments made by the appellant under oath that the threat of execution is looming.
- 13) I agree with the appellant that there is no assurance that the respondent will not execute the decree to recover the decretal sum. The appellant averred that unless the order for stay is given it would suffer substantial loss in that the respondent is not in a financial position to

make a refund of the decretal sum should the appeal turn successful.

14) The respondent did not respond to this assertion which was deponed in the supplementary affidavit of Awuor Mauleen Nelly. The record shows that the respondent was awarded a sum of ksh.2,203,550/= being damages for the injuries he sustained in an accident involving the respondent’s motor vehicle. The aforesaid amount is a colossal amount for a man of straw.

15) Having failed to provide evidence of his capability to repay the decretal sum if the appeal turns successful, then I am convinced that the appellant has shown the substantial loss it would suffer if the order for stay is denied.

16) The **third** and final principle is the provision of security for the due performance of the decree. The respondent is of the averment that should the court grant the order for stay than it should order the appellant to pay him half the decretal sum while the remaining half be deposited in an interest earning account in the joint names of the advocates appearing in this appeal.

17) The appellant is opposed to the respondent’s proposal that half of the decretal sum be paid to him. The appellant stated that it is ready to instead deposit the entire decretal sum. I think the proposal by the applicant to deposit the decretal sum is reasonable.

18) In the end, I am convinced that the motion dated 16.12.2019 has merit. Consequently an order for stay of execution pending appeal is granted on condition that the appellant deposits the decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this appeal within 30 days from the date hereof. In default the application shall be treated as having been dismissed. Costs of the motion to abide by the outcome of this appeal.

Dated, signed and delivered virtually via Microsoft Teams at Nairobi this 19<sup>th</sup> day of June, 2020.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent