



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 157 OF 2020**

**DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**MICHAEL NJIMA MUCHIRI.....1<sup>ST</sup> RESPONDENT**

**JOSEPH MWAI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for resolution is the Notice of Motion dated 30<sup>th</sup> March, 2020 brought by the appellant/applicant and supported by the grounds set out on its face and the facts stated in the affidavit of *Isabella Nyambura*. The applicant sought for the substantive order for a stay of execution of the judgment delivered by the trial court on 5<sup>th</sup> March, 2020 pending hearing and determination of the appeal and for costs of the Motion to be provided for.

2. In her affidavit, Elizabeth Nyambura who is the Legal Counsel for the applicant stated that sometime in 2014 the 1<sup>st</sup> respondent instituted a suit against the applicant seeking an order to the effect that the applicant satisfies the judgment and decree previously passed in CMCC NO. 3498 OF 2013 in favour of the 2<sup>nd</sup> respondent and against the 1<sup>st</sup> respondent.

3. The deponent further stated that the trial court vide its judgment delivered on 5<sup>th</sup> March, 2020 found the applicant liable to satisfy the judgment and decree, and ordered the applicant to pay to the 1<sup>st</sup> respondent the sum of Kshs. 188,495/ plus costs of Kshs.25,780/ and that the applicant has lodged an appeal against the aforesaid judgment.

4. It was the averment of the deponent that unless an order for a stay of execution is granted, the 1<sup>st</sup> respondent is likely to execute the decree and that he may be unable to refund the decretal sum once the same is paid to him and the appeal succeeds since his has no known means of income, thereby rendering the appeal nugatory.

5. It was also the averment of the deponent that the applicant is ready and willing to deposit the decretal sum as security for the due performance of the decree.

6. To oppose the Motion, the 1<sup>st</sup> respondent filed Grounds of Opposition dated 23<sup>rd</sup> July, 2020 and put forward the following grounds:

***a) THAT the appellant/applicant is guilty of inordinate delay since the judgment was delivered on 5<sup>th</sup> March, 2020 and the application was filed on 24<sup>th</sup> June, 2020.***

***b) THAT the applicant has not demonstrated by evidence how they will suffer any or substantial loss if the application is not granted nor how the respondent has no known source of income.***

***c) THAT the application is a ploy to delay the 1<sup>st</sup> respondent from enjoying the fruits of a legally obtained judgment.***

***d) THAT the applicant is capable of settling the whole decretal amount and they should not be granted leave merely because they can furnish security.***

***e) THAT there is need to strike a balance between the 1<sup>st</sup> respondent who is the holder of a legally obtained decree and the applicant who seeks stay without tendering any evidence to support the grounds thereto.***

***f) THAT the right to enjoy the fruits of a legally obtained judgment should be balanced with the right to appeal.***

**g) THAT the appeal has no chances of success, brought in mala fides, is frivolous, is groundless and an abuse of court process.**

**h) THAT the judgment was issued by a competent court and for a stay of execution pending appeal to issue, the conditions set out in Order 42, Rule 6 of the Civil Procedure Rules, 2010 ought to be met.**

**i) THAT the appellant/applicant ought to only be granted a stay of execution if they deposit the entire decretal amount in a joint interest earning account.**

7. The Motion was canvassed through the filing of written submissions. The applicant who filed submissions on 5<sup>th</sup> October, 2020 contended that the Motion has been brought without undue delay and that the same would have been brought earlier on were it not for the challenges arising out of the Covid-19 pandemic.

8. The applicant further contended that the 1<sup>st</sup> respondent has not brought any evidence or material to controvert the applicant's apprehension that he may not be in a position to refund the decretal sum once the same is paid to him and hence has not discharged the burden of proof placed on him.

9. The applicant went on to submit that since the 1<sup>st</sup> respondent's financial abilities are unknown, it follows that the applicant is likely to suffer undue hardship and substantial loss unless an order for a stay of execution is granted. To support its argument, the applicant cited *inter alia*, the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where the Court of Appeal rendered that:

***“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge—see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”***

10. The applicant also cited the case of **University of Nairobi & Another v Peter Kiplagat Tum (2012) eKLR** in which the court held that where the means of a respondent are unknown, there is a likelihood of substantial loss to be suffered by an applicant.

11. The applicant reiterated its willingness to comply with the conditions which will be set regarding the provision of security for the due performance of the decree.

12. In response, the 1<sup>st</sup> respondent submitted that there has been an inordinate and inexplicable delay in bringing the application from the date of delivery of the impugned judgment. Reliance was placed on the case of **Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Company Limited & 10 Others [2014] eKLR** in which the court rendered itself thus:

***“...There is no precise measure of what amounts to inordinate delay, as what amounts to inordinate delay will differ from case to case depending on the circumstances of each case. But, care should be taken not to apply the word “inordinate” in its dictionary meaning; but rather in the sense of excessive as compared to normality. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads to an inescapable conclusion that it is inordinate and therefore, inexcusable.”***

13. The 1<sup>st</sup> respondent went on to submit that the applicant has not demonstrated the substantial loss it stands to suffer since there is in place a lawful judgment and decree for execution, and that the applicant has not brought any evidence to support its sentiments that the 1<sup>st</sup> respondent is a man of straw and hence unable to refund the decretal sum should the circumstances require it. To reinforce his argument, the 1<sup>st</sup> respondent quoted *inter alia*, the following decision arrived at by the court in the case of **Mutua Kilonzo v Kioko David [2008] eKLR**:

***“To my mind, the Applicant has failed to establish what loss he will suffer if the decree is executed. I say this with respect because Lillian Munyiri aforesaid is an officer at Gateway Insurance Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means. That is all fine if there is evidence to back up that position.”***

14. It was the contention of the 1<sup>st</sup> respondent that though the applicant expressed its ability and willingness to deposit the decretal amount, it did not bring any evidence of the same and hence this court ought to dismiss the application with costs.

15. It is noted that the 2<sup>nd</sup> respondent did not participate at the hearing of the Motion or file any documents in respect to the same.

16. I have considered the grounds as presented in the Motion; the facts deponed in the affidavit supporting; the Grounds of Opposition; and the competing written submissions together with authorities cited.

17. The applicable provision on the granting of an order for a stay of execution is **Order 42, Rule 6 (2) of the Civil Procedure Rules** which both parties have cited before me. The provision specifies the principles for consideration in such applications and which I shall address hereunder.

18. In respect to the first principle on whether the Motion has been brought without unreasonable delay, I observed from the record that the judgment to be appealed against was delivered on 5<sup>th</sup> March, 2020 whereas the instant Motion was filed slightly over three (3) months later on 24<sup>th</sup> June, 2020. Upon taking judicial notice of the global impact of the Covid-19 pandemic and the short time that has passed in between, I find that there has been no unreasonable delay in bringing the Motion.

19. The second principle concerns itself with whether the applicant has shown that it will suffer substantial loss. I considered the explanation given by the applicant that the 1<sup>st</sup> respondent has no guaranteed financial means to repay the decretal sum once the same is paid out to her and the appeal succeeds. I also considered the response by the 1<sup>st</sup> respondent that the applicant has not brought any evidence to support this explanation and the fact that the authorities he cited on this subject are merely persuasive, as opposed to a few binding authorities that were cited by the applicant.

20. While it is true that every person is entitled to enjoy the fruits of his or her lawful judgment, it is trite law that upon an applicant raising issue with the financial capabilities of a respondent to refund a decretal sum, the evidential burden then shifts to the respondent to show the means/resources he or she has. This was the legal position taken by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** cited by the applicant.

21. Furthermore, in the more recent case of **CFC Stanbic Bank Limited v John Kung'u Kiarie & Dyer & Another [2016] eKLR** the Court of Appeal reasoned that though the respondent in that instance stated in his affidavit that he is a man of means with substantial assets to repay the decretal sum, he did not place any evidence before the court to show such abilities.

22. In the absence of any attempt by the 1<sup>st</sup> respondent at proving his financial means or convincing this court of his ability to refund the decretal sum once the same is paid to him, I am of the view that the applicant has satisfied that it stands to suffer substantial loss.

23. On the third and final condition relating to the provision of security, I considered the applicant's willingness to comply with the conditions to be set by this court and I also considered the proposal of the 1<sup>st</sup> respondent in this respect.

24. In the end, the Motion is allowed in terms of order (iii) and the following orders are made consequently:

**a) There shall be a stay of execution of the judgment delivered on 5<sup>th</sup> March, 2020 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 30 days from today, failing which the order for stay shall automatically lapse.**

**b) Costs of the application to abide the outcome of the appeal.**

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of October, 2020.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the 1<sup>st</sup> Respondent

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