



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. E 002 OF 2020

CHARLES ROBERT ONDIEKI.....APPLICANT

VERSUS

AHMED ABDI SHEIKH.....1ST RESPONDENT

ABDIKADIR EMI ROOBLE.....2ND RESPONDENT

RULING

1. The application dated 8th July, 2020 principally seeks order **that there be a stay of execution of enforcing the whole ruling delivered on 29th June 2020 pending the hearing and determination of Nairobi High Court Civil Appeal Number E002 of 2020.**

2. The application is premised on the grounds stated therein and the affidavit in support sworn by the Applicant. It is stated that the Applicant is dissatisfied with the ruling of the Lower Court in respect of an application, *intia alia*, to set aside an *ex parte* judgment entered against him. That the application was allowed on condition that the decretal sum of Ksh.2,900,127.42 be deposited. It is further stated that the Applicant is unable to raise such a colossal sum of money owing to economic hardships due to COVID 19 Pandemic as his business has crumbled. The Applicant is apprehensive that the Respondents are likely to commence execution proceedings and render the Appeal which has high chance of success nugatory. That the Applicant will suffer substantial loss. The Applicant urged the court to allow him pay reasonable throw away costs and ventilate his defence which raises triable issues.

3. In a replying affidavit filed in opposition to the application, it is stated that the Applicant admitted that he owes the money in question and on 2nd August, 2018, the parties entered into a Memorandum of Agreement. That in paragraph No. 3 of the Statement of Defence the Applicant admitted having entered into the said Memorandum of Agreement and to refund the sum of Ksh.2,350,000/=. That the defence does not raise any triable hence, since the grant of conditional orders by the trial court. It is further stated that the Applicant has not offered any security for the due performance of the decree.

4. The application was canvassed by way of written submissions which I have considered.

5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (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.”

6. The ruling of the trial court was delivered on 29th June, 2020. The application at hand was filed on 13th July, 2020. There was no unreasonable delay.

7. The Applicant has not offered any security. What the Applicant has offered is payment of throw way costs. However, the Appeal is yet to be heard for this court to make a determination on the issue of the terms upon which the *ex parte* judgment ought to be set aside.

8. The Appellant has stated that his business has crumbled. No documents have been exhibited to demonstrate the existence of any business and whether the said business was previously thriving and has now crumbled.

9. The upshot is that this court finds no merits in the application. The application is dismissed with costs.

Date, signed and delivered at Nairobi this 16th day of Dec., 2020

B. THURANIRA JADEN

JUDGE