



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.413 OF 2017 (O.S)**

**PETER MATHENGE GITONGA T/A**

**MATHENGE GITONGA & CO. ADVOCATES.....PLAINTIFF**

**VERSUS**

**NJOROGE KIBATIA & SIMON MAINA KARUGA T/A**

**KIBATIA & COMPANY ADVOCATES.....DEFENDANTS**

**RULING**

1. Before me are two applications. The defendant's application is dated 13<sup>th</sup> November 2018 brought pursuant to section 65 of the Civil Procedure Act, order 42 Rule 6(1) and (2), order 51 Rule 1 of the Civil Procedure Rules and seeks the following orders:-

- a) The application be certified urgent and service be dispensed with in the first instance;
- b) There be an order for stay of execution of the judgement entered on the 18<sup>th</sup> October 2018 and the resultant Decree of the Court pending the hearing and determination of this application *inter-partes*;
- c) There be an order for stay of execution of the judgement entered on the 18<sup>th</sup> October 2018 and the resultant Decree of the court pending the filing, hearing and determination of the Applicant's Appeal against the said judgement and decree;
- d) In the alternative, there be an order of temporary stay of execution of the judgment entered on the 18<sup>th</sup> October 2018 and the resultant decree of the court pending the hearing and determination of Nyahururu ELC No. 58 of 2018, Kagwe, Tea Factory Company Limited versus Grace Jelat Kipchoim & others; or
- e) There be an order of temporary stay of execution of the judgement entered on the 18<sup>th</sup> October 2018 and the resultant decree of the court pending the completion of the investigations into a complain of fraud on the transfer of inter-alia, **Land Parcel number Laikipia/Nyahururu/6732**;
- f) The costs of this application be provided for.

2. The aforesaid application is based on grounds nos. (1) XIV on the face of the application. It is further supported by supportive affidavit dated 13<sup>th</sup> November 2018 and the annexures thereto.

3. The application is opposed through the Plaintiff's/Respondent Replying affidavit dated 13<sup>th</sup> December 2018 and the annexures thereto.

4. The 2<sup>nd</sup> application by the Plaintiff/Applicant dated 10<sup>th</sup> December 2018 is brought pursuant to **section 94 of the Civil Procedure Act** and the same seeks the following orders:-

- a) This application be and is hereby certified as extremely urgent deserving to be heard on priority basis and ex-parte in the first instance.
- b) Leave be and is hereby granted for issuance of warrants of execution prior to the taxation of party and party costs.

c) Costs of this application.

The same is premised on grounds nos. 1 to 14 on the face of the application and is supported by supporting affidavit dated 10<sup>th</sup> December 2018.

5. The application dated 10<sup>th</sup> December 2018 is opposed by the Defendant/Applicant through a Replying affidavit dated 17<sup>th</sup> December 2018.

6. Upon hearing both applications together both counsel filed written submissions and highlighted on the same. The Defendant/Applicant submissions are dated 3<sup>rd</sup> December 2018 whereas the Plaintiff/Applicant submissions are dated 21<sup>st</sup> December 2018.

7. I propose in dealing with the two applications to deal with the two applications separately.

**A) Application dated 13<sup>th</sup> November 2018.**

8. The application dated 13<sup>th</sup> November 2018 is mainly seeking orders of stay of execution and/or stay of judgement entered on 18<sup>th</sup> October 2018.

9. I have considered the application affidavits in support and in opposition, as well as parties rival submissions. The issue for consideration in this application is as follows:-

**a) Whether the application has met the threshold for granting of stay of execution?**

10. The conditions to be considered before granting of stay of execution or proceedings under a decree or order appealed from are well settled. Order 42 Rule 6(2) (a) & (b) of Civil Procedure Rules provides as follows:-

**"(2) No order for stay of execution shall be made under subrule (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."**

11. In the instant application, Notice of appeal has already been filed and served in accordance with the Rules of the Court of Appeal. In view of the aforesaid and for the purpose of filing an appeal, the notice of Appeal having been filed it shall be declared that an appeal has been filed.

12. The Applicant to succeed in his application has to demonstrate and satisfy the court that unless the order is granted the applicant stands to suffer substantial loss and also that the application was filed without undue delay.

13. In this case of **Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another [2018] eKLR** it was stated that this condition is the cornerstone which determines whether the court should exercise its discretion to grant an order for stay of execution.

14. This suit was commenced by way of Originating Summons for enforcement of a professional undertaking issued by the Defendant/Applicant to the plaintiff. That the Plaintiff/Applicant performed his obligation by relaying to Defendant/Applicant the completion documents, and he proceeded to transfer 88 plots to his client but declined and/or neglected to honour his professional undertaking by failing to release Kshs.278,690,000 to the Plaintiff/Applicant.

15. What is substantial loss? This term "**substantial loss**" has severally been considered by courts. It has been agreed that substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather it is a concept which refers to any loss, great or small that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal (*see for instance Antonie Ndiaye vs African Virtual University (2015) eKLR*). Where the court held that "**mere financial burden occasioned by a judgment does not constitute substantial financial loss.....**"

16. In the instant case, the Defendant/Applicant's obligation was to honour the professional undertaking upon receipt of the completion documents. He received completion documents, transferred the land into his clients name who still has the 88 titles in its name. The defendant/Applicant has not demonstrated what substantial loss he would suffer upon honouring the professional undertaking. I find the defendant will not suffer any substantial loss as he has performed his duties to its client by delivering the titles into his client's names. I further find that in case the appeal succeeds, there will be no hardship in getting back the defendant's client money as the plots are still in the defendant's client's name. The argument that the plaintiffs clients are people of unknown means do not hold any water as the defendant already knows that the plaintiff's clients did surrender their titles to the defendant who transferred the same and who as per sale agreement knows the value of the said lands is not less than the sum for which he had given professional undertaking.

17. Further the Defendant/Applicant has not demonstrated to the satisfaction of the court that the refusal to grant orders sought would render the Intended Appeal nugatory. In the case of **Absalom Dova vs Tarbo Transporters [2013] eKLR** it was held that:-

**"The discretionary relief of stay of execution pending appeal is designed on the basis than no one would be worse off by virtue of the order of the court: as such order does not introduce disadvantage, but administer justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits under the decree..."**

18. Further in **Nelson Havi t/a Havi & Company Advocates vs Jane Muthoni Njage t/a J.M Njage & Company Advocates [2015]** the court held that:-

**"And as the law stands, it is not up to the Defendant to care about whether honouring the professional undertaking will produce unfavourable results to her clients.....an undertaking is always given on full instructions of the client the advocate must ensure he has the funds before giving the undertaking."**

19. The execution of a decree is taken after due process and is not an event but a process. It is usually a lawful process that enables the decree holder reap the fruits of litigation. The professional undertaking is a binding obligations upon the Advocate giving the professional undertaking. The funds enable him to give the other counsel undertaking and as the money is not of the Advocate he should not be heard to talk of the fact that, if he releases the money he will suffer substantial loss. The process of execution in my view do not amount to substantial loss to a person who has given a professional undertaking. The amount being paid do not belong to the Advocate but the purchaser who have already benefited by having acquired 88 plots. I further find that substantial loss has nothing to do with the sum being colossal or the size of the decretal amount.

20. In the instant matter, the decree under consideration is for money decree. It is usually agreed that stay of execution in respect of money decree will not normally be granted. In **Kenya Shell Limited vs Benjamin Karuga Kibiru & another [1986] eKLR** the court stated that:-

**"It is normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory..."**

21. Where an issue of substantial loss is raised in an application, the burden of proof lies with the Applicant. The Applicant herein has not discharged this burden for evidential burden to shift the same to the Respondent to demonstrate that he is capable of refunding the decretal sum should the appeal succeed. I have perused the Applicant's affidavit, and I found no allegation to the effect that the plaintiff is not in a position to refund the decretal sum should the appeal succeed. It is strange to note the defendant in his affidavit at paragraph 6, he alleges the money will be released to unknown vendors, yet he was the Advocate who gave professional undertaking and was supplied with completion documents with full details of the vendors. In view of the foregoing I find the Defendant/Applicant has failed to demonstrate that he will suffer substantial loss or any loss or damages if the order of stay is not granted. I find that the money is supposed to be released to the Advocate and the court may consider granting conditions for the protection of the funds, as the case may be.

22. I now turn on the issue of security. The Defendant/Applicant urges that it is ready and willing to have the entire decretal sum and interest secured in the form a Bank Guarantee and/or abide by any such conditions as the court may impose or deem fit to impose for stay of execution pending hearing and determination of the intended appeal.

23. The Defendant/Applicant relies on the case of Focin Motorcycle case (supra) where it was observed that it is sufficient for an applicant seeking an order of stay to depose that he is ready and willing to provide security.

**"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security, but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."**

24. The plaintiff/Respondent is opposed to a bank guarantee for the due performance of the eventual decree, as the Plaintiff/Respondent urges he relied on the security of a professional undertaking by the Defendant/Applicant, when the Defendant/Applicant has tadate failed to honour. Further it is Plaintiff/Respondent contention that Bank Guarantee has been defined as a promise by lending institution to ensure the liabilities of a debtor will be met and as such it is lesser in security as compared with a professional undertaking. I am of the view that any security issued should be convenient and easy to realize. I find that a security in the form of Bank guarantee cannot be considered convenient nor easy to realize; as in some instances it is not easily realized forcing a party to have to go through a process of instituting proceedings against the bank to ensure enforcement of the guarantee.

25. In **Antonie Ndiaye vs African Virtual University (2015) eKLR**; the court in granting a stay noted that there was need to hold the rights of the parties to the suit in an almost symmetrical bound. The court ordered that half the amount be released to the Respondent while the rest be held in a joint interest earning account.

26. In determining whether to grant stay as sought I have to consider the rights of the 88 vendors and the transaction to which the vendors completely performed their part of the contract, that the vendors have not been paid the purchase price since handing over the completion documents close to 2 years and as such their rights have been violated. I have also considered the fact that issuance of bank guarantee will not lessen their suffering but would prolong their waiting for an appeal process whose finalization cannot be foretold in view of the time taken to determine an appeal in this country.

27. The Defendant/Applicant further seeks stay on the ground that it never undertook to personally or as a firm undertook to pay the balance of the purchase price and only undertook to cause to be paid to the decree holder the aforesaid balance in such compliance to conditions and warranties in the agreement for sale. The same allegation is repeated under paragraph 3 of the Replying affidavit of DR. John K.F. Omenge sworn on 17<sup>th</sup> December 2018.

28. It is from the Defendant/Applicant's affidavit contended that their duty was not to undertake to pay but to cause payment to the Respondents. The **Black's Law Dictionary Tenth Edition on page 266** defines "cause" as follows:-

**"To bring about or effect"**

In view of the definition of the word "cause" the Defendant/Applicant was to take action that would result in payment of the amount undertaken to be paid by it.

29. I note the Defendant/Applicant in raising this point in the present application is attempting to relitigate on the same issue before this court and this court having previously pronounced itself, I find by proceeding to reconsider the same point, would be sitting on appeal on its own decision. I decline to do so and only point out that if the court made an error in its decision, which the court do not agree it did, this would be a good ground of an appeal but not a good ground for granting stay, as such ground does not follow under the grounds set out under order 42 of the Civil Procedure Rules for granting stay.

30. The Defendant/Applicant in the alternative, to prayers nos. 2 and 3 of the application sought an order of temporary stay of execution of the judgment entered on the 18<sup>th</sup> October 2018 pending hearing and determination of Nyahururu ELC No. 58 of 2018 **Kagwe Tea Factory Company Limited vs Grace Jelat Kipchoim & others** or there be an order of temporary stay of execution pending the completion of the investigation into complaint of fraud on the transfer of *inter-alia*, land parcel number **Laikipia/Nyahururu/6732**. The Applicant has annexed plaint dated 25<sup>th</sup> October 2018 after delivery of this court's judgement. The prayers sought thereto are numerous and different from the prayer sought in this matter. The parties are totally different from the parties in this case. The court before which the ELC No.58 of 2018 is filed has no jurisdiction to deal with this matter nor do this court have jurisdiction to deal with ELC No, 58 of 2018. I therefore find that this court lacks jurisdiction to deal with matters before ELC Court and as such it would be improper to grant orders of stay pending the hearing and determination of a matter before ELC court or pending the completion of investigation into an alleged complaint of fraud for which matter this court has no control nor better particulars theory and further for which this court has no jurisdiction to deal with. I further note the Defendant/Applicant is pursuing the same relief in the different forums at the same time to enforce a concerned right. The defendant recourse lies on an appeal, however by using double approach style in seeking some relief, at the same time before different court in my view is an abuse of the court process.

31. In determining the Defendant/Applicant application, I am alive to the fact that this court has discretion to grant or deny an order of execution of stay. The discretion should be exercised considering the fact of the case and judiciously. The Defendant/Applicant in seeking stay has attached Notice of Appeal but has not attached memorandum of appeal. It is now over 60 days since judgment was delivered and no appeal has been filed. The period for filing of an appeal has since expired without filing of a draft memorandum of appeal. The Defendant/Applicant on the other hand has not satisfied all the grounds for granting of stay of execution as provided for under order 42 of the Civil Procedure Rules; save that the Defendant/Applicant has offered security, which the Respondent considered unsatisfactory. I have also considered the claim herein is for money decree and the appeal will not be rendered nugatory if stay is not granted. I have further considered that no appeal has been filed to date and time for lodging an appeal has since lapsed. In the instant application the plaintiff's capacity to repay back the money in case the intended appeal succeeds has not been raised. I have also taken with account that in issuance of professional undertaking by an Advocate is in this case, the Advocate assumes the risk involved and as such if the appeal would be successful this also would be against the Plaintiff/Respondent and not his clients. The Plaintiff/Respondent capacity to repay in case the appeal succeeds has not been questioned. The Defendant/Applicant has not in this matter urged the Plaintiff/Respondent is a man of straw and neither has it been demonstrated the appeal has a chance of success; but it has been indicated the Applicant is willing and is to give security.

**B) Application dated 10<sup>th</sup> December 2018**

32. The Plaintiff/Applicant's application dated 10<sup>th</sup> December 2018 is brought pursuant to section 94 of the Civil Procedure Act and seeks the following orders:-

- a) This application be and is hereby certified as extremely urgent deserving to be heard on priority basis and ex-parte in the first instance.
- b) Leave be and is hereby granted for issuance of warrants of execution prior to the taxation of party and party costs.
- c) Costs of this application.

33. The application is premised on grounds nos. 1 – 14 on the face of the application and is supported by affidavit of Mr. Muguro Irungu sworn on 10<sup>th</sup> December 2018.

34. The application is opposed. The Defendant/Respondent filed an affidavit sworn on 17<sup>th</sup> December 2018, by one Njoroge Kibatia and another by DR. John K.F. Omanga.

35. At the hearing both counsel made their respective rival submissions in support and in opposition of the application which the court noted and shall consider in the determination of the application.

36. The present application seeks court's leave to allow the plaintiff to execute the decree before taxation of the Bill of costs in a judgement delivered on 18<sup>th</sup> October 2018 in favour of the plaintiff against the defendant who had given a professional undertaking to the plaintiff, but failed to comply with the court's order of 18<sup>th</sup> October 2018. That as of the time of filing of the application parties had not agreed on party and party costs. The other facts of this case are well captured in the application dated 13<sup>th</sup> November 2018 and need not be repeated in this 2<sup>nd</sup> application.

37. It is Plaintiff/Applicant contention that on 18<sup>th</sup> October 2018 the court issued a decree against Defendant/Respondent to settle Kshs. 278,690,000 plus interest at court rate within 30 days from the date of the decree and as of time of filing this application 50 days had lapsed without compliance. That the company secretary of Kagwe Tea Factory confirmed that Kagwe Tea Factory had been holding the monies subject of this decree the Defendant/Respondent has refused to engage the plaintiff to agreeing on the party and party costs, urging they intended to appeal. That position has made it difficult for the Plaintiff/Applicant to take execution proceedings. That it would take close to a month or even half a year to tax party and party costs before a ruling would be delivered. It is further contended by the Plaintiff/Applicant that considering the nature of the matter, the emotions involved and how it has difficult for Plaintiff/Respondent to run the law firm it calls for urgent hearing of this matter and granting leave to execute prior to ascertainment of party and party costs.

38. **Section 94 of the Civil Procedure Act** under which the application is brought provides as follows:-

**"Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."**

39. The Defendant/Respondent in opposing the application urges that the respondent has preferred an appeal against the judgement of 18<sup>th</sup> October 2018 and that there is another pending matter being Nyahururu ELC 58 of 2018 – **Kagwe Tea Factory Company Limited vs Grace Jelat Kipchoim & others** and that the Defendant/Respondent has never undertaken to personally or as a firm undertaken to pay the balance of the purchase price but only undertook to cause to be paid to the decree holder the said balance in strict compliance to conditions and warranties in the agreement for sale. The reasons for failure to release the money to the Plaintiff/Applicant raised in this application were raised before delivery of the judgment, were considered and a determination made. The court found them not to be meritorious and rejected the same for reasons noted in the judgement. It would be wrong for this court to revisit the same and also wrong for the Defendant/Respondent to relitigate the same through this application. These are issues which can be canvassed before an appellate court but not before this court as by considering the same the court would be sitting on Appeal on its own judgment. I therefore find the Defendant/Respondent's grounds in opposition to this application not amenable in opposing the Plaintiff/Applicant's application.

40. I have considered section **94 of Civil Procedure Act**, and it is clear that the said section empowers a court to allow execution of a decree before costs are ascertained by taxation and in doing so the court should allow such execution in circumstances that it considers just. In the instant case there is a judgment on record, there is no order of stay on record and this court had conclusively determined the matter before it and even gave the defence 30 days stay and upto date the amount is yet to be paid or deposited with the Plaintiff/Applicant. There is no good reason advanced by the Defendant/Respondent to warrant this court deny the Plaintiff/Applicant execution of its orders issued in the judgement of 18<sup>th</sup> October 2018. The intended appeal and ELC No. 58 of 2018 as noted by this court in dealing with an application for stay of execution is not a bar to execution of the decree.

41. In **Bruce Joseph Bockle vs Coquero Limited Civil Appeal No. 94 of 2016** (Mombasa), the Court of Appeal dealing with an appeal pursuant to an order issued under section 94 of the Civil Procedure Act granting leave to execute before taxation of party and party costs expressed itself as follows:-

**"...aspects of the judgements may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review to apportion liability amongst judgement-debtors, no part of a judgment is executable until after determination of the review of appeal. Such as view would permit any person desirous of jamming the justice process or merely to postpone pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment.**

**Indeed, the very fact that the judgment-debtor is still pursuing appeals or reviews, would prevent the preparation of a reasonable bill of costs; for, until those challenges are pursued to conclusion, a bill of costs when fights are still going on at whatever level of the courts might only present a very inaccurate and deceptive picture; and might result in unnecessary and expensive piecemeal taxations - one on the judgement, and another after appeal or review. That is inconvenient and unjust. Unless the later proceedings are so intertwined with the awarded judgment award that the whole thing must be done only once, there is no good reason to hold up a party's right to an ascertainable part."**

42. Having considered both applications dated 13<sup>th</sup> November 2018 and 10<sup>th</sup> December 2018 I proceed to make the following orders:-

a) **Application dated 13<sup>th</sup> November 2018 is granted as follows:-**

i) **There be stay of execution of judgment entered on 18<sup>th</sup> October 2018 and the resultant Decree of the court pending depositing one half of the Kshs.278, 690,000/- in joint name of the Advocates with a Bank of repute and the other half to be paid to the Plaintiff/Respondent all within 14 days from the date hereof in default execution to issue.**

b) **Application dated 10<sup>th</sup> December 2018 is allowed in the following terms:-**

i) **The Plaintiff/Applicant is HEREBY granted leave for issuance of warrant of execution prior to taxation of party and party costs if the Defendant/Respondent fails to comply with order (a) (i) above within the specified period of 14 days from the date of this ruling.**

ii) **Costs of the applications to the plaintiff.**

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of January, 2019.**

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**J .A. MAKAU**

**JUDGE**