



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 32 OF 2018

NICHOLAS KIRWA APPELLANT

VERSUS

KIPKOSGEI ARAP MELLY.....RESPONDENT/APPLICANT

RULING

In Civil Suit No. 184 of 2017, the Respondent sued the Applicant for the recovery of 900,000 of which he had contributed to set up a chemist business in partnership with the Applicant. The business failed and when he requested the Applicant for a refund he failed and or neglected to honour it.

The Applicant raised a defence, denying the responsibility for failure of the business. He alleged the Respondent's son who was on day to day management of it, mismanaged the same. He however indicated in paragraph 7 of the defence that they resorted to Alternative Dispute Resolution which resulted to the letter of acceptance by the defendant dated 28th day of September, 2017.

On 6th December 2017 the Respondent filed a Notice of Motion requesting for summary judgment against the applicant as prayed in the plaint. It was based on the grounds that the applicant had admitted the debt and offered to repay it by instalments of which he failed to honour. He contended that the defence had raised no triable issues and a trial would lead to waste of judicial time.

The said application was allowed. The applicant appealed against the ruling and brought up the current application seeking stay of proceedings and execution pending the hearing of the appeal.

He contends that if the application is not allowed he'll suffer irreparable loss, he had a defence on record and summary judgment was not warranted and that if the execution is carried out the appeal will be rendered nugatory.

The said application is brought under *Order 42 rule 6(2) of the Civil Procedure Rules, 2010* which provides that an application for stay of execution pending appeal, must demonstrate the following:-

- (1) Substantial loss may result to the applicant unless the order is granted.
- (2) The application was made without unreasonable delay: and
- (3) Such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.

There is no dispute in this matter that there is a pending appeal on the ruling of 14th March 2018. The application in issue was raised on 5th April, 2018 and there isn't inordinate delay. There is also no evidence that if the amount of 900,000/- is paid to the Respondent, and the applicant succeeds on appeal, the Respondent will be able to raise it. If such happens the applicant would suffer substantial loss.

On these grounds I do find the application merited. It is granted but the applicant will have at least to deposit 900,000/- in an interest earning account, in the name of both Advocates, within 21 days. Failure to do so grants the respondent liberty to execute.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of March 2019.

In the absence of;

Appellant

Respondent

And in the presence Mr. Mwelem - Court assistant