



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1009 OF 2005

GRACE WANGUI NGENYE.....PLAINTIFF/RESPONDENT

-VERSUS-

CAPITAL GROUP LIMITED.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant has taken out a Notice of Motion dated 16th January, 2019 supported by the grounds set out on the face thereof and the facts deponed to in the affidavit of *Somoina Kimojino*. The substantive order sought therein is for a stay of execution of the judgment delivered by this court on 15th November, 2018 in favour of the respondent for the sum of Kshs.9,000,000/= pending the hearing and determination of the intended appeal.
2. The aforementioned deponent, being the Group Manager of the applicant company, stated that being dissatisfied with the aforesaid judgment, the applicant is desirous of appealing against the same and believes its appeal has reasonable chances of success, adding that the respondent is likely to execute the decree and has in fact served the applicant with a bill of costs dated 13th December, 2018 claiming the sum of Kshs.2,029,789/=.
3. It is the deponent's assertion that if the respondent is allowed to proceed with both execution and taxation on the bill of costs, the intended appeal will be overtaken by events and there is no guarantee that the decretal sum will be recoverable in the event of a successful appeal.
4. In response, the respondent swore a replying affidavit on 28th January, 2019 essentially averring that execution is yet to commence since the decree has not been extracted. As concerns the mentioned bill of costs, the respondent's position is that the same has neither been filed nor taxed. She further stated that the application is merely intended to hamper her enjoyment of the fruits of her judgment.
5. It is the respondent's statement that there is nothing to indicate that the applicant's intended appeal has high chances of success since no draft memorandum of appeal has been availed to this court. In her affidavit, the respondent also pointed out that she has every means possible to refund the decretal amount.
6. The supplementary affidavit of Somoina Kimojino was filed in response thereto.
7. The Motion was disposed of through written submissions with applicant restating its position that execution is imminent thereby making the order for a stay necessary; and that this court is not required to consider the merits of the appeal at this stage thus there was no need for a draft memorandum of appeal to be availed. Reliance was placed on judicial authorities.

8. It was the applicant's further submission that the conditions set out in Order 42, Rule 6 of the Civil Procedure Rules have been met. The applicant ensured to submit in closing that the respondent will not be prejudiced if a stay is granted.

9. The respondent's submissions essentially brought forth the arguments that the prayer seeking a stay of execution is premature since the decree has not been extracted and execution is yet to commence, that there is no indication of substantial loss that will befall the applicant and in any case, the applicant has neither proved on a balance of probabilities that the respondent is not in a position to refund the decretal sum nor offered any form of security.

10. In its supplementary submissions, the applicant maintained inter alia that the extraction of a decree is not a requirement under **Order 42, Rule 6** abovementioned and hence the prayer for a stay of execution is properly before this court.

11. Having considered the facts as presented in the Motion and its supporting affidavit, the replying and further affidavits respectively, and the rival submissions hand in hand with the cited authorities, I now refer to **Order 42, Rule 6 (2)** of the Civil Procedure Rules which frames the conditions to be met for a stay of execution to be granted as follows:

a) The application must be brought without unreasonable delay;

b) The applicant must demonstrate that substantial loss may result; and

c) Provision should be made for security.

12. The aforesaid conditions have been reinforced in various authorities, including those cited by the applicant.

13. I will now address the condition as to whether the application has been brought without unreasonable delay. In so doing, I take recognition of the fact that this court delivered its judgment on 15th November, 2018 whereas the Motion before me was filed on 16th January, 2019. I also appreciate that this court granted the applicant 30 days' stay of execution from the date of judgment. It therefore follows that the application was filed close to one (1) month thereafter. In my humble view, this does not amount to unreasonable delay.

14. The second condition to be considered is that of substantial loss, which the applicant correctly acknowledged in its submissions as forming the cornerstone of an application of such nature, adding that a bill of costs had been filed and the decree extracted, both of which were denied by the respondent.

15. It is my view on the above that execution is a lawful process and a party cannot ride on the argument that substantial loss will result from imminent execution. Either way, I have perused the record and failed to come across a decree. To add on, the bill of costs annexed to the application bears no court stamp as evidence of filing.

16. The applicant also brought forth the argument that the respondent will not be in a position to refund the decretal sum once the same is paid and the appeal succeeds in the end; going further to submit that the respondent bore the evidentiary burden of proving that she is in a position to repay the said decretal sum. My view is that while there lies truth in such argument, it is also relevant to appreciate that the evidence laid by the applicant should meet the prima facie standard at the very least. It is not sufficient for the applicant to merely state that the respondent lacks the financial capability to refund the requisite amount.

17. My opinion was shared by the court in **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR** (cited by the applicant) in this manner:

"...the Applicant should place cogent evidence before the court which shows that the Respondent cannot refund the money, and it is in face of such limitation that the Respondent

should discharge the evidential burden that she is of sufficient means to make a refund of the decretal sum. If it were to be otherwise, what Applicants will do is to merely state that the Respondent is not able to refund the decretal sum in the event the appeal succeeds. And that would be shifting of the legal burden from the Applicant to the Respondent, which I have already stated never shifts from the Applicant for as long as it is him who is asserting the particular fact. The law never intended to be and will never go that way... The Applicant provided no evidence at all to show any financial limitation on the part of the Respondent.

18. Likewise, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012]* the court went further ahead to opine that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

19. On the flip side, the High Court in *Francis Njogu Njehia v Tito Kibet Mibei [2018] eKLR* (also cited by the applicant in its submissions) pursued a different angle in finding that since the applicant in that instance reasonably expressed his fear that the respondent would not refund the decretal sum, the evidentiary burden shifted to the respondent to prove otherwise.

20. It is therefore apparent from the above that though substantial loss ought to be established, what amounts to substantial loss is relative and differs from one case to another. In our instance, the applicant submitted that the respondent did not swear an affidavit of means to establish her earnings and/or valuable assets. The respondent on her part contended that she gave evidence on oath stating that she is in gainful employment and owns a variety of properties whose value combined with her salary as a judge is sufficient in satisfying the decretal sum should the appeal succeed.

21. I have considered the positions taken by the respective parties. I have also taken judicial notice of the respondent’s standing as a Judge of the High Court. Given the special nature of this case and the parties involved, there arises the need to balance the rights of the parties. In stating so, I am guided by the following cases-*Edward Kamau & another v Hannah Mukui Gichuki & another [2015] eKLR* and *Ongetta Hesbon Momanyi v Advocates Disciplinary Tribunal & another [2018] eKLR*.

22. In *Edward Kamau (supra)*, while the court observed that the applicant had not shown substantial loss, the Honourable Lady Justice Aburili wisely held as follows:

“Therefore, to ensure that the parties to the suit fight it out on a level ground on equal footing, stay can be granted on terms, since there is no absolute guarantee that the appeal as filed shall be successful on all fours, while appreciating the respondent has a lawful judgment whose execution is being suspended. In the end, I employ a balancing act between two rights- that of appeal by the applicants and of enjoyment of a lawful judgment and not being discriminated for being of unknown financial means, for the Constitution commands that justice shall be done to all irrespective of status.”

23. The court in *Ongetta Hesbon Momanyi (supra)* also noted that it had not been shown that there will be an inability to refund the decretal sum once paid. Nevertheless, the following decision was rendered ultimately:

“In the final analysis, to balance the competing interest of the parties, I will exercise discretion and allow the application for stay of execution pending the hearing of the Appeal...”

24. From the foregoing, it is apparent that the granting of a stay is a discretionary remedy. In the present case, I am satisfied that the respondent is in a position to refund the decretal sum given her professional and financial standing in society, notwithstanding that she did not file an affidavit of means.

25. In any event, the applicant’s statement of defence was struck out and the issue of liability put to rest;

what remains in dispute therefore is the issue of quantum of damages and more specifically, the question of how much the respondent is entitled to as opposed to whether or not she is entitled to the same. In the circumstances, it is settled that at the very least, the respondent will be able to refund the difference of the decretal sum, if any, upon determination of the appeal.

26. Be that as it may, it is imperative that I ensure to create a level ground for the parties by balancing their corresponding interests in such a way as to create a win-win situation, given that the applicant is entitled to appeal against my judgment while the respondent is entitled to the fruits of her judgment.

27. The final condition is on the provision of security, which the applicant indicated a willingness to comply with.

28. In conclusion therefore, I will allow prayer 3) of the Motion on the condition that the applicant do pay to the respondent the sum of Kshs.6,000,000/= and the remaining sum of Kshs.3,000,000/= be deposited in court. The two (2) conditions to be complied with within 30 days from today, failing which the stay order shall lapse.

Dated, Signed and Delivered at Nairobi this 14th day of March, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Plaintiff/Respondent**

..... **for the Defendant/Applicant**