



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE 393 OF 2019

ANGALUKI MUAKA.....PLAINTIFF

VERSUS

BERYL AWINJA.....DEFENDANT

RULING

1. The Notice of Motion dated 28th February 2019 by the Defendant is for stay pending the hearing and determination of an intended Appeal from the decision of this Court of 1st February 2019.
2. On 1st February 2019 judgment was entered against the Defendant for the sum of Kshs.2,687,797.00 plus interest thereon at court rates from the date of filing of suit. The Plaintiff was also awarded costs of the suit. The judgment in favour of the Plaintiff is a money judgment.
3. The Application is sought under the provisions of Order 42 Rules 6(1) and (2) of the Civil Procedure Rules which read:-

[Order 42, rule 6.] Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

4. The Application was filed just 20 days after the judgment and was made without unreasonable delay. One condition for grant of stay is easily satisfied.
5. In addition a Notice of Appeal was lodged in the registry of this court on 13th February 2019. It can therefore be deemed that an appeal to the Court of Appeal has been duly filed against the decision of the court (order 42 Rule 6(4)).
6. In support of the assertion that substantial loss may result to the applicant unless the order is made, the Defendant deposes as follows in the Supporting Affidavit of 28th February 2019.

“That unless the application is urgently heard and determined, then I will suffer great loss and damage in the very likely

event that the judgment and orders this court issued on 1st February are executed.”

7. This Court has little difficulty agreeing with counsel for the Defendant that execution of a decree is a logical consequence of a judgment which is not satisfied. Clearly then that in itself cannot amount to substantial loss. It is a painful reality of litigation. Substantial loss in relation to a money decree could perhaps happen if money is paid out to a decree holder who is unable to repay it in the event that an ultimate order binding him to repay is made. The Defendant does not say that the Plaintiff suffers such disability.

8. That said, an additional response by the Plaintiff’s counsel was that notwithstanding the failure by the Defendant to establish that important limb of substantial, the Decree holder is willing to accommodate the Defendant as long as the Defendant furnishes security for the due performance of such decree that may in the end bind her. This is a reasonable concession. This is one way of striking a balance between protecting a decree debtor against immediate execution and ensuring the decree holder does not eventually lose in the event his victory is upheld by the Appellant Court.

9. In the end that is condition that the Court shall impose as a condition for stay.

10. The Notice of Motion of 28th February 2019 succeeds to the extent that there shall be stay of execution of the judgment of this court of 1st February 2019 pending the hearing and determination of the intended appeal herein on condition that the Defendant shall within 60 days hereof furnish a suitable Bank Guarantee in the sum of Kshs.3,000,000/= (three million) for the due performance of the money decree. In ordering surety in that sum, the Court bears in mind the interest that the judgment sum has attracted to date and the element of costs which are yet to be taxed.

11. Each party to bear its own costs of the motion.

Dated, Signed and Delivered in Court at Nairobi this 27th Day of September 2019.

F. TUIYOTT

JUDGE

PRESENT:

Agwara holding brief for Plaintiff

Berly Awinja the Defendant (in person)

Court Assistant: Nixon