



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 135 OF 2019**

**BAHARI (T) COMPANY LIMITED.....APPELLANT**

**VERSUS-**

**ALIBHAI RAMJI INVESTMENT LIMITED.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 11<sup>th</sup> July 2019, the Appellant/Applicant, moves this Court seeking orders for ;

(a) Stay of execution of the judgment and decree delivered by **Hon. E.K Makori** on 27<sup>th</sup> July, 2019 in Mombasa CMCC No. 1489 of 2018. The application also seeks orders for the costs of the application.

2. The Application is expressed to be brought under *Section 1A, 1B, 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules*. It is premised on the grounds stated on its face and in the supporting affidavit sworn on 11<sup>th</sup> July 2019 by **Peter Omwenga Mwebi** Appellant's advocate.

3. In supporting the motion, the Applicant contends that ;

**(a) it is dissatisfied with the judgment of the lower court in which the Respondent was awarded a total sum of Kshs. 2,905,659/= plus costs and interest;**

**(b) that it has already filed an appeal and if stay of execution is not granted, the Respondent will execute the decree and its Appeal will be rendered nugatory.**

**(c)the applicant is willing to offer security for the decretal amount.**

4. The Application is opposed through a Replying Affidavit sworn by **Mushtaqali Alibhahi**, the Respondent Manager. It is the Respondent's case that;

**(a) it owns the suit property and controls several prime properties with a minimum rental income of about Kshs. 2,000,000/=. Therefore, it has financial capacity to easily and without much prompting refund the Judgment sum;**

**(b) that no reason has been given why the Respondent should not enjoy the fruits of his Judgment;**

**(c) that the application is not merited and ought to be dismissed because the applicant has failed to satisfy the preconditions for grant of stay pending appeal stipulated under *Order 42 rule 6 of the Civil Procedure Rules*.**

5. Upon request, counsel for the parties were allowed to canvass the application by way of written submissions. The applicant filed their submissions on 7<sup>th</sup> August 2019 while the Respondent filed theirs on 6<sup>th</sup> September 2019.

**ANALYSIS & DETERMINATION**

6. I have carefully considered the application, the affidavits on record, the rival submissions made on behalf of the parties, all the authorities cited and the law.

7 The equitable relief of stay pending appeal is discretionary in nature. But needless to say, that discretion must be exercised judiciously;

Order 42, Rule 6. (2) States;

**“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;**

**(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.”**

8. The holding in the case of **Absalom Dora vs Tarbo Transporters (2013) e KLR** is relevant in that it states:

**“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such the order does not introduce any disadvantage, but administers the 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. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”**

9. It is thus incumbent upon the Applicant to demonstrate that it has met the threshold of the above three conditions. (See **Housing Finance Company of Kenya V Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR**).

10. Applying the above principles to the instant application, I will start with a consideration of whether substantial loss will be suffered if stay orders are not granted since there is no dispute that the application was filed without undue delay.. The Applicant submitted that its Appeal would be rendered nugatory if stay orders are not granted. In support of this proposition, the applicant relied on the case of **Magnate ventures v Simon Mutua Muatha & Another [2018]** where it was stated:

**“Notably, the 1<sup>st</sup> Respondent herein did not file an Affidavit of means to demonstrate that he was in a good financial position to repay the Appellant the decretal sum in the event it was successful in his appeal. In fact, his Replying Affidavit was silent on how he would repay the Appellant monies it would pay him before its Appeal could be heard and determined.”**

11. Counsel for the Respondent on the other hand submitted that it has not been demonstrated that the Respondent is a person of straw and that it may not repay the said decretal sum in the event the Appeal is successful as alleged. In support of this proposition, the Respondent relied on the Case of **Bake ‘N’ Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**, where it was stated as follows;

**“I reiterate that the applicant has failed to demonstrate that it will be totally ruined in relation to the appeal if it pays over the decretal sum to the respondent, and that it will be reduced into a mere explorer in the justice process if it does what the decree commands it to do without any prospects of recovering the money should the appeal succeed. In a money decree, substantial loss lies in the inability of the respondent to refund the decretal sum should the appeal succeed. Yet as I have stated above, there was no such averment on oath and it only emerged in written submissions which as I have alluded to above, is not evidence.”**

12. In **Sofinac Co. Ltd vs Nelphaat Kimotho Mutuu (2013) eKLR** Odunga, J held inter alia:

**“The appellant’s belief that the respondent will be unable to repay the same is solely based on the appellant’s lack of knowledge as to the respondents’ financial capability and does not give rise to the presumption that the respondent will be unable to repay the sum. There must be factors that led to that presumption. The law of evidence places the onus of proof on the party making the allegation and a mere averment that due to the respondents’ social and economic status she is unlikely to be able to refund the money is not tenable in Law”.**

13. In **Masisi Mwita -Vs- Damaris Wanjiku Njeri (2016) eKLR**, it was held that to show that the Appellant stands to suffer substantial loss, it must be demonstrated that the Respondent will not pay the money back if the Appellant succeeds in his appeal.

14. It is worth noting that the Respondent’s Manager swore an affidavit in response to the application. The replying affidavit on record contained an averment that they indeed own the suit premises and they have a minimum rental income of nearly Kshs. 2,000,000/= per month.

15. In its affidavit, the applicant did not deem it fit to address the issue of whether or not if the decretal sum is paid, he may not recover it from the Respondent. It is trite law that he who alleges must prove (see Sections 107,108, and 109 all of the Evidence Act). Real and cogent evidence must be tendered by way of affidavit and not by way of submissions as has been done by counsel for the Applicant in this case that the Respondent is not possessed of any sufficient means to refund the Kshs. 2,905,659/= should the appeal succeed.

16. In the above premises, and on a balance of probabilities, I am satisfied that the Respondent has established that it is capable of refunding the decretal amount should the appeal succeed.

17. The upshot of this is that in applying the above principles, I hereby disallow the application before me and dismiss it with costs to the Respondents.

18. It is so ordered.

**Dated, signed and delivered at Mombasa this 23<sup>rd</sup> day of October, 2019.**

**D. O. CHEPKWONY**

**JUDGE**