



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CASE NO. 246 OF 2016

X-TREME ELECTRONICS LTD.....PLAINTIFF/RESPONDENT

VERSUS

THE CO-OPERATIVE BANK OF KENYA.....DEFENDANT/APPLICANT

RULING

1. This court by its Ruling dated **29th November 2018** struck out the defendant's defence and entered judgment for the plaintiff for Ksh 12,660,128.60 and Ksh 8,375,348.60 plus costs and interest. The defendant being aggrieved by that Ruling filed on **6th December 2018** a Notice of Appeal as provided under Rule 75 of the Court of Appeal Rules.

2. The defendant has filed a Notice of Motion application dated 31st January 2019 seeking stay of execution of the judgment, hereof, pending the hearing and determination of the appeal.

ANALYSIS

3. The application is brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6 (2) (a) and (b) provides the conditions of granting a stay of execution pending appeal, 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.”

4. The defendant has raised only two issues by its application. Those issues are captured in the affidavit sworn by **Debra Ajwang' Ogada** the defendant's Legal Officer. The deponent stated thus:

- *I am aware that the applicant is ready and willing to deposit the entire decretal sum as security and abide by any such conditions as the Court may impose or deem fit as a condition for stay of execution pending the filing, hearing and determination of the Appeal.*
- *The applicant stands to suffer substantial and irreparable loss unless an order for stay of execution is granted because:*
 - a. The decretal sum is colossal and the Plaintiff/Respondent unlikely to refund the same if the appeal is successful;*
 - b. The applicant will be required to institute a suit to recover the decretal sums from the Respondent;*
 - c. The appeal will be rendered nugatory if the application is not granted in terms of the prayers sought; and*
 - d. The Respondent is likely to attach tools of trade and equipment of the Bank during execution.*
- *The status quo between the parties at this point is that the Respondent has Judgment against the Applicant and is likely to*

execute the same.

5. It will be seen that the two issues the defendant raised are that it is willing to provide security for the due performance of the decree and that it is apprehensive that it will suffer substantial loss if stay is not granted because the plaintiff may be unlikely to refund the judgment amount if the appeal does succeed.

6. The jurisprudence of an application for stay pending appeal where the applicant alleges they may not be refunded the judgment amount if the appeal succeeds re-stated in the case **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR** while discussing another case viz:

“Stanley Karanja Wainaina & Another -V- Ridon Ayangu Mutubwa Nairobi H.C.C.A. 427/2015 where it was stated:

“It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005 stated:-

This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

9. The Respondent bears the evidential burden to prove that he is not a man of straw as alleged. The 1st Respondent Anne Wambui Wangui has not made any attempt to discharge this burden.

7. The plaintiff failed to respond to the defendant’s allegation that it would suffer substantial loss if stay of execution was not granted. The plaintiff did not shift that burden of proof as recognized in the case of Focin (*supra*). Accordingly the defendant has satisfied one of the conditions of granting stay of execution under Order 42 Rule 6(2).

8. The defendant has also satisfied the other condition of stay of execution by offering to provide security for due performance of the decree.

CONCLUSION

9. The plaintiff has succeeded with the prayer sought.

10. In the end the orders that commend themselves to me are as follows:

a. There shall be stay of execution of the Ruling of 29th November 2018 on the following condition:

(i) That the defendant does provide within 30 days from this date hereof the decretal sum which shall be deposited in the joint interest earning account opened in the names of the learned advocates in this matter.

(ii) Failure to provide the decretal sum as stated in (i) above the stay of execution will automatically vacate.

b. The costs of the Notice of Motion dated 31st January 2019 shall abide by the outcome of the pending appeal.

DATED and SIGNED at NAIROBI this 28th day of November 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE RESPONDENT

.....FOR THE APPLICANT