



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 16 OF 2015**

**ANNE OMOLLO.....PLAINTIFF**

**VERSUS**

**ODUOR ONGWEN.....1<sup>ST</sup> DEFENDANT**

**RONALD NG'ENY.....2<sup>ND</sup> DEFENDANT**

**BETH SYENGO.....3<sup>RD</sup> DEFENDANT**

**DR. DAVID OLIMA.....4<sup>TH</sup> DEFENDANT**

**NAIROBI STAR PUBLICATIONS LIMITED.....5<sup>TH</sup> DEFENDANT**

**JUSTUS OCHIENG.....6<sup>TH</sup> DEFENDANT**

**RULING**

There are before me two applications for stay of execution pending appeal. The first one is the Notice of Motion dated 15th January 2018 by the 1st – 4th Defendants and the second is the Notice of Motion by the 5th and 6th Defendants dated 26th January 2018.

The gist of the Notice of Motion dated 15<sup>th</sup> January 2018 is that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are dissatisfied with the Judgment and award of damages to the Plaintiff by this court and have filed a Notice of Appeal with an intention to challenge the said Judgment and decree and that unless the stay is granted the Plaintiff will proceed to execute and the 1<sup>st</sup> – 4<sup>th</sup> Defendants will then suffer irreparable and substantial loss and the appeal rendered nugatory. The application is supported by the affidavit of Oduor Ong'wen sworn on 15<sup>th</sup> January 2018 to which is attached the proposed Memorandum of Appeal, the Notice of Appeal and a letter dated 21<sup>st</sup> December 2017 requesting for typed proceedings and judgment in the case. He depones that the applicants are willing to comply with such conditions as this court may grant in terms of security pending the appeal. He has further deponed that should the stay be refused their appeal shall be rendered nugatory.

The 5<sup>th</sup> and 6<sup>th</sup> Defendants application is premised on similar grounds and is supported by the affidavit of Linda Musita sworn on 26<sup>th</sup> January 2018. Like Oduor Ong'wen she too has attached a Notice of Appeal, a copy of the judgment and a letter requesting for typed proceedings and has deposed that in view of the considerable amount of damages awarded in favour of the Plaintiff, the 5<sup>th</sup> and 6<sup>th</sup> Defendants will suffer substantial loss unless the orders sought are granted. She has also deposed that the appeal risks being rendered nugatory and further that the 5<sup>th</sup> and 6<sup>th</sup> Defendants are willing and able to abide by an order to provide security as may be awarded by this court.

The applications are opposed. In her replying affidavit sworn on 24<sup>th</sup> January 2018 the Plaintiff deposes that the draft Memorandum of Appeal does not raise triable issues; that no appeal has been filed in the Court of Appeal; that the application is only intended to delay the realization of the fruits of her judgment and that the applicants have not demonstrated that she is not in a position to refund the decretal sum should the application be dismissed and the appeal succeeds. She also deposes that a stay of execution ought not to be granted in a money decree; that the applicants are not deserving of the orders sought as they have not demonstrated that they have the capacity to pay the judgment sum in the event that their intended appeal is dismissed and that in any case the application is premature since she has not commenced execution proceedings and the costs in the case are yet to be taxed. She further urges that in the event that this court is inclined to grant a stay then the applicants should deposit the entire decretal sum in an interest earning account.

The applications were canvassed through written submissions as consented by the parties and directed by this court.

I have considered the applications and rival submissions carefully. To grant or not to grant a stay of execution is in the discretion of the court. However such discretion must be exercised judicially and Order 42 Rule 6(2) of the Civil Procedure Rules sets out, as a guide, the conditions which a party applying for stay must meet. The applicants in this case have met two conditions in that their applications have been brought timeously and they have also expressed their willingness to abide by any conditions that this court may impose as to the deposit of security. As to whether they stand to suffer substantial loss should this application be refused and the appeal succeeds I am guided by the decision of the Court of Appeal in - **Kenya Shell Limited V. Kibiru & Another [1986] KLR 410** where Platt, JA, stated at Page 416:-

***“..... Substantial loss in its various forms is the corner stone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”***

The decree herein is a money decree and the same is capable of being refunded should the intended appeal succeed. Apart from stating that the respondent is not capable of refunding the sum were the appeal to succeed the applicants have not given any reasons and that to me is not sufficient. In so holding I find support in the decision of Odunga J in **Sofinac Co. Ltd. V. Nelphaat Kimotho Mutuu [2013] eKLR** where he held:-

***“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.”***

Also in **Rose Mbithe Ndeti V. Mathew Kyalo Mbobu [2008] eKLR** where the Court of Appeal while considering a similar application stated:-

***“The applicant has not demonstrated that the respondent is a man of straw, who, once paid the decretal amount, would not be able to refund it in case the intended appeal succeeds. On the other hand, the respondent has stated through his learned Counsel that he will be capable of refunding any amount found due should the intended appeal succeed after he is paid the decretal amount. In those circumstances, the second requirement that the applicant shows that the success of the intended appeal, should it succeed would be rendered nugatory by the refusal of this application has not been satisfied.”***

Similarly in this case, the respondent has through her affidavit stated that she will be capable of refunding any amount found due should the intended appeal succeed after she is paid the decretal amount. In the circumstances the condition that the applicants will suffer substantial loss or that their appeal will be rendered nugatory has not been satisfied. In the result I find no merit in the application and it is dismissed with costs to the respondent.

**Signed, dated and delivered at Kisumu this 19<sup>th</sup> day of April 2018**

**E. N. MAINA**

**JUDGE**