



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 27 OF 2017

EARTH PLANE BUS LIMITED.....1ST APPLICANT

SHAKUL MOHAMED.....2ND APPLICANT

SAID MOHAMED MUSTAF.....3RD APPLICANT

VERSUS

D M M (Suing through his father and next friend M M).....RESPONDENT

R U L I N G

1. By an application dated **10th April, 2018** the Applicants seek stay of execution of the Judgment and/or Decree of **Hon. G. W. Kirugumi (Senior Resident Magistrate) in Mwingi in Civil Suit No. 4 of 2016** delivered on the **7th September, 2017** pending hearing and determination of the Appeal filed herein.
2. The application is premised on grounds that the Judgment was delivered on the **7th September, 2017**, and the **30 days** stay of execution of the Judgment have lapsed; the Applicants are aggrieved by the Judgment on quantum and liability; they have filed an Appeal against it; the Respondents are in the process of executing and should they do so the Applicants will suffer irreparable damages and there is a likelihood that they will not recover any decretal sum awarded to the Respondent which will render the Appeal nugatory.
3. **Robert Ogode**, the Advocate in conduct of the matter swore an affidavit in support of the application where he reiterated what is stated in the grounds stated in the body of the application.
4. **M M**, the Respondent deposed an affidavit in reply. He deposed that the Applicants filed a similar application before the Subordinate Court where a conditional stay of execution was granted. The Applicants were granted 30 days within which to deposit the entire decretal sum in a joint interest earning account of both parties' Advocates' names. After expiry of the 30 days, following the Applicant's request the time within which the order was to be complied with was extended. The extension was made on exparte basis. Prior to the matter being heard interparte, the Applicant moved to file the instant application having concealed the fact of the application before the Lower Court. That the Applicant could only appeal against the order of the Lower Court.
5. At the hearing learned Counsel, **Mr. Ogode** for the Applicant submitted that there was a stay condition granted by the Lower Court. That Directline Insurance Company were the ones representing the Appellant under the principle of subrogation and the maximum sum the Insurance Company could pay is **Kshs. 3,000,000/=**. Therefore they could not comply with the condition set. He stated that they were ready and willing to deposit security within the **Kshs. 3,000,000/=**. That, should the Respondent realize the Lower Court Judgment the Appeal will be rendered nugatory.
6. **Mr. Owour**, learned Counsel for the Respondent argued that after the Applicants failed to comply with conditions given by the Lower Court time within which they were to deposit the decretal sum was extended. Before the time lapsed they moved to the High Court and failed to disclose the fact of the application in the Lower Court. He dismissed the application as an abuse of the Court process and called upon the Court to find that the Applicants came before it with unclean hands. Therefore they cannot be aided.
7. The application is brought pursuant to the provisions of **Order 42 Rule 6(1) and (2)** that provides thus:

“(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.” (Emphasis mine).

8. It is contended that the Applicant should not be granted the relief sought because they have approached the COURT with dirty hands having not disclosed that they were granted orders by the Lower Court but failed to comply. The Applicant has explained the predicament they have found themselves in such that they are incapable of complying with the conditions set by the Lower Court.

9. The Applicants have filed a Memorandum of Appeal. The Appeal has been assigned a number. According to **Order 42(1)** of the **Civil Procedure Rules**, even if the application for stay was granted by the Lower Court, this Court being the Appellate Court is seized of jurisdiction to consider the application and make orders that are just.

10. In the case of **Butt vs. Rent Restriction Tribunal – Civil Application No. NAI 6 of 1979, Madan JA** stated that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal....”

11. With this in mind I must determine whether principles of granting stay of execution as enunciated in **Order 42 Rule 6(2)** of the **Civil Procedure Rules** have been met.

12. Counsel for the Applicant did not delve into details of whether the principles of granting the order sought have been met. However, he explained their willingness to give security for due performance of the Decree. It is however averred in the affidavit that the Applicants stand to suffer irreparable loss as there is a likelihood of the sum awarded not being recovered if the Appeal succeeds.

13. Substantial loss was considered in the case of **Sewankambo Dickson vs. Ziwa Abby HCT – 00 – CC MA 0178 of 2005** where the Court stated that:

“.....substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal.....”

The question to be determined is therefore whether the Respondent will be capable of refunding the money if the Appeal succeeds. The duty was upon the Respondent to demonstrate that he is not a man of straw therefore is capable of refunding the money. He had to prove his ability to refund the money in case the Appeal succeeds. This was well put in the case of **ABN AMRO BANK N. V. vs. Le Monde Foods Limited Civil Application No. NAI. 15 of 2002** where the Court stated that:

“In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and that the pending appeal were to succeed. The evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

14. I have perused the replying affidavit, what comes out is the argument that the intention of the Applicant is to frustrate the Respondent from enjoying the fruit of the Judgment.

15. In the circumstances, justice would be seen to have been done if the order sought is granted. Therefore I allow the application on condition that the Applicants deposit security in the sum of **Kshs. 3,000,000/=** in Court within **seven (7) days**. In default execution to proceed. Costs of the application shall abide the outcome of the Appeal.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 21st day of June, 2018.

L. N. MUTENDE

JUDGE