



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 509 OF 2012**

**NANCY WANJIKU KARIITHI**

**PATRICK B GATHERU**

**(Both suing as the personal representatives of**

**SYDNEY NJUGUNA KARIITHI(DECEASED) ..... PLAINTIFFS/RESPONDENTS**

**VERSUS**

**FONTANA LIMITED ..... DEFENDANT/APPLICANT**

**RULING**

1. This ruling seeks to determine a Notice of Motion dated 28<sup>th</sup> February, 2017 and filed under the provisions of Order 42 Rule 6 and 9 of the Civil Procedure Rules and sections 1A, 1B & 3A of the Civil Procedure Act seeking orders that there be stay of execution of the judgment delivered on 16<sup>th</sup> February, 2017 and the resultant processes pending the *inter partes* hearing of the intended appeal and that the costs of the Application be provided for.

2. The Application is premised on the grounds on the face of the application and the Supporting Affidavit of COLLINS NYAEMA of even date. It is deponed that the Applicant being aggrieved by the judgment entered in favour of the Respondents in the sum of Kshs. 3,021,840 intends to appeal to the Court of Appeal and that the said appeal is arguable with excellent chances of success. The applicant is willing to deposit in court or in a joint interest earning account such security within such period as the court may deem fit. It is further deponed that the Applicant will suffer substantial loss which cannot be remedied by an award of damages as the Respondents may not be able to refund the decretal sum since as was found by the Court he does not earn more that Kshs. 60,000/= from farming business. The applicant believes that the Respondents will not be prejudiced if the orders are granted.

3. The Application was opposed by the Respondents who filed Grounds of Opposition dated 21<sup>st</sup> March, 2017 and a Replying Affidavit sworn by ROSE OBAGA on 7<sup>th</sup> February, 2018. The Application is opposed on the grounds that it is incompetent and an abuse of the Court process, that there is no likelihood of execution before taxation of the Respondent's costs, that the applicant has not shown how the intended appeal will be rendered nugatory, that the Respondents stand to suffer prejudice and that the applicant has not satisfied the conditions set down under order 42 Rule 6 (2) of the Civil procedure Rules, 2010 in particular on substantial loss and that the Respondents are not men of straw and can repay any amounts in case the appeal is successful. It is deponed that the Respondents have filed a declaratory suit to recover the decretal sum from the insurance company and therefore there is no danger of executing against the Defendant. It is also deponed that the claim involves minors and the decretal sum will be safely invested for the minors under the Fatal Accidents Act until they are 18 years and there cannot be substantial loss.

4. This Application was canvassed orally in Court. I have considered the Application and the submissions of both parties and the authorities relied upon. Order 42 Rule 6 of the Civil Procedure Rules provides the conditions for granting an order of stay of execution which are;

- (a) That the application has been made without unreasonable delay;
- (b) security for the decree or order has been given; and
- (c) That substantial loss may result to the Applicant unless the order for stay is made.

5. What constitutes unreasonable delay varies from the circumstances of each case. The instant application was filed on 6<sup>th</sup> March, 2017 whereas the judgment sought to be stayed was delivered on 16<sup>th</sup> February, 2017. The Application was therefore made 18 days after the judgment was delivered which period cannot be considered to be unreasonable delay. It was submitted by the Respondents' Counsel that the applicant has been indolent in prosecuting the application and only decided to prosecute the same after the Respondent filed the declaratory

suit. Order 42 Rule 6 obligates an applicant to file an application without unreasonable delay but it does not provide for promptness of prosecuting the same. In any case, since the application was prosecuted before the lapse of one year, which is the period provided for dismissal for lack of prosecution, I do not find that there was inordinate delay.

6. The Applicant has deponed that they would suffer substantial loss if the execution is not stayed since the Respondents do not earn more than Kshs. 60,000 from farming business and as such cannot refund the decretal sum. On the other hand, the Respondents stated that they are people of means and can settle the decretal amount. They also averred that the decretal sum would be invested for the minors. Once an Applicant casts doubt on the financial capability of the Respondent to refund the decretal sum in the event of a successful appeal, the burden shifts to the Respondents to prove their financial capability. This is so because the Applicant is not privy to the Respondent's other sources of income. The mere statement that they are not men of straw is not enough. The Respondents, having not discharged that burden, it is my finding that they might not be able to refund the decretal sum if the appeal succeeds and the Applicant would therefore suffer substantial loss.

7. Substantial loss was discussed in the case of **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR where the court held that,**

*“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIKA CHESETO** that:*

***“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”***

8. The Applicant has offered to deposit such security as the court may order for the due performance of the decree.

9. The Respondents raised an issue that they have filed a declaratory suit and as such there is no danger of having the decree executed against the Defendant/Applicant. In their submissions, the Applicant responded that the issue of a declaratory suit is not a consideration under Order 42 Rule 6 of the Civil Procedure Rules. The fact that there is a declaratory suit filed after this application does not bar the Court from determining the instant application. The suit is pending and unless the same is determined and the outcome is known, for now, the Applicant herein is the judgment debtor.

10. As was stated by **justice Aburili** in the case of **Selestica Limited v Gold Rock Development Ltd [2015]** *“the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”*

11. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose.

12. To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent. See **M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997”**

13. My finding is that the Applicant has established a case for the grant of stay orders pending Appeal. Since the subject decree is a monetary one, it would be in the interest of justice to ensure that the Respondents would not encounter difficulties in executing in the event the Appeal does not succeed. Therefore in the circumstances, this court will grant the Applicant a conditional stay on the terms that the Applicant will deposit the whole of the decretal sum in a joint interest earning account to be operated by the Applicant's and Respondents' Advocates. The decretal sum is to be deposited within 30 days from the date of this ruling failure to which the stay orders lapse.

**Dated, Signed and Delivered at Nairobi this 14<sup>th</sup> Day of June 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....*For the Plaintiff*

.....*For the Defendant*