



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL CASE NO. 164 OF 2017**

**EASTERN PRODUCE (K) LTD.....APPELLANT/APPLICANT**

**VERSUS**

**JOSEPHAT SHITUKU MPAPALE...RESPONDENT/RESPONDENT**

**RULING**

In Kapsabet PMCC No. 165 of 2016 of Josephat Shituku Mpapale -vs- Eastern Produce (K) Limited, the court on 27<sup>th</sup> November, 2017 entered judgment in favour of the Respondent as follows:-

- (a) Liability 85% to 15% against the appellant/Applicant
- (b) General Damages ..... Kshs. 200,000/=
- (c) Less 15% contribution ..... Kshs. 30,000/=
- (d) Sub total ..... Kshs. 170,000/=
- (e) Special damages ..... Kshs. 6,500/=
- (f) Total ..... Kshs. 176,500/=
- (g) Plus cost and interest

The Appellant/Applicant dissatisfied by the said judgment preferred an appeal in Eldoret HCCA No. 164/2017, Eastern Produce (K) Ltd -vs- Josephat Shituku Mpapale.

On 10<sup>th</sup> January 2018 the defendant/Applicant by way of a Notice of Motion applied in the sub-ordinate court for an order of stay of execution of the decree pending the hearing and determination of the filed appeal. The court made its ruling on 23<sup>rd</sup> April, 2018 and allowed the application on condition that:-

- (a) Half the decretal sum of Kshs. 176,000/- be deposited in a joint interest earning account in the names of both advocates.
- (b) The other half of the decretal amount be paid to the plaintiff/respondent.

The appellant dissatisfied with the given conditions filed this second application vide Notice of Motion dated 11<sup>th</sup> May, 2015. Prayer one which seeks stay of execution pending the hearing and determination of the application, is already spent. Prayer two however subsists and seeks stay of execution of the judgment and decree of the subordinate court made on 27<sup>th</sup> November, 2017, pending the hearing and determination of the appeal.

Save for the facts already alluded in the short facts of the matter at hand, other facts on which the application is founded are that:-

- (i) The appellant/Applicant has appealed against the judgment by the subordinate court on both issues of quantum and liability.
- (ii) The Respondent's financial ability is unknown and the respondent is unlikely to refund the sums if paid out to him in the event

the appeal succeeds.

(iii) The appeal is likely to be rendered nugatory this being a monies decree.

(iv) The respondent is likely to execute the decree unless the orders of stay sought herein is granted.

(v) The Appellant/Applicant is ready and willing to deposit the entire decretal sum in a joint interest earning account in the names of both advocates on record within a stipulated period by the court to safeguard the interest of both parties.

(iv) The application is made in good faith and in the interest of justice and fairness.

The respondent vide his replying affidavit dated 23<sup>rd</sup> May 2018 opposes the application on the grounds that:-

(i) The applicant has failed to prove that they will suffer substantial loss or irreparable effect should the stay not be granted.

(ii) He is a man of means and therefore able to refund the decretal dues should the appeal succeed.

(iii) He ought to enjoy the fruits of his judgment and therefore, depositing the whole decretal amount in a joint account would be unfair and prejudicial to him.

(iv) Dismissal of the application will not prejudice the applicant as the appeal will not be rendered nugatory.

(v) The application does not meet the threshold required under *Order 42 rule 6(2)* that the court should be satisfied that substantial loss may result to the applicant unless the order is granted; and that security is offered for due performance of such decree.

In his submissions the applicant averred that there is likelihood of suffering substantial loss should the appeal succeed. Though the respondent alleges that he is a man of means, this has not been proved and no evidence has been availed to show it. The applicant further indicates that the offer he has made to deposit the entire decretal sum in a joint account is reasonable as it will safeguard the interests of both parties, subjecting none to prejudice.

The respondent on his part submitted that the allegation that the applicant will suffer substantial loss based on the payment of the decretal amount if the appeal succeeds has been made without proof. The applicant, is averred, should be willing to comply with the court's order and pay half of the decretal sum to him and deposit the other half in a joint interest earning account. He urges this court to dismiss the application and the sub-ordinate court's order be complied with.

In determining this application, I am guided by the criteria set out in the case of *Halal and another -vs- Thornton and Turpin Ltd (1993) KLR 365* in which the court of appeal held that the High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.

The appellant/Applicant in this case has a pending appeal against the respondent of which is against both quantum and liability. If the said appeal succeeds it can have full reversal effect on the decision of the lower court. 176,000/- of which is half of the decretal sum of which the applicant was ordered by the lower court to pay to the respondent, if the appeal succeeds and the respondent is unable to reimburse, the applicant would definitely suffer substantial loss. Though the respondent claims that he is a man of means, there is nothing presented apart from merely alleging so, to show that he is capable of reimbursing the applicant the 176,000/- should the appeal succeed. The applicant on his part is willing to offer full security of the decretal sum of which he says will be deposited in an interest earning joint account in the name of both advocates for the period the court deems fit. This would ensure that no party is prejudiced during pendency of the appeal. The application was also made without inordinate delay given that the lower court ruling was on 23<sup>rd</sup> April, 2018 and the application herein was filed on 11<sup>th</sup> May, 2018. The applicant has therefore satisfied the legal threshold for granting of stay of execution. I accordingly find the application merited and is granted. The applicant will deposit the total decretal sum in

an interest earning bank account in the name of both advocates in this matter, pending hearing and determination of the appeal.

Costs will be in the cause.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 31<sup>st</sup> day of July, 2018.**

In the presence of:-

1. Ms Ruto holding brief Mr. Onyinkwa for the appellant

2. Mr. Magare holding brief Mrs Chepkurui for the Respondent

3. Mr. Mwelem- Court clerk

**COURT:-**

Deposit be made within the next 30 days.

**SIGNED**

**S.M GITHINJI**

**JUDGE**

**31/7/2018**