



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 4 OF 2017(O.S)

IN THE MATTER OF SECTION 55 OF 56 OF THE ADVOCATES ACT

AND

IN THE MATTER OF ORDER 52 RULES 4 AND 7 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF AN UNDERTAKING THE FIRM OF ODHIAMBO & WEDA ADVOCATES

HENRY KIPKORIR KIMUTAI.....APPLICANT

VERSUS

WEDA AMBROSE OTIENO.....1ST RESPONDENT

ODHIAMBO DISMUS OMONDI WAKLA.....2ND RESPONDENT

(Both respondent formerly trading as ODHIAMBO & WEDA ADVOCATES)

RULING

1. In a judgment dated 31st May 2018 the 1st Respondent Weda & Company Advocates was ordered and directed to honour a professional undertaking dated 24th May 2012 and to pay to the applicant in the Originating Summons a sum of Kshs.4 Million within 45 days of the judgment together with costs.

2. Upon application for stay dated the 4th July 2018, the 1st Respondent was directed to pay a sum of Kshs.2 Million to the applicant pending hearing and determination of the substantive application.

3. Prayer No. 4 and 5 of the Application thereof stated -

(4) In the alternative to prayer 3, there be a stay of execution of the decree herein to the extent of Kshs.2,600,000/= and Value Added Tax(VAT) pending hearing and determination of the intended Appeal or

(5) In the alternative to prayer No. 3 and 4 there be a stay of execution of the decree wherein pending the resolution of the question of the Appellants agreed fees in terms of the decision of the court until further orders of the court.

4. The main grounds for the above propositions as seen from the face of the application and the affidavit in support are that the appeal has high chances of success and payment of the decretal sum to the Applicant would render the appeal negatory, and irreparable harm and embarrassment to the Applicant.

5. There propositions are opposed. The Respondent filed grounds of opposition dated 16th July 2018 and on the 19th July 2017.

6. It is stated that the applicant has not demonstrated any substantial loss that he may suffer should the decree be executed against him and that he is not willing to provide security for the due performance of the decree.

7. The decree subject of this application is a money decree ordered against the law firm Weda Co. Advocates.

8. An order of stay of execution is at the courts discretion.

Order 42 Rule 6 (1) CPR sets the conditions that a party must meet for such order to be availed

1. Substantial loss to the applicant

2. Security for due performance of the decree

3. Balance of convenience.

9. The general principle in granting or refusing a stay is if there is no overwhelming hindrance, a stay must be granted so as not to render an appeal nugatory. If goods reasons are advanced a court ought not refuse a stay.

10. In doing so the court should exercise its discretion judiciously and if persuaded that irreparable loss may be occasioned by a refusal, may proceed to grant stay – **Civil Appeal No. 18 of 2017 Amal Hauliers Ltd -vs- Abdulnasir Abukar Hassan (2017) e KLR.**

11. I have considered the grounds upon which the application is brought, and the objections.

I am not persuaded that the applicant has met the conditions set under **Order 42 rule 6 of CPR.**

12. In the first instance, on the 19th July 2018, the court directed the applicant to pay to the respondent Kshs. 2 Million pending hearing of the application. He failed to do so. He has tendered nothing to the court to demonstrate that the respondent may not be able to refund the said sum should the appeal succeed.

13. The money and subject of this originating summons was given to the applicant by the respondent to place as security in court to secure a stay order on his behalf. He failed to do so.

If at the time the Respondent was able to pay the same and there being no reason shown otherwise or changed circumstances demonstrated I am persuaded that he would be able to refund.

14. I have taken liberty to reproduce the prayers the applicant seeks **in the alternative.**

I have expressed myself sufficiently in the judgment on the issue of costs that they will be determined upon taxation of the advocates Bill of costs. It is not upon the advocate to dictate to the court what he thinks ought to be before taxation. That is the duty of the taxing master of the court.

15. Having considered the objections by the respondent and upon my discretion and circumstances of this matter and as an appeal is a right to a litigant I shall not stand in the applicants way to be heard on appeal.

16. Consequently I grant an order of stay of execution of the decree herein subject to the applicant, **Weda & Co. Advocates**, meeting the following conditions:

1. That the applicant shall pay to the respondent Henry Kipkorir Kimutai a sum of 2 Million within a period of 45 day of this order.

2. That the balance of Kshs 2 Million shall be deposited in a joint interest earning account in the names of the parties advocates in a bank to be agreed upon within a period of 90 days of this order.

3. That default by the applicant shall cause the stay order to lapse unless otherwise extended by the court or varied. That sum shall be so deposited as security for the due performance of the decree.

Dated, signed and delivered this 20th day of December 2018.

J.N. MULWA

JUDGE