



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.589 OF 2012

DR. JOHN RITHO KANOGO.....1ST PLAINTIFF/RESPONDENT

DR. GEOFFREY AVUGWI RITHO.....2ND PLAINTIFF/RESPONDENT

MARGARET RITHO.....3RD PLAINTIFF/RESPONDENT

VERSUS

JOSEPH NGUGI.....1ST DEFENDANT

THE STANDARD GROUP LIMITED.....2ND DEFENDANT

RULING

The Applicants/Defendants have moved the court by way of a Notice of Motion dated the 21st day of December 2017 under Sections 1A and 1B of the Civil Procedure Act and Orders 42, Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, seeking orders for stay of execution of the judgment and/or decree given in this matter, pending the hearing and determination of the intended formal application for stay and appeal before the court of appeal.

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit sworn by Millicent Ngetich on the 21st December, 2017.

In the said affidavit, it is deponed that, on the 6th day of December, 2017, judgment in this matter was delivered in favour of the 1st, 2nd and 3rd Respondents for Kshs.10,9 and 8 million respectively plus the costs of the suit which amounts, are excessive in the circumstances, and will be burdensome to the Appellants/applicants.

It is further deponed that the Applicants being dissatisfied with the decision of this Honourable Court, intend to appeal against the whole decision to the court of Appeal. That, the Respondents reside outside the jurisdiction of this court and the applicants are not aware of any of their assets or their financial situation and they are apprehensive that they will not be able to recover the money once the Appeal is successful.

The Applicants aver that unless a stay of execution of the judgment and decree is granted, the Respondents may proceed with execution to their detriment. The applicants are ready and willing to comply with such orders as the court deems fit as to the issuance of security for due performance of the decree. That the Respondents will not be prejudiced in any way if the application is granted and it is in the interest of justice that the application be granted.

The plaintiffs/Respondents have opposed the application by way of Grounds of opposition filed on 31st January 2018. They have stated that;

(1) The application is not merited and it's based on pure allegations and speculation regarding the plaintiffs' means.

(2) That it is the defendants' legal obligation to prove that the plaintiffs have no means but there is no such evidence.

(3) That this being a money decree, the defendants have not shown any sufficient cause to warrant the plaintiffs' denial of their fruits of litigation.

(4) That, the Plaintiffs are all Kenyans who are professional men and woman highly qualified in their specialized fields, earning substantial income, and each of them would be in a position to refund any portion of their respective decretal sums, in the unlikely event of the success of the intended Appeal.

(5) That the defendants have not shown any sufficient cause to warrant the stay of execution sought.

(6) The award of damages and the quantum thereof is purely at the discretion of the court and the amounts awarded to the plaintiffs are not excessive.

(7) The Defendants have not offered to pay the entire amount in court and/or for the same to be held in a joint interest earning account between the parties' Advocates herein, to warrant the stay sought.

(8) The defendants intended appeal does not stand any chance of success bearing in mind that the 2nd defendant never produced any evidence at the hearing of the suit and also bearing in mind that the evidence adduced by the first defendant was self defeating and supported the plaintiffs' suit.

In addition to the grounds of opposition, the first plaintiff swore an affidavit on the 20th April, 2018 wherein he has set out his professional qualifications and has deponed that;

(a) He receives reasonable remuneration, he has investments and fixed assets in Nairobi and elsewhere, has a piece of land L.R. 209/9294 which is developed with 80 residential premises with income of Kshs.1.4million per month and the property is valued at Kshs.144 million.

(b) That him and his siblings are professional people holding responsible careers and therefore, the allegations that they would not be able to refund the decretal sum, if paid to them, is not only false but malicious.

(c) That the 2nd defendant has a good job as a neurosurgeon in Spain and has a good salary while his sister, the third plaintiff has a good job with good income in the United States of America where she works as a financial analyst with a well known global blue chip firm.

(d) He has deponed that he personally undertakes to refund money paid to any of them in the event of a successful Appeal.

(e) On the assertion that they do not live in Kenya, he avers that they were all born and educated here but they proceeded to their respective destinations where they are working in gainful employment and none of them has renounced their respective citizenship.

(f) He further averred that he is ready and willing to deposit his title for parcel No. 209/9294 with his Advocate for safe keeping for purposes of indemnifying the defendants in the event that the Appeal succeeds or is ready to deposit it anywhere else as directed by the court. He deposes that the value of the property is much more than the total decretal sum herein and has annexed a copy of the valuation report showing that the property is worth Kshs.144 million shillings.

Parties filed written submissions in support of their respective positions, which the court has fully considered.

The application is brought under Order 42 Rule 6 of the Civil Procedure Rules. Under sub rule (2), the court will only grant a stay after it's satisfied that; substantial loss may result to the applicant unless the order is made, that the application has been made without unreasonable delay and security for due performance of the ultimate decree has been given.

What is substantial loss in the sense of Order 42 Rule 6? This was ably described by Justice Ogola in the case of **Tropical Commodity Suppliers Limited** in which he quoted the case of **Kenya Shell Limited Vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga** (1982-1988).....substantial loss does not represent any particular mathematical formula, rather it is a qualitative concept, it refers to any loss great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely minimal.

Substantial loss especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the applicant and it does not shift. But it is not enough for the applicant to merely state that the Applicant cannot refund the sum paid. There must be cogent evidence which show the inability or financial limitation on the part of the Respondent to refund the decretal sum. And it is only when such *prima facie* evidence is laid before the court by the applicant that the evidential burden shifts to the Respondent. Evidential burden does not arise on mere averment that the Respondent cannot refund the money as the applicant intends the court to believe or by making comparisons as submitted by the applicant that since the amount is huge – at least according to the Applicant – the court should find that the applicant will suffer more hardship and suffering than the Respondent might suffer if he is forced to pay out the said sum; whilst on the other hand if the Respondent is kept out of the decretal sum she would not be affected. This kind of submission is not defensible in light of what I have stated that none of the rights held by the parties is greater or the lesser than the other as to entitle a court of law to prefer one over or not the other.

The applicants have submitted that due to the quantum of damages awarded to the Respondents, it shall be burdensome for them to raise the amounts and that, the Respondents have remained outside the jurisdiction of the court and if the money is paid to them, it is doubtful that they would be in a position to refund the same, if the Appeal succeeds.

On the other hand, the 1st Respondent has sworn an affidavit deponing not only his capability to refund the decretal sum but also the other Respondents. The Applicants are apprehensive that if the money is paid to the Respondents, they may not be able to refund and recovering the same would be difficult considering that they live outside the jurisdiction of the court. As rightly argued by the Counsel for the Respondents the fact that the decretal sum is a lot is not a good reason to grant a stay of execution of a decree. The 1st Respondent has deponed that they will be in a position to refund the decretal sum should the Appeal succeed. With the evidence on record, the court is

satisfied that the Respondents will be in a position to refund the decretal sum but bearing in mind that they live outside the jurisdiction of this court, it's important that the court do take that fact into account as well.

On whether the application was made without undue delay, the Judgment sought to be stayed was delivered on 6th December, 2017 and the application was filed on the 21st December, 2017. The same was filed timeously and there was no delay.

In an application for stay of execution, the court must weigh the claims by both sides and balance the interests of both parties – see the case of **Oraro Vs. Co-operative Bank Civil Appeal No. 358 of 1999**. In so balancing the interests of the parties herein, I do grant a stay of execution pending the hearing and determination of the intended Appeal to the Court of Appeal, on condition that, half of the decretal sum is paid to each of the Respondents and the balance be deposited in a joint interest account to be opened in the joint names of the counsels on record. The orders of the court aforesaid to be complied with, within 30 days from the date of this ruling failing which the stay order shall lapse. The costs of the Application shall abide the outcome of the Appeal.

It is so ordered.

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

.....

L. NJUGUNA

JUDGE

In the presence of

..... For the Plaintiff/Respondent

..... For the Defendant/Applicant