



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 45 OF 2017

KENYA NUT COMPANY LIMITED.....APPELLANT/APPLICANT

VERSUS

SARAH NANJALA WAMBOGO.....RESPONDENT/DEFENDANT

RULING

The Appellant/Applicant herein has moved the court by way of Notice of Motion dated 14th February 2017 seeking a stay of execution pending the hearing and determination of the appeal and costs of the application.

The main grounds in support of the application are that the Appellant has filed an Appeal against the judgment of the lower court delivered on the 12th January, 2017. That the appellant was granted interim orders which lapsed on the 12th February 2017 and it is yet to obtain typed copy of the judgment. That if a stay is not granted the Appellant's appeal shall be rendered nugatory as the Respondent's assets are unknown and there is imminent risk that the applicant will not recover the sum of Ksh.143,500,00/= awarded as general damages together with interest and costs, in the event that the intended appeal is successful. That the Appellant is ready to furnish such security as the court may deem fit and just.

The application is supported by the affidavit of Victor Senaji sworn on 14th day of February 2017 which basically reiterates the grounds as set out hereinbefore.

The application proceeded ex parte as the Respondent neither attended court nor filed a response to the application despite having been served with a hearing notice on the 24th March 2017.

The court has considered the application and the submissions by the counsel for the Appellant. It is mainly brought under Order 42 Rule 6 (2) of Civil Procedure Rules. Under that rule, no order for stay of execution shall be made 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.

On the issue of substantial loss, the Appellant has stated that if the appeal succeeds the Respondent may not be able to refund the decretal sum as his assets are unknown. Courts have in several cases defined substantial loss. In the case of Antoine Ndiaye -vs- African Virtual University Nairobi HCCC No. 422 of 2006 the Judge had this to say;

“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 nominal.”

In Kenya Shell Limited –vs- Benjamin Karuga Kabigu and another, the court held thus;

“It is usually a good rule to see if Order 42 Rule 6 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.”

Similarity in the case of Machira t/a Machira & Co. Advocates vs- East African Standard (No2) (2002) KLR 63, the court was of the view that;

“In this kind of applications for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.....”

In our case, the Appellant has expressed reasonable doubts as to the Respondent’s financial capability to refund the decretal sum if the Appeal succeeds. It is a well established principle of law that where such doubts are raised, the evidential burden shifts to the Respondent to satisfy the court that he is in a position to refund the decretal sum. In this case, no evidence was offered as the Respondent did not defend the application and for that reason, the court finds that the Applicant has established that it will suffer substantial loss if the orders sought herein are not granted.

On the issue of delay, it is noted that, the judgment by the Lower Court was delivered on 12th January, 2017. The application herein was filed on the 14th February 2017 a month after. The court finds that there was no unreasonable delay in filing the present application.

On the issue of security, the applicant has stated that it is ready and willing to comply with any conditions that may be imposed by this Honourable Court.

In the result, I find and hold that the Applicant has satisfied this court that he deserves the orders sought in the application dated the 14th February, 2017. The application is granted as prayed in terms of prayer 4 but of condition that the decretal sum be deposited in court within 30 days from today failing which the stay order shall lapse.

Dated, signed and delivered at Nairobi this 31st day of March, 2017.

.....

L NJUGUNA

JUDGE

In the presence of

..... ***For the Appellant/Applicant***

..... ***for the Respondent/Defendant***