



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 308OF 2017

STOIC COMPANY LIMITEDAPPLICANT

VERSUS

VINCENT NJUGUNA NJENGA.....RESPONDENT

RULING

1. The application dated 19th June, 2017 seeks orders that there be a stay of execution of the judgment dated 24th May, 2017 and all consequential orders thereto pending hearing and determination of the Appeal herein.

2. According to the grounds and the affidavit in support of the application, the judgment of the lower court was delivered on 24th May, 2017 against the Applicant for the sum of Ksh.500,000/=. The Applicant is dissatisfied with the said judgment and has filed the Appeal herein. It is further stated that the Respondent has commenced the execution process and Auctioneers have already proclaimed the Applicant's property. It is averred that the Appeal has high chances of success and if the decretal sum is paid there will be no chances of recovering the same as the Respondent is a person of unknown means. The Applicant has offered to deposit security for the due performance of the decree.

3. The Application is opposed. The Respondent filed the grounds of opposition dated 14th July, 2017 which state as follows:

“1.That the application does not meet the conditions of stay of execution required to be fulfilled under Order 42 rule 6 of the civil procedure Rules.

2. That the application is otherwise an abuse of the process of the court.

3. That the Applicant has not showed in which way the intended appeal will be rendered nugatory in the event the intended appeal succeeds.

4. That the appeal is not arguable and the same has no chance of success.”

4. The application was canvassed by way of written submissions. I have considered the said submissions.

5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (1) 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.”

6. The judgment of the Lower Court was delivered on 24th May, 2017. The application under consideration was filed on 19th June, 2017. The application was filed without unreasonable delay.

7. The Applicant has pointed out the substantial loss that he may suffer as the non recovery of the decretal sum in the event that the appeal is successful. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR:**

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”

8. The Respondent has not tabled any evidence of his means. As stated by the Court of Appeal in the case of **Nairobi Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd. vs. Aquinas Francis Wasike & Another:-**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by respondent or the lack of them. One an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

9. To balance the interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

Date, signed and delivered at Nairobi this 23rd day of Nov., 2017

B. THURANIRA JADEN

JUDGE