



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 152 OF 2017

ALPINE COOLERS LIMITED.....APPLICANT

VERSUS

ALFRED AVUKWI MIHESO.....RESPONDENT

RULING

1. The application dated 4th May 2017 seeks orders of stay of execution of the judgment and decree delivered on 6th March, 2017 pending the hearing and determination of the appeal filed herein.
2. It is stated in the affidavit in support that the judgment of the lower court was delivered on 6th March 2017 awarding the Respondent the sum of Ksh.213,596/= damages. The Applicant is aggrieved by the said judgment and has appealed herein. The Applicant is apprehensive that in the event the appeal succeeds he may suffer substantial loss if execution proceeds as the Respondent's source of income is unknown. The Applicant is willing to deposit security for the due performance of the decree. It is further stated that the appeal has high chances of success.
3. The application is opposed. It is stated in the replying affidavit that the application is meant to delay the Respondent from reaping the fruits of his judgment. It is further stated that the appeal has no chances of success and if the order sought is granted, the Applicant should deposit security for the decretal sum.
4. 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.”
5. The judgement of the lower court was delivered on 6th March, 2017. The application under consideration was filed on 5th April, 2017. There was no unreasonable delay.
6. The Applicant Company has stated that it is apprehensive that the Respondent may not be able to refund the decretal sum and will suffer substantial loss. 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.”

7. The Respondent has not said anything to allay these fears. As stated by the Court of Appeal in the case of **Nrb 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 a respondent or the lack of them. Once 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.”

8. The Applicant has offered to deposit security.

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

Dated, signed and delivered at Nairobi this 22nd day of Nov., 2017

B. THURANIRA JADEN

JUDGE