



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 152 OF 2015**

**TRISHCON CONSTRUCTION CO. LTD.....PLAINTIFF**

**VERSUS**

**AVTAR SINGH BAHRA.....DEFENDANT**

**RULING**

1. I rendered a final judgment in this matter on 28 September 2017. I partially allowed the Plaintiff's claim. I dismissed the Defendant's counter claim in its entirety. I then decreed that the Plaintiff be paid the sum of Kshs. 6,752,810/= by the Defendant together with interest and costs. Both parties were not contented and have since filed their respective Notices of Appeal. In the meantime, the Defendant is back before me.
2. The Defendant has filed a motion under Order 42 Rule 6 of the Civil Procedure Rules. The Defendant seeks to stay the execution of the decree made in favour of the Plaintiff until the hearing and determination of the intended appeal. The motion is pegged on the grounds outlined on the face thereof. The motion is also factually supported by the affidavit of the Defendant sworn on 18 October 2017.
3. The Plaintiff opposes the motion and has filed a Replying Affidavit. The opposing affidavit was sworn by one Dhanji Velja Halai on 16 November 2017.
4. It is common ground that for a party to benefit from the provisions of Order 42 Rule 6 of the Civil Procedure Rules, a party ought to satisfy the four factors outlined in the Rule. First, a valid Notice of Appeal ought to have been filed. Secondly, the application for stay ought to have been made without undue or unreasonable delay. Thirdly, the applicant ought to establish to the court's satisfaction that he stands to suffer substantial loss if no stay orders are issued. Finally, the applicant must also be ready and able to avail such security for the due performance of the decree as the court may order. These are the four odd factors which fetter the court's discretion whilst considering an application for stay of execution.
5. In the instant cause, it is common cause that the Defendant filed his Notice of Appeal in time. It is also not in controversy that the applicant filed the instant application with reasonable promptitude. There was no delay.
6. What is however in controversy is whether the Defendant application will suffer substantial loss. There is also the question as to whether the Defendant has offered any security for the due performance of the decree.
7. Mr. Makori submitted that the decree in question is a monetary decree and thus there can be no

substantial loss if the Defendant was to satisfy the decree and later on succeed on his appeal. Ms. Koki, for the Defendant, was of the contrary view. Ms. Koki insisted that the Defendant stood to suffer substantial loss if execution was allowed to proceed and the appeal ultimately succeeded as there was no assurance that the amounts paid would ever be recovered. In such a case, it would be worthless pursuing the appeal, so submitted the Defendant's counsel.

8. Ms. Koki then submitted that the Defendant is willing to provide any security as may be ordered by the court. The rejoinder by Mr. Makori on the issue of security was that it was not for the Defendant judgment debtor to await the court's discretion on what security to provide but rather a defendant seeking a stay of execution was obligated to offer appropriate security for the due performance of the decree.

9. What the Defendant seeks is stay of execution with a view to enabling the Defendant to await the result of the appeal in the hope that the appellate court will decide in favour of the Defendant and find that the Defendant owes the Plaintiff no monies. For this the Defendant says that if there is no stay he will suffer substantially. I can now only point out that there is no certainty that the appeal will succeed and any alleged substantial loss solely on that basis may only be termed speculative.

10. I must also point out that the court ought to be loath to grant a stay of execution merely to avoid injustice or inequity by reason of substantial loss. Stay ought to be only granted where substantial justice so requires and on the basis of the established factors outlined above [at paragraph 4]. Put differently, granting of stay of execution entails an exercise of discretion to be judiciously executed as the purpose of the stay ultimately is to ensure that both parties are protected. The Defendants right of appeal is not to be trampled, yet the successful Plaintiff is also not to be put through undue hardship. Neither party should be unduly aggrieved: see **Mukuma –v- Abuoga [1988] KLR 645**.

11. In the case of monetary decrees, it is not normal to grant stay of execution especially where the amount is not substantial. The rationale is essentially that money is easily recoverable should the appeal be ultimately successful.

However, where the Defendant shows that he will suffer substantial loss or that the prejudice is substantial, were he to make a substantial monetary payment or that the decree holder has no known assets, the court ought to be benevolent enough and grant stay on terms as to security.

12. It ought to be the court laying out the condition or security. This appears to be my reading and apprehension of Order 42 Rule 6. It should not be the applicant stating the security. That may lead to further curtailing the court's jurisdiction.

13. I am not convinced, in the instant case, that the Defendant has shown that he will suffer substantial loss were he to honour and satisfy the decree. I see no reason why the successful Plaintiff should be locked out of the fruits of its judgment. I see no reason to grant any stay of execution even upon a condition as to security. I therefore decline to exercise my discretion in favour of the Defendant.

14. The application dated 23 October 2017 is dismissed but with no order as to costs.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of December, 2017.**

***J.L.ONGUTO***

**JUDGE**