



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC. CASE NO. 767 OF 2010

ZEPAHNIA NGARIA ANGWENYE..... PLAINTIFF/APPLICANT

VERSUS

MOSES LUTOMIA WASHIALI1ST DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK 2ND DEFENDANT/ RESPONDENT

RULING

1. The instant matter arises from a taxation by the Deputy Registrar as a taxing master in which the Deputy registrar taxed costs as against the applicant amounting to Kshs.2,138,820/=.
2. The applicant challenged the same amount lamenting that it was exorbitant and did not follow principles as laid down by the Law. The challenge of the taxing master decision was not successful and thus the applicant lodged a notice of appeal to impugn the High court decision.
3. Meanwhile a motion dated 17.12.2015 was lodged seeking stay of the ruling/orders of 5.11.015 pending appeal.
4. The application is brought principally under order 42 Rule 6 of the CPR which deals with stay for execution pending appeal.
5. The application is supported by the grounds on the face of the motion and the supporting Affidavit of Moses Lutomiah Washiall sworn on 17.12.015.
6. The application is predicated on the grounds that the amount taxed was Exorbitant and not in accord with the laid down legal principles.
7. The applicant avers that he will suffer irreparable damage if execution is levied. The affidavit in support reiterates the same facts.
8. Mr. Wanyanga for the applicant submitted that the thresh hold for grant for stay of Execution pending appeal under order 42 Rule 6 CPR has been demonstrated by the material in court. That the application was filed without delay and in any case within 14 days of the decision.
9. The Applicant who is now a retired citizen cannot raise the decretal amount but will have to dispose properties to raise the amount. However he submits that Execution will inflict him irreparable damages and in any case the decretal amount may not be recovered if paid to the J/C in event appeal succeeds.
10. The applicant offers to deposit 30% of the taxed amount in court, or in an interest earning account as security pending appeal. The applicant intimated that he will seek in appeal to have taxed

amount reduced to a maximum of 50% of the taxed amount. The Respondent oppose the application via the affidavit of Zephania Ngaira Anyweye, sworn on 31.12.015.

11.The Respondent avers that the application is an afterthought and intended to delay the enjoyment of the Respondent’s fruit for his judgment. He sought to have application dismissed with costs. Mr. Nyamai for the Respondent submitted that the entire decretal amount should be deposited otherwise the application be dismissed and stay orders be discharged.

12.Order 42 Rule 6 (2) CPR provides that;

“(2) 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”.

Then the security is offered for performance for the decree.

13.The application was filed within 14 days which demonstrates same was not filed with delay. On security the applicant offers to deposit 30% of the decretal amount. On substantial loss, the court doubts whether the material before the court demonstrates the likelihood of the same.

14.In **DANIEL CHEBUTUL ROTICH and 2 others - VS - EMIRATES AIRLINES HCC 368/01** the court held that;

“substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay for execution is not granted and that the applicant therefore forced to pay the decretal sum”.

15.In **MUKUMU – VS – ABUOGA (1988) KLR 645** the court held that;

“... substantial loss is what is to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

16.In the instant matter, there is no prove that payment of the decretal amount would render appeal nugatory. However since the respondent was amenable to the deposit for the security, the court makes the following orders;

1. The applicant shall deposit Kshs.1 million with the Respondent within 30 days from date herein.
2. Thereafter the balance of the taxed amount to be deposited within 30 days in a joint account by both parties advocates pending appeal.
3. In default of any of the above, the Execution to proceed.
4. Costs to the Respondent.

Dated, signed and delivered in court at Nairobi this 13th day of January, 2016.

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C. KARIUKI

JUDGE