



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL 135 OF 2014

ALHYDER TRADING COMPANY LIMITED APPLICANT

VERSUS

LUCY JEPNGETICH MIBEI RESPONDENT

RULING

1. The Amended Notice of Motion dated 11th March 2015 is expressed to be brought under **Section 1A, 1B, 3, 3A** and **Order 42 Rule 6(1)** of the **Civil Procedure Rules** and all other enabling provisions of the law. The substantive prayer in the application is that there be a stay of execution of the judgment and decree issued against the applicant by *Hon. S. Mokuu* in Eldoret CMCC No. 596 of 2012. The judgment was for a sum of Kshs. 1,126,000 together with costs and interest.
2. The application is premised on the grounds stated on its face which are re-iterated in the supporting affidavit sworn on 5th March, 2013 by *Rana Shokhat Ali Waryan*, the applicant's Managing Director.
3. In the supporting affidavit, the deponent avers that the applicant was extremely aggrieved by the judgment of the lower court dated 14th October, 2014 and that it had already proffered an appeal to the High Court against the said judgment. It is the applicant's case that its appeal has high chances of success and that if the orders sought are not granted and execution proceeded, the appeal will be rendered nugatory since in its view, the respondent did not have financial capacity to refund the decretal sum if the appeal is successful.
4. It is also the applicant's case that if the application is not allowed, it will suffer substantial loss as the amount at stake is substantial and that its payment will cripple its business operations. The applicant further contended that it was willing to furnish reasonable security for the due performance of the decree on terms the court deemed just.
5. The application is opposed. The respondent filed a Replying affidavit on 27th May, 2015. It is the respondent's contention that the application is frivolous, unmeritorious and was only aimed at delaying the realization of fruits of her judgment. The respondent invited the court to dismiss the application or allow it on condition that the applicant deposits in court or in an interest earning account the entire decretal sum of Kshs 1,726,036 together with interest accrued and any other accruing charges pending the hearing and determination of the appeal.
6. When the application came up for interparties hearing on 29th July, 2015, Learned counsel on

record agreed that the same be disposed of by way of written submissions. To that end, the applicant filed its submissions on 3rd November, 2015 while those of the respondent were filed on 14th October, 2015.

7. I have considered the application, the affidavits on record, the written submissions filed by the parties and the authorities cited. I find that this being an application for stay of execution pending appeal, in order to succeed in its application, the applicant must satisfy the requirements for grant of stay orders enumerated under **Order 42 Rule 6** of the **Civil Procedure Rules**. The applicant must prove to the satisfaction of the court that it will suffer substantial loss if the orders sought are not granted; that it has filed the application without delay and that it is willing and able to give such security as the court may order for the due performance of the decree.
8. The question that now arises for my determination is whether the applicant has fulfilled the conditions for grant of stay as stipulated above. I must state at this juncture that the decision whether or not to grant stay of execution pending hearing of an appeal is at the discretion of the court. The conditions set out under **Order 42 Rule 6** of the **Civil Procedure Rules** are only meant to be guidelines to assist the court in the exercise of its discretion.
9. Having said that, I wish to start by considering whether the application was filed timeously. I note that the judgment of the lower court was delivered on 14th October, 2014. The appeal was filed on 12th November, 2014 while the initial application for stay was presented in court on 20th February, 2015 but because of drafting errors, that application and another one dated 5th March, 2015 were either withdrawn or abandoned before the instant application was filed. There was therefore an obvious delay of about 4 months since the date the impugned judgment was delivered and the filing of the initial application and about 3 ½ months from the date the appeal was filed and the date that application was filed in court. The applicant did not attempt to offer any explanation for this delay. I find that an unexplained delay of about four months is inordinate and is certainly inexcusable. The application appears to have been filed as an afterthought perhaps to delay the respondent's realization of fruits of her judgment.
10. On the issue of substantial loss, the applicant has merely stated in the deposition sworn on its behalf and in its written submissions that if it was compelled to pay the decretal amount in the sum of Kshs. 1,726,036, it will suffer substantial loss as such payment will cripple its business operations.

The applicant did not however disclose to the court the nature of its business or how such payment could cripple its operations.

11. I have however noted its claim that if execution proceeded and the appeal is eventually successful, the appeal may be rendered nugatory as the respondent did not have capacity to refund the decretal amount. The law is that once an applicant expresses apprehension about the respondent's ability to fully refund the decretal sum in the event that the appeal is successful, the burden shifts to the respondent to rebut that assertion. The Court of appeal emphasized this position in **ABN Amro Bank N.V Vs Le Monde Foods Limited Civil Application No. NAI 15 of 2002** where it stated as follows;

“In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has –such as land, cash in the bank and so on”.

12. In the instant application, though her alleged incapacity to refund the decretal sums was deponed to in paragraph 5 of the supporting affidavit, the respondent in her replying affidavit did not respond to that claim. She did not in fact make any mention of her financial capacity. In the circumstances, I find that the respondent has failed to demonstrate that she was in a position to refund the decretal amount in the event that the pending appeal was successful.

13. This court is a court of justice. Though in an application for stay I am not expected to consider

whether or not the pending appeal has chances of success, i am alive to the fact that in such an application, two competing interests are at play and it is the court's responsibility to see how those interest can be balanced in a way that meets the ends of justice. The applicant has a right to appeal and to enjoy the benefits of that right in the event that the appeal is successful while the respondent has a right to enjoy the fruits of her judgment.

14.I have noted that the applicant has offered to furnish such security as would be ordered by the court for the due performance of the decree. In the interests of justice, having taken everything into account, I exercise my discretion and order a stay of execution of the decree herein on condition that the applicant deposits the decretal sum of Kshs.1,726,036 in a joint interest earning account in the joint names of the advocates for both parties within 21 days from the date of this ruling in default of which this application shall automatically stand dismissed.

15.Costs of the application to abide the outcome of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 18th Day of February, 2016

In the presence of:

Mr. Miyienda for the Respondent

No appearance for the Appellant/Applicant

Ms. Naomi Chonde – Court Assistant