



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 405 OF 2013

HARUN MWIRIGI t/a PETUAL ENTERPRISES.....APPELLANT

VERSUS

BROOKSIDE DAIRY LIMITED.....RESPONDENT

RULING

1. **Harun Mwirigi t/a Petual Enterprises** the appellant herein took out the motion dated 19th June 2015 in which he sought for the following orders:
 - i. ***THAT this matter be certified as urgent and be heard exparte in the first instance.***
 - ii. ***THAT pending the hearing and determination of this application there be a stay of execution of the decree in Milimani CMCC No. 3412 of 2007.***
 - iii. ***THAT the time in which the appellant is to comply with this court orders given on 21st April 2015 be extended for another 21 days.***
 - iv. ***THAT in lieu of the appellant depositing the entire decretal sum in a joint interest earning account in the names of the advocates on record for the parties in this appeal, as security for stay of execution, the said sum be reduced and varied to the sum of kshs 200,000/=***
 - v. ***THAT costs of this application be provided for.***
2. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the matter disposed of by written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed in support of the application and the grounds of opposition. The appellant avers that the respondent intends to execute the decree unless an order for stay is granted. The appellant further pointed out that he was ordered by the court to deposit the entire decretal sum in a joint interest earning account in the names of the advocates on record within 21 days as a condition for being granted stay of execution but he is not in a position to secure the decretal sum since his business went down. He pleaded with the court to indulge and allow him to deposit a sum of kshs 200,000/= which he can secure. He averred further that the respondent is in the process of obtaining warrants to have him arrested and committed to civil jail for failure to pay the decretal sum

The respondent on its part argued in its grounds of opposition that following the appellant's application dated 16.1.2015 that elicited the ruling dated 22.4.2015, the appellant undertook to offer security as may be directed by court cannot be heard to offer inadequate security. It asserted that the proposal to reduce the security is prejudicial to the respondent and that it is trite law that the security offered must be commensurate to the decree. It further argued that the orders given on 22nd April 2015 were vacated at the expiry of 21 days and there are no orders capable of extension. She accused defendant of filing the application for stay after unreasonable delay.

3. The principles to be considered in an application for stay are well settled under Order 42 Rule 6. Firstly, there must be threat of substantial loss on the part of the applicant if the orders of stay fail to issue. Secondly, the application must have been brought without delay and thirdly, the question for the due performance of the decree has to be considered.

In this case, the appellant sought similar orders of stay vide an application dated 16th January 2015 and was granted orders for stay of execution on condition that the appellant deposits the decretal sum in a joint interest earning account in the name of the respective advocates appearing in this suit within 21 days. The appellant has now come back seeking to have the decretal sum reviewed downwards to kshs 200,000/=. On the first principle, the applicant seeks order of stay but has not shown how he will suffer substantial loss.

4. The second principle to be considered is that an applicant must file the application for stay without unreasonable delay. The respondent has alleged that there was unreasonable delay before filing the motion. The judgment was delivered on 22.4.2015. The motion was filed on 19.6.2015. The appellant claims that his advocate diarized the judgment date incorrectly and as a result, he was not able to establish that a judgment had been delivered until June 2015 when he filed this application. The respondent on the other hand claims that the delay was unreasonable. This was a delay of nearly two (2) months, this in my view is inordinate but excusable considering the circumstances of this case.
5. Thirdly, the court must take into consideration the provision of security for the due performance of the decree. On this principle, as stated above this court already ruled on the same and ordered the full decretal sum be deposited in a joint interest earning account. The appellant now seeks to have the security reviewed downwards. I have looked at the initial application, the appellant in paragraph 9 of his supporting affidavit stated that:

"...I am willing to offer such security for any decree that may ultimately be binding upon me..." .

It is on this averment that this court granted the appellant the orders for stay on condition that he deposits the decretal sum. I am convinced that the appellant at that moment knew the predicament that he is in now and was willing then to deposit such security as this court orders. He has not adduced any proof to show that he is not in a position to provide the security ordered which security he was so willing to provide 2 months prior.

6. The appellant further argues that he was not aware that the judgment was delivered on 22.4.2015 since his advocate diarized the delivery of judgment date to be 24.4.2015. Even if that was the case, the appellant cannot claim to have become aware of the judgment on 16th June 2015. Had he come to court on 24.4.2015 for judgment as diarized, he would have discovered that the judgment was already delivered and he would have taken the necessary steps within the stipulated 21 days to avoid default.
7. In the end, I find the motion dated 19.6.2015 without merits and I hereby dismiss it with costs to the respondent.

Dated, Signed and Delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant