

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO. 464 OF 2015

KENTAINERS LIMITEDAPPELLANT

VERSUS

SAMSON INDUMWARESPONDENT

*(An appeal from the judgement of the honourable Senior Principal Magistrate, Hon. E. K. Usui in
Milimani Commercial Courts in Civil Case No. 1161 of 2012 dated 1st September 2015)*

RULING

1. Kentainers Ltd, the appellant herein took out the motion dated 20th April 2016 in which it sought for an order for stay of execution of the decree pending appeal. The motion is supported by the affidavit of David Muthama. Samson Indumwa, the respondent herein filed the replying affidavit he swore to oppose the motion.

2. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion and the rival oral submissions. The applicant has pointed out that it has filed an appeal arguable grounds with high chances of success. The applicant further stated that it has deposited the decretal sum in interest earning account in the joint names of advocates appearing in this matter. The appellant further argued that unless the order is granted the appeal will be rendered nugatory in that if the decretal sum is paid to the respondent it will be extremely difficult to recover the amount in the event the appeal succeeds. It is said that the economic status of the respondent show was a machine operator is unknown. The respondent and his advocate did not address their minds over this issue. Mr. Ochiro, learned advocate for the respondent was of the view that the motion was filed as an afterthought since he together with the appellant's advocate had a gentleman's agreement that he keeps the execution of the decree in obedience to enable the appellant make arrangements to amicably settle the decree. Mr. Ochiro further pointed out that the appellant did not summon any witnesses in support of its defence. Therefore the applicant has no arguable appeal.

3. The principles to be considered in such application are stated under Order 40 rule 6 of the Civil Procedure Rules. **First**, an applicant must show that the application was timeously without unreasonable delay. It is the submission by the respondent that the application ws filed after a delay of more than three months since the date of judgment hence the delay was inordinate. It is clear from the record that judgment was delivered on 1st September 2015 and an application for stay of execution of the decree was filed on 1st December 2015 about three months after the date of delivery. The application was heard and determined on 1st April 2016 in which the applicant ws given an order for stay to last for 30 days. Before the lapse of the thirty days the appellant filed the current motion. There is no dispute that it took the appellant approximately three (3) months from the date of judgement to file the motion. The delay in my view is abit long but the same is excusable in view of the terse admission that there was some bit of negotiation between learned counsels to delay the execution of the decree. For purposes of this appeal, I find the delay not unreasonable.

4. The **second** principle to be considered is whether the applicant will suffer substantial loss if the order is denied. The applicant has submitted that if the order is denied and the decretal sum is released to the respondent the same may become difficult to recover from the respondent if the appeal succeeds because the sources of income of the respondent is unknown. I find this argument plausible in view of the fact that the respondent did not seriously contest the allegation that he had no economic ability to make a refund.

5. The **third** and final principle to consider is the provision of security for the due performance of the decree. The applicant has pointed out that the decretal sum has been deposited in an interest earning account. The respondent did not contest this fact. The document availed to court shows that a sum of ksh.973,110/= being the decretal sum had been deposited in a fixed deposit account on 27.1.2016.

6. In the end, I find the motion to be with merit. It is allowed as prayed with costs abiding the outcome of the appeal.

Dated, Signed and Delivered in open court this 27th day of May, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the Respondent.