



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 1619 OF 1993**

**Davson & Ward and GEOMAX CONSULTING ENGINEERS.....PLAINTIFF**

**VERSUS**

**EDON CONSULTANTS (SUED AS A FIRM)**

**JEREMIAH EDDY OBAR NDONG. .... DEFENDANT**

**RULING**

The application before the court for determination is the Notice of Motion dated the 9<sup>th</sup> November, 2015 brought under Sections 1, 1A and 3A of the Civil Procedure Act and Order 42 Rule 6 (1) (2), 43 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law.

The Applicant has sought the following orders: -

- (i) That for reasons to be recorded, this application be certified urgent in the first instance and the same be heard ex parte***
- (ii) That this Honourable court be pleased to grant the Defendant leave to appeal against the judgment and/or Order of the Hon. Mr. Justice Sergon made on the 6<sup>th</sup> day of November, 2015.***
- (iii) That, pending the hearing and determination of this Application inter parties or until further Orders of this Honourable Court, this Honourable Court be pleased to issue an order of stay of execution of the Decree issued on the 17<sup>th</sup> day of February, 1994 and subsequently reviewed on the 29<sup>th</sup> day of October, 1996 and all the consequential orders allowing execution of the Decree by way of an attachment and sale of the Defendant's property or by any mode whatsoever.***
- (iv) That pending the hearing and determination of the intended appeal or until further orders of this Honourable Court, this Honourable court be pleased to issue an order of stay of execution of the Decree granted on the 17<sup>th</sup> day of February, 1994 and subsequently reviewed on the 29<sup>th</sup> day of October, 1996 together with all the consequential orders allowing execution of the Decree by way of an attachment and sale of the Defendant's property or by any mode whatsoever.***
- (v) That the costs of the Application be provided for.***

It is premised on the grounds set out on the body of the same and is supported by the annexed affidavit of Jeremiah Eddy Obar Ndong which was sworn on the 9<sup>th</sup> November, 2015.

The facts as captured in the affidavit are that pursuant to a decree issued on the 17<sup>th</sup> day of February, 1994, the applicant was ordered to pay the Plaintiff a sum of Ksh.3,050,724/- together with interest at the rate of 23% p.a. or at such higher bank rates as were prevailing from 2<sup>nd</sup> day of October, 1992 until payment in full.

That on 14<sup>th</sup> May, 2014, the Plaintiff took out a Notice to show cause against the applicant. In opposition to the said notice, the Applicant filed a notice of a preliminary objection contending that by virtue of the provisions of Section 4(4) of the Limitation of Actions Act the execution process was time barred since it was being undertaken 21 years after the issuance of the decree.

The preliminary objection was dismissed by the Deputy Registrar on the 22<sup>nd</sup> October, 2014. The applicant preferred an Appeal against the said ruling which appeal was dismissed by Justice Serگون.

The applicant being dissatisfied with the said judgment dismissing the appeal, intends to appeal to the Court of Appeal against the whole of that judgment and is seeking the leave of the court to appeal.

The Applicant avers that unless a stay of execution is granted, it shall suffer irreparable loss and the intended appeal shall be rendered nugatory. The Applicant avers that it is ready to furnish such security as this Honourable court shall deem appropriate for the due performance of decree.

In opposing the application, the Plaintiff/Respondent has filed a replying affidavit sworn by George M. Njoroge on 11<sup>th</sup> day of November, 2015. He depones that a decree was issued against the Defendant on the 17<sup>th</sup> February, 1994 and was subsequently reviewed on the 29<sup>th</sup> October, 1996 by consent of both parties in which, parties agreed to review the decretal sum downwards from Ksh.3,050,724 to ksh.2,441,250/-

That for over 20 years the Plaintiff was unable to execute the decree due to several objections that were raised by the Defendant. It avers that, in dismissing the preliminary objection, the Deputy Registrar gave a considered ruling to the effect that the delay in executing the decree was caused by the defendant's myriad attempts to frustrate the process.

It further avers that the learned Judge, in dismissing the appeal, concurred with the findings of the Deputy Registrar and found that the Appeal had no merits. He has urged the court to dismiss the application arguing that the present application by the Defendant is only meant to delay the inevitable outcome thereby further frustrate the Plaintiff in enjoying the fruits of their judgment.

Parties filed their respective submissions which reiterate the contents of their affidavits. The court has carefully read and considered the said submission.

The Applicant herein has sought a stay of execution pending appeal which is governed by the provisions of Order 42 Rule 6(1) and 2 of the Civil Procedure Rules which provides for the conditions to be satisfied before a court can grant orders of stay of execution. The first condition is that the court will only grant orders of stay of execution if it is satisfied that substantial loss may result. The second condition is that the applicant must have brought the application without undue delay and he must offer and be willing to give security as the court may order.

In this case, the applicant has deponed that he will suffer substantial loss. However, he did not illustrate how he will suffer that loss. Instead, he has claimed that the Respondent had not shown that he is capable of refunding the decretal sum. In the case of **Kenya Shell Limited Vs Kibiru & another (1989) KLR 410**, the court held that: -

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money.”***

The case of **Machira t/a Machira & Co. Advocates Vs East African Standard No. 2 (2002) KLR 63**, is also useful in this regard the court held; -

***“In this kind of applications for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars..... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.”***

The case of **Tropical Communications Suppliers Ltd Vs Inter Credit Bank** considers, what in law constitutes “**Substantial Loss**” where the Judge observed in my view, substantial loss need not be determined by a mathematical formula those computation yields no particular amount. Indeed Jowitt’s Dictionary of English Law (2<sup>nd</sup> Edn) Volume 2 at 1713 carefully defines the analogous concept of “**Substantial Loss**” as

***“damages which represent actual loss, whether great or small, as opposed to nominal damages.”***

In similar view, Black’s Law Dictionary (6 edn) defines the word substantial as, inter alia

***“of real worth an importance, not seeming or imaginary or illusive.”***

The conclusion is inescapable, substantial loss does not represent any particular amount or size, it cannot be quantified by any particular mathematical formular. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.

The applicant has claimed that the Respondent has not shown that he is capable of refunding the decretal sum. It is noted that, that fact is not contained in the supporting affidavit but has only been raised in the submissions. Courts have held time and again that submissions are not evidence and a party cannot raise matters of facts in the submissions which are not contained in the affidavit but if an Applicant, under oath, expresses reasonable doubts on the Respondent’s ability to refund the decretal sum, the burden shifts to the Respondent to rebut that assertion. This was the holding in the case of **ABN AMRO Bank Vs Le Monde Foods Limited Civil Application No. 15 of 2002**. In this case the court had this to say:

***“In those circumstances, the legal burden 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, should the appeal 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. See also Kenya Posts and Telecommunication Corporation Vs Paul Gachanga Ndarua, Civil Application No. 367 of 2001.***

Regarding the issue of whether the application was filed without undue delay; the court finds that there was no delay as the judgment was delivered on 6<sup>th</sup> November, 2015 and the application herein was filed on 9<sup>th</sup> November, 2015.

On the issue of security, the applicant has offered to furnish any security as this court shall direct.

The stay of execution is sought pending the hearing of the intended appeal, to the Court of Appeal and whether or not, the Applicant has an arguable appeal is one of the considerations that the court should take into account. From the submissions I note that, the intended appeal is on a point of law and more specifically section 4 (4) of the Law of Limitation Act. The Court of Appeal in the case of Judicial Commission of inquiry into the **Goldenberg Affair & 3 Others Vs Lalach** held that: -

***“There may or may not be other arguable points but as we have said before, even one arguable point is sufficient for the purposes of Rule 5(2), there need not be a chain of arguable points to sustain the application.”***

The Court of Appeal in the case of **Butt Vs Rent Restriction Tribunal**, in Civil Appeal No. 1979 had this to say: -

***“If there is no other overwhelming hinderance, a stay ought to be granted so that an appeal, if successful may not be rendered nugatory. A stay which would otherwise be granted ought not to be refused because the Judge considers that another, which in his opinion will be a better remedy, will become available to the Applicant at the conclusion of the proceedings.”***

This court is alive to the fact that, it is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not, particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being rendered nugatory. **Per Brett, LJ in Wilson Vs Church (No.2) 12 CHD (1879) 454** and in the same case, Cotton L. J. said: -

***“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”***

In the premises foregoing, the application dated 9<sup>th</sup> November, 2015 is allowed in the following terms.

- 1) The applicant is granted leave to file the appeal.***
- 2) A stay of execution is hereby granted pending the hearing and determination of the intended appeal.***
- 3) The Applicant to deposit half of the decretal sum in a joint account to be opened in the joint names of the advocates in this matter, within 30 days from today.***
- 4) If the money is not deposited within the aforesaid period, the stay of execution shall automatically lapse.***
- 5) Costs of the application to be in the cause.***

Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of September, 2016.

.....

**L NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Plaintiff***

..... ***For the defendant***