



**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.....RESPONDENT**

**RULING**

1. The Appellant filed the notice of motion dated 16<sup>th</sup> January, 2015 seeking stay of execution of the decree in Milimani CMCC No. 3412 of 2007 pending the hearing and determination of this appeal. The application is premised on the grounds stated on the face of the application and the supporting affidavit of Harun Mwirigi Mburugu sworn on 16<sup>th</sup> January, 2015. He stated that judgment was entered against him but because it took him time before settling the decree, the Respondent moved the court to have him arrested and committed to civil jail. He filed an application before the trial court seeking stay of execution but the court declined to grant him the said orders. He stated that the Respondent is in the process of re-activating the process of his arrest and committal to civil jail. That if the orders sought are not granted he may be detained in jail and suffer punishment and loss of liberty and this appeal shall be rendered nugatory. He expressed his willingness to furnish such security as the court may order.

2. The Respondent opposed the application vide the replying affidavit of Peter Kuria sworn on 26<sup>th</sup> January, 2015. It was contended that the Appellant will not suffer loss since the Respondent is a reputable company and is able to pay back the decretal amount if the appeal succeeds and added that payment of decretal sum does not render an appeal nugatory. He stated that the filing of the applications for stay of execution by the Appellant was prompted by the commencement of execution process. The application in the trial court was filed a year after the filing of the memorandum of appeal. He contended that an award in a counter claim is not a compelling reason for grant of the orders sought in view of the fact that the said award was lower than the award the Respondent was given and that the Respondent's award shall be set off from the Appellant's award. He contended that the Appellant has not demonstrated what substantial loss he stands to suffer or that he is unable to settle the decretal sum. He stated that the Appellant's attachable assets could not be traced as explained in the auctioneers letter dated 30<sup>th</sup> April, 2014. He contended that an appeal cannot act as stay of execution and that the Appellant has been in deep slumber since the entry of judgment and has perfected in the art of knee jerk reaction whenever execution is activated.

3. In his submissions, the Appellant stated that the delay in filing the application before the trial court was due to the delay in settlement of the decree. That the application was dismissed on 11<sup>th</sup> December, 2014 and he presented the application herein on 21<sup>st</sup> January, 2015. On the issue of substantial loss it was submitted that the execution being undertaken by the Respondent is not by way attachment of property of the Appellant but by arrest and committal to civil jail. He submitted that the arrest and committal will be

substantial and grave and will amount to subjecting him to servitude in contravention of Article 30 (1) of the Constitution. That loss of liberty is substantial loss to him and may not be remedied if the appeal succeeds. He further submitted that the amount of KShs. 194,133/= owed to him on the counter claim is sufficient set-off.

4. The Respondent on the other hand submitted that the delay of one month and twelve months earlier is unreasonable for a vigilant aggrieved party. On this point the Respondent cited the case of **Julius Matasyo v. Pyrethrum Board of Kenya (2013) eKLR** where an unexplained delay of three months was considered unreasonable. On substantial loss, the Respondent submitted that the Appellant has not demonstrated that he stands to suffer substantial loss. It was stated that payment of the decretal sum by the Appellant to the Respondent will not in any way cause the Appellant irreparable loss since the Respondent is a very solvent entity of good repute and is more than able to repay the decretal amount. It was submitted that the fact that the process of execution has commenced does not amount to substantial loss. To buttress this argument the Respondent cited **Mukuma v. Abuoga (1988) KLR 645**. It was the Respondent's argument that there was no cause to deny it the fruits of judgment notwithstanding this appeal. The Respondent quoted **Portritz Maternity v. James Karanga Kabi, HCCA No. 63 of 1997**. The Respondent cited **Martha Karua v. The Standard Limited & Another (2007) eKLR** where it was held that it is not normal in money decrees for the appeal to be rendered nugatory if payment is made and argued that no substantial loss has been demonstrated by the Appellant. The Respondent took issue with the Appellant's failure to indicate the amount he is able to provide as security and cited **Gladwell Wangechi Kibiru t/a Santa Libera v. Lady Kathleen Blackburn (2013) eKLR** and **The Standard Bank Ltd v. G.N. Kagia t/a Kagia & Co. Advocates Nairobi Civil Application No. 193 of 2003** where an application for stay of execution was denied for non disclosure of the value of properties offered as security. The Respondent urged that the Appellant be ordered to deposit the entire decretal sum in a joint interest earning account in the names of the advocates of the parties herein. On sufficient cause, the Respondent argued that the chances of success of an appeal is not a legal requirement for granting orders of stay of execution.

5. This application is based on Order 42 Rule 6 (1) and (2). That Rule provides:-

***“6.(1) No appeal or second appeal shall operate as a stay of a decree***

***or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(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; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

6. The above Rule was discussed in the case **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** where it was held as follows:-

***“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be***

**binding upon him.”**

7. In the instant case, there is no dispute that there was delay of one month however, the Appellant stated that it was as a result of the delay in extraction of the decree. In my view the delay is not unreasonable as the same cannot occasion the Respondent prejudice that cannot be compensated in costs.

8. As for substantial, loss the Appellant is apprehensive that the Respondent will commit him to civil jail which shall deprive him of the right to liberty. To my mind committal to civil jail shall occasion the Appellant substantial loss before his appeal is heard and determined.

9. For security, I am fortified by the pronouncement in **Gati v. Barclays Bank of Kenya LTD. [2001] KLR 526 at 531** that an undertaking as to damages is one of the requirements for granting an injunction and where one has been given, an injunction should not issue. Although the Appellant herein has not given the value of security, he has indicated willingness to deposit security. In the circumstances, I am inclined to allow the application on the following terms:-

a) The Appellant do deposit the decretal sum in a joint interest earning account in the names of the advocates appearing in this appeal within the next (21) days from the date herein failure to which the orders herein shall be vacated.

b) Costs of the application shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 22<sup>nd</sup> day of April, 2015.

J. K. SERGON

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent