



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 634 OF 2007

DR. FAITH MULI.....PLAINTIFF

VERUS

DR. MOSES NJUE GACHOKA (Carrying business in the name and

style of KINGS MEDICAL COLLEGE.....DEFENDANT

RULING

1. Before me is a notice of motion dated 20th March, 2015. The motion is expressed to be brought under Order 22 Rule 22(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Defendant is praying for an order of stay of execution of decree pursuant to the judgment of this court delivered on 13th March, 2015 pending the hearing and determination of the intended appeal. The application is premised on grounds set out on the body of the application and the supporting affidavit of the Defendant. He averred that there is imminent danger of execution of the decree and that he is likely to suffer substantial loss if the orders of stay are not granted. He further averred that he has an arguable appeal. The Defendant expressed his willingness to comply with any orders of this court including but not limited to the order that he be allowed to sell the property by way of private treaty and thereafter offset the total outstanding amounts.

2. In reply to the application the Plaintiff filed a replying affidavit dated 13th April, 2015. She contended that no threat for execution has been given as the Defendant was only informed of the judgment and that no decree has been extracted thereby the prayer for stay of execution is not in tandem with the rules of execution. It was averred that the Defendant has maintained his defamatory remarks that the court has even been lenient on awarding damages but awarded only KShs. 3 Million with costs which the Defendant should pay in earnest. It is the Plaintiff's position that the Defendant should be ordered to pay 2/3 of the judgment sum and have a leeway to proceed with his appeal.

3. On 12th May, 2015 when this application came up for hearing, Mr. Bwomote learned counsel for the Plaintiff indicated that he does not oppose the application for stay but asked that this court directs the Defendant to deposit 2/3 of the decretal sum.

4. Mr. Mbaka learned counsel for the Defendant on the other hand offered KShs. 500,000/= as security for costs. Several decisions have addressed the issue of court as follows. The court in **Shah v. Shah (1982) KLR 95** held that the discretion to order or refuse security of costs must be exercised reasonably and judicially. In the case of **Halai & Anor v. Thornton Turpin (1963) Ltd (1990) KLR 365** it was stated as follows:

“The court ought not to place a successful litigant in such a disadvantageous position that should the appeal not be proceeded with or withdrawn or fail, the respondent would

find it difficult to realise the fruits of his litigation due to the inadequacy of the security ordered.”

5. The court in **Kenya Tanzania Uganda Leasing Co. Ltd v. Mukenya Ndunda (2013) eKLR** stated as follows on the issue of security:

“As stated in the case of KENYA COMMERCIAL BANK LIMITED vs. SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced...”

6. Such balance is arrived at by making an order for suitable security for due performance of the decree awaiting the outcome of the appeal. The Defendant herein has offered KShs. 500,000/= while the Plaintiff wants the Defendant to furnish 2/3 of the decretal sum. The Defendant's offer is a show of good faith.

7. Learned counsels appearing in this matter made oral submissions. Both are in agreement that the order for stay should be granted but were unable to agree on the amount to be deposited as security for the due performance of the decree. The plaintiff’s learned advocate in his oral submissions has urged this court to order the defendant to deposit kshs. 1 million instead of kshs.500,000/=

The defendant has insisted on his offer. He has not however raise the amount demanded by the plaintiff. Kshs. 1million represents 1/3 of the judgement sum. I find the figure suggested by the plaintiff to be reasonable. Consequently, I grant prayer 2 of the notice of motion dated on 20.3.2015 on condition that the defendant deposit ksh.1,000,000/= within 30 days from the date hereof in default, the notice of motion will be deemed to have been dismissed.

Costs of the motion to await the outcome of the appeal.

Dated, signed and delivered in open court this 15th day of May 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant