



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 47 OF 2003

SIGMA FEEDS LTD.....1ST DEFENDANT/APPLICANT

MICHAEL MULI MWOTO.....2ND DEFENDANT/APPLICANT

VERSUS

ALI EMOY ABDI NOOR (Suing as the legal representative of the Estate of

ADAN ABDI NOOR (DECEASED)).....PLAINTIFF/RESPONDENT

RULING

1. The application dated **27th November, 2012** is brought by way of Notice of Motion pursuant to the provisions of **Section 1A, 1B and 3A** of the **Civil Procedure Act, Order 40 Rule 4 (1), (2), (3), (4), (5) and (6), Order 47 Rule 7** of the **Civil Procedure Rules 2010** and all enabling provisions of the law where the Applicant seeks stay of execution pending hearing and determination of the appeal.
2. The application is premised on grounds that following the decision of the court the Applicant who was aggrieved filed a Notice of Appeal. The appeal has a good chance of success. If orders of stay are not granted, the Respondent will proceed to execute and this will prejudice the Applicant since the Respondent's financial ability is not ascertained and would therefore not compensate the Applicant in event of the appeal succeeding. The Applicant is willing and ready to abide by any reasonable and just order that the court deems fit to grant including an order for deposit of decretal sum in an interest earning account in the names of the Plaintiff's and Defendant/Applicant's Advocates as security and that the application is made without unreasonable delay by the Applicants.
3. An affidavit in support of the application was sworn by **Mildred M. Wameya** the Claims Manager with **Geminia Insurance Company Limited**, the insurer of the Applicant who reiterated what was stated in the grounds of appeal.
4. In response thereto the Respondent deponed that the application lacks merit and is an abuse of the court process. He is a man of means and is capable of refunding the decretal amount if the pending appeal is successful. The appeal has no chance of success and the Applicant has not established substantial loss as required by the law.
5. In seeking stay of execution of the judgment and decree pending determination of the intended appeal the Applicant brought the application under the wrong provisions of the law. **Orders 40 and 47** of the **Civil Procedure Rules** do not provide for prayers sought. The application ought to have been brought

under **Order 42 Rule 6** of the **Civil Procedure Rules** which lays out the conditions warranting grant of stay of execution that provides thus:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under 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 orders set aside.

(2) No order for stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

However, failure to bring the application under the correct law is a mere technicality. This court must disregard technicalities and consider the substance of the application in order to ensure justice is done.

6. According to the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules**, if the Applicant will suffer substantial loss, the application is brought without undue delay and the Applicant is willing to furnish security as determined by the court then the order can be granted. The Court of Appeal in the case of **BUTT V RENT RESTRICTION TRIBUNAL (Madan, Miller and Porter, JJ.A)** while considering an appeal from the High Court refusing a stay of execution pending appeal held:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judges’ discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant or refuse an application for stay, will consider the special circumstances of the case and unique requirements.”

The discretion to grant the order sought therefore resides with the court subject to the conditions stated.

7. The judgment to be appealed was delivered on the 15th day of **October, 2012**. The Notice of Appeal was filed on the 17th **October, 2012**. The Notice of Appeal having been lodged two (2) days after delivery of judgment was done without delay.

8. Judgment herein was in a sum of **Kshs. 712,000** plus costs and interest. The question to be answered is if the stay order sought is not granted the Applicant will suffer substantial loss. It is averred that the Respondent may have no means of refunding the sum if the appeal is successful. Would this be considered as substantial loss? What amounts to substantial loss was defined in the case of **MUKUMA VS. ABOUGA (1998) KLR 645** where the court held that:

“..... the issue of substantial loss is the coverstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

9. In the case of **PRAXEDES OKUTOYI VS. MEDICAL PRACTITIONERS AND DENTISTS BOARD (2008) eKLR** the court in an endeavor to clarify the issue of substantial loss referred to the case of **RELIANCE BANK LIMITED VS. NORLAKE INVESTMENTS LTD (C. A. 93 OF 2002, NAIROBI)** where it stated that in making decision the court is bound to consider the conflicting claims of both sides. The instant case herein emanated from an accident claim. Very little is stated about the financial status of the claimant. If successful the appeal may be rendered nugatory.

10. The Applicant has expressed the willingness to furnish security. In the premises I grant stay of execution on condition that he Applicant deposits the entire decretal sum in an interest earning joint account of both the Applicant's and Respondent's Advocates' names at a Financial Institution of their choice within 14 days. In default the application to stand dismissed.

11. The Respondents shall have costs of the application.

12. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 16TH day of JUNE, 2015.

L.N. MUTENDE

JUDGE