



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 90 OF 2014**

**NJORO CANNING FACTORY.....APPELLANT/APPLICANT**

**VERSUS**

**JOHN MICHAEL MBUGUA.....1<sup>ST</sup> RESPONDENT**

**SAMCON LIMITED.....2<sup>ND</sup> RESPONDENT**

**(UNDER RECEIVERSHIP)**

**RULING**

1. The Applicant and Appellant in this appeal seeks an order of stay of execution from the trial courts judgment pending the hearing of the appeal. The application is dated 25<sup>th</sup> March 2015 and is brought under **Order 42 Rule 6 of the Civil Procedure Rules**.

2. The main grounds upon which the application is brought are that if the money decree in the sum of Kshs.1 Million, but standing at Ksh.2,302,395/= due to accrued interest and costs as at March 2015, is paid to the respondent, he may not be able to refund should the appeal be successful and thus will render the appeal nugatory, and secondly, that the appellant shall suffer irreparable loss. In his sworn affidavit filed on the 26<sup>th</sup> March 2015, the appellant stated that the application was filed without delay, that the appeal had high chances of success as it raised shown legal issues. On security for the due performance of the decree, it was argued that it was ready to offer a bank guarantee of Kshs.500,000/= as the judgment was joint and several and also is willing to abide with term that the court may deem necessary.

3. In opposing the application, the 1<sup>st</sup> Respondent filed a replying affidavit on 20<sup>th</sup> April 2015. He states that the conditions set under **Order 42 Rule 6 of the Act, Chapter 21**, have not been met by the applicant.

The respondent argued that he is a man of means and able to raise the decretal sums should appeal be unsuccessful. He stated that he is a businessman in Naivasha having several business ventures and that no security for the due performance of the decree as a very necessary pre-condition for grant of stay of execution pending appeal. He further states that the appeal has no chances of success.

4. I have considered the application, the supporting and opposing affidavits, and annexures. I have also considered submissions by both counsel in support of their rival positions.

Under **Order 42 Rule 6(2)**, the applicant must satisfy the court that;

1. The application has been brought without unreasonable delay.
2. That substantial loss may result to the applicant unless the order sought is made.
3. That sufficient security for the due performance of the decree is offered.

I am minded that the applicant made a similar application in the trial court that was declined. This court is not bound to agree with the trial courts finding in exercise of its discretion. As held in the case **Bhatt -vs- the Rent Restriction Tribunal and Others civil application No NAI 6 of 1997**, grant or denial of an order of stay of execution is discretionary to the court hearing the application.

5. It is not in dispute that the application was made without delay. That satisfied ground No. 1. On sufficiency of security for due performance of the decree, standing at over Kshs.2.3 Million, the applicant stated it is a small business and was willing to offer a bank guarantee of its share of the judgment. I have noted that the judgment was ordered joint and several, that the decree holder is at liberty to demand due performance from either of the two judgment debtors – as held in the case **Francis J. Muyao -vs- Macharia C.A No. 121 of 2000**. To that extent, the security offered is not sufficient to secure the total decretal sum. The applicant however stated that it was ready and willing to comply with conditions as the court may set and deem necessary.

6. On whether the applicant may suffer substantial loss if a stay order is denied, I have considered its submissions that he is a man of means and that he runs several business ventures at Naivasha. He has however not provided evidence of such means. He did not demonstrate by affidavit or otherwise that he indeed is the proprietor or director in any of the business ventures he mentioned nor any financial bank statements to confirm his monetary liquidity, or ownership of any assets. As submitted by counsel for the applicant the burden to prove his financial ability rested with the respondent. Where doubts are raised as to the capability of the respondent to refund the decretal sum, the evidential value shifts to him prove that he is able.

The court of appeal in **ABN AMRO Bank -N.V. -vs- Le Monde Foods Ltd – Civil Appeal No. NAI 15 of 2002** it was held:

***“This evidential burden would easily be very easy for a respondent to discharge. He can simply show what assets he has as land cash in bank and so on.”***

It is not enough to state that if an appeal is unsuccessful a party would be able to repay the decretal sum as the respondent has done. By the time the appeal is heard the decretal sum may as well have doubled due to the accrued interest.

7. As held by Justice Alnashir Visram (as he then was) in **I.T. Inamdar & Others -vs- Postal Corporation of Kenya HCCC No. 1629 of 2000**, I find that the applicant may suffer substantial loss should the appeal be successful, as I am not convinced of the financial ability of the Respondent. If he was as financially able as he deposes in his affidavit, it would not have been difficult for him to demonstrate the same as aforementioned. The court cannot go out of its way to try to find out who this respondent is by doing searches to find out whether he owns what he deposes to own. The result is therefore that the Respondent may not be able to repay the decretal sum should the appeal be successful.

8. I have considered all the authorities tendered, and the parameters that guide the court in an application for stay pending appeal. Justice Madan in the **Butt case (supra)** said that if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be rendered nugatory. The Respondent has told the court that the appeal is meritless and the order of stay ought to be declined. In my view, it is not the duty of this court to determine whether the appeal has merit or not at the interlocutory stage. To do so would be jumping the gun. Under **Order 42 Rule 6 of the Civil Procedure Rules**, this is not one of the conditions that the court should consider.

9. From the foregoing, the applicant has substantially met the conditions for grant of stay pending appeal.

The application dated 25<sup>th</sup> March 2015 is granted subject to the following:

1. That the applicant shall, by way of security for due performance of the decree, give and file in court a bank guarantee in the sum of Kshs.2,400,000/= from a reasonably stable bank or in the alternative deposit a sum of Kshs.2,000,000/=in a fixed deposit joint account in the names of advocates for both parties within a period of 30 days from the date of this ruling.

2. Costs of this application shall be costs in the appeal.

**Dated, signed and delivered in open court this 19<sup>th</sup> day of November 2015.**

**JANET MULWA**

**JUDGE**