



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

**CIVIL APPEAL NO 566 OF 2013**

**SAMUEL NJOROGE GICHIMU .....PLAINTIFF/RESPONDENT**

**VERSUS**

**NDUMIA GROUP LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**DAVID MUGO NDUMIA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**ROSE NYAKINYUA NDUMIA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

The application before this court is a Notice of Motion **7<sup>th</sup> March, 2014** brought under Section 3A and Section 75 of the Civil Procedure Act and under Order 42 Rule 6 (2) (1) (a) & (b), Order 43 Rule 1(2) & (3), Order 51 Rule 4, of the Civil Procedure Rules.

The Appellant/Applicant seeks a stay of execution pending the determination of the Civil Appeal No. 556 of 2013. The application is premised at 10 grounds stated on the face of the application. It is supported by the affidavit of Mr. David Mugo Ndumia a Director of the 1<sup>st</sup> Appellant/ Applicant and the 2<sup>nd</sup> Applicant. In his affidavit he deposes as follows; that the Respondent obtained a ruling in an application dated 18<sup>th</sup> July, 2013 by Hon. C. Obulutsa acting Chief Magistrate to strike out their defense on the 29<sup>th</sup> September, 2013; that thereafter the Respondent obtained a breaking order issued orally in Court on 20<sup>th</sup> December, 2013 and he threatened to prosecute against them; that he had previously attached the property of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. That the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were never part nor guarantors of the loan agreement the subject of the dispute between the respondent and 1<sup>st</sup> appellant. Consequently, the 2<sup>nd</sup> and 3<sup>rd</sup> appellant/applicant stand to incur substantial leave should the stay of execution not be granted; that they have filed an appeal challenging the awarded decretal amount of Kshs 1,068,000/= on entry of the judgment against 2<sup>nd</sup> and 3<sup>rd</sup> Applicant; that he has paid Kshs 2.7 million towards settlement of the awarded decretal amount of Kshs 3,768,000 and has deposited one million shillings; that they have an arguable appeal with a high probability of success and if the stay of execution is not granted they appeal will be rendered nugatory and they will suffer substantial loss; that they have prayed for an order to clarify the details of the judgment entered against them as the trial Magistrate handwriting is difficult to read and there are yet to be supplied with typed copies of the ruling or decree.

The application was opposed; the plaintiff/respondent filed a replying affidavit dated 11<sup>th</sup> March, 2014. The respondent give a background to this application, stating that after Hon. Obulutsa gave his ruling on 24<sup>th</sup> September, 2013 the respondent sought a stay of execution and setting aside of the warrants; that the Lower Court set aside the warrants for reasons as they were based on the Judgment/Decree on 17<sup>th</sup> July,

2013 and the Learned Magistrate ordered that a fresh decree be drawn on valid judgment of 24<sup>th</sup> September, 2013. Thereafter a fresh decree dated 24<sup>th</sup> November, 2013 was drafted and new warrants issued on 12<sup>th</sup> December, 2013. The auctioneer proceeded to proclaim the applicant property and they immediately paid a sum of Kshs 2.2 million towards the settlement of the decretal sum. The applicant had initially paid 500,000/= so the balance of the decretal sum stood at Kshs 1,068,000/=. After the proclamation the applicant filed two applications dated 16<sup>th</sup> November, 2013 and 19<sup>th</sup> December, 2013 seeking a stay of execution of the Court ruling of 24<sup>th</sup> September, 2013 and lifting of the warrant of the attachment of sale. The Court ordered them to pay one million as security for the grant of an order of stay of execution. On 6<sup>th</sup> March, 2014 Hon. Obulutsa dismissed the two applications for lack of merit. The Court argued that the applicant having admitted into their pleadings to have paid 2/3 of the decretal sum he had utterly failed in proving substantial loss. Thereafter the applicant filed the present application seeking a stay of execution.

The applicant argues that there is nothing ambiguous or obscure on the ruling of 24<sup>th</sup> September, 2013 nor does it require clarifications and that this is yet another tactics by the applicant to continue delaying this matter indefinitely by denying him the fruits of the judgment; that the applicant has not demonstrated that he is a man of straw incapable of refunding the decretal sum should the appeal succeed nor have they proved the substantial loss that would occur should the stay of execution be granted. That though the application was made promptly it lacked in substance and same lack merit and should be dismissed.

In a supplementary affidavit dated 21<sup>st</sup> March, 2014 of David Ndumia, he deposes that, the applicants have executed a mortgage with a view of settling the undisputed of the decretal amount and risks losing the mortgage property parcel number 1870/VI/239 East Church Road and they therefore face the possibility of substantial loss if the application is not granted.

Oral submissions were made at the hearing of the application. Mr. Kinyanjui for the applicant stated that the applicant defense was struck out without being given a hearing ;that the respondent is not resident in Kenya and it is difficult to trace him to get a refund in the event the appeals succeed, and the decision against 2<sup>nd</sup> and 3<sup>rd</sup> Respondent was unjust; that time and time again the respondent has proceeded to against the defendant and if the stay is not granted they will proceed to attach the appellants property which has sentimental value and is not compensable in the event the appeals succeeds; that the appellants have provided the security of one million and the 2.5 million paid was the 1<sup>st</sup> Applicant was the balance of the principal sum provided in the loan agreement a fact the respondent has not been denied.

Mr. Musyoki, submitted that judgment was for 3,765,000/- and the applicant paid 2.5 million leaving a balance of 1,068, 000/- and they then proceeded to prosecute for the balance. Thereafter this application was filed; he argued why the applicant would pay the substantial amount and fail to pay the balance. It is further submitted that the respondent is a Kenyan who works in America and that they have failed to show that he will not be able to refund the money; that the Respondent did not raise the issue that they were not parties to the agreement to the lower court and that since judgment was entered jointly and severally the respondent can to execute against them. Counsel wondered what the applicant will achieve in the appeal yet they have paid 2.5 million.

Mr. Kinyanjui argued that in the defense filed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents stated that were not parties to the agreement and that the veil had not been lifted even though they signed as directors; that the 1<sup>st</sup> appellant admitted and paid; that while as the respondent admits that he resides in the USA he does not disclose his residence. He argued the Court to grant the orders.

In considering whether to grant a stay of execution under Order 42 Rule 6 (2), the applicants have to satisfy the Court that substantial loss may result if the orders are not made and the application has been made without unreasonable delay. The applicants states that he will suffer substantial loss because of the continuous execution by the respondent and that if the Respondent proceeds he will attach property of sentimental value. I note the 1<sup>st</sup> Applicant has paid part of the decretal sum. They argue that they will suffer substantial loss because they risk losing property of sentimental value and that they have taken a

mortgage, in my view these are not sufficient reasons to demonstrate that they will suffer substantial loss. The Respondent has submitted that in the event the appeal succeeds he will be able to refund the amounts. Further from what is on record it appears that the 1<sup>st</sup> Applicant want to settle the amounts and has paid up some amounts. The Applicants do not need an order from this Court on the typed proceedings, ruling of the Lower Court they can pursue the same in the lower Court. I find no merit in this application and dismiss it with cost.

Orders accordingly.

Dated signed and delivered this **24<sup>th</sup>** Day of **October** 2014.

**R. E. OUGO**

**JUDGE**

In the presence of:

.....1<sup>st</sup> Appellant /Applicant

.....2<sup>nd</sup> Appellant /Applicant

.....3<sup>rd</sup> Appellant /Applicant

.....Respondent

.....Court Clerk