



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 41 OF 2013**

**KENYA FLEXOGRAVURE LIMITED.....APPELLANT**

**-VERSUS-**

**FRANCIS NJENGA MBURU.....RESPONDENT**

**RULING**

The Notice of Motion dated and filed on 18<sup>th</sup> June 2013 has been brought under the provisions of **Order 42 Rules 6(1), 7 and 9** and **Order 43** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The Applicant seeks the following orders-

- (a) spent
- (b) spent
- (c) that there be a stay of execution of the judgment/decree delivered on 13<sup>th</sup> March, 2013 pending the hearing and determination of the appeal herein;
- (d) that this Honourable Court in exercise of its original jurisdiction be pleased to set aside the Ruling/Order dated 6<sup>th</sup> June, 2013 in Nakuru CMCC NO. 305 of 2011 on the stay of execution application and Order that the entire decretal sum be deposited in court or in a joint interest earning account as security for the preferred appeal; and
- (e) that the costs of this application be provided for.

The application is supported by the affidavit of H.N Patel sworn on 18<sup>th</sup> June, 2013 and is opposed by the Grounds of Opposition dated 28<sup>th</sup> June 2013 and the Replying Affidavit sworn by the Respondent on 28<sup>th</sup> June 2013.

The Respondent filed suit in the lower court against the Appellant for general and special damages following the injuries he sustained in an industrial accident in the course of his employment with the Appellant. By a judgment delivered on 13<sup>th</sup> March 2013, the Respondent was awarded an all inclusive sum of Kshs. 1,793,000/= together with costs and interest at court's rates.

Aggrieved, the Respondent lodged an appeal in this court against the judgment. He also filed before the

lower court an application for stay of execution pending the hearing and determination of this appeal. In its ruling made on 6<sup>th</sup> June 2013, the court allowed the application on condition that half the decretal sum plus costs of the suit are paid to the Respondent while the other half is deposited in a joint interest earning account in the names of both Advocates for the Applicant (Appellant) and the Respondent.

In the present application the Applicant has asked the court to set aside this order made on 6<sup>th</sup> June 2013 and substitute it with an order that the entire amount be deposited in court or in a joint interest earning account as security for the appeal. It is apprehensive that the Respondent would not be able to repay the same should the appeal succeed. It has also contended that the lower court considered issues that she should not have in determining an application for stay and as a result, her ruling amounts to a determination of the appeal on the two issues appealed against. She was also persuaded by title documents that were produced as evidence of means by the Respondent which had not been subjected to an independent valuation. The Appellant argued that it is in the interest of justice that the ruling is set aside and the orders revised pending the hearing and determination of the appeal.

In the Grounds of Opposition, it was alleged that the application is bad in law since the Applicant has not complied with the conditions requisite for granting a stay of execution pending appeal under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. He has failed in his application to demonstrate any substantial loss he stands to suffer if the orders sought are not granted. It was further contended that the application is defective as it seeks to stay an order of the court that is not the subject of the intended appeal. Further, the Respondent argued that the only remedy available to the Applicant against the lower court's orders of stay is to appeal and he may not to seek a review or setting aside of these orders.

The Respondent also contended that the application is an abuse of the court process as there is also pending for determination before the lower court an application dated 18<sup>th</sup> June 2013 which seeks the same orders as those sought in the present application. The application herein is therefore *sub judice* and the Applicant is estopped from seeking the same orders from two courts of competent jurisdiction.

The Respondent also denied the contention that he is not a man of means and would therefore not be in a position to refund the part of the decretal sum paid to him should the intended appeal be successful. He attached to his Replying Affidavit a copy of the title deed to the property known as Title No. Njoro/Ngata Block 1/2018, a copy of the logbook to the motorcycle registration number KMCB147A and the receipt from the Nakuru Municipal Council for his large food, fruit and charcoal business situated at Olive Inn Centre at Kiamunyi. He was of the view that these documents suffice as proof that the Appellant would be able to recover its money in the unlikely event that its appeal is successful.

The Respondent also accused the Applicant of being in contempt of court orders. He argued that the Applicant had not deposited half the decretal sum in court. Upon perusing the court file, Counsel for the Respondent did not find any evidence of any receipts issued after making the deposits alleged. That the intention of the Applicant is to frustrate the Respondent and delay his enjoying the fruits of his judgment.

#### **ISSUES FOR DETERMINATION:**

I have considered the pleadings and the rival submissions of Counsel made in this court on 15<sup>th</sup> October 2014. The issues for determination are-

- (a) Whether this court has jurisdiction to set aside or review the order of the lower court made on 6<sup>th</sup> June 2013;
- (b) if the answer to (a) above is in the affirmative, whether the Applicant has satisfied the conditions for grant of stay of execution pending the hearing and determination of the appeal filed herein; and
- (c) the conditions, if any, upon which the orders of stay should be granted.

## **ANALYSIS**

This is the second application for stay of execution pending appeal. The first one having been made in the lower court and the applicant was aggrieved with the terms and conditions made therein. I shall not belabour the issue of *sub judice* at length but will only say that once an appeal is filed in the High Court, the Applicant has a right to file an interlocutory application as provided under the provisions of **Order 42(6)(1)** which reads as follows:

**“.....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 make such order thereon as may to it seem just.....”**

Therefore this court is of the view that the Applicant is not estopped from seeking the same orders and that this court has jurisdiction to entertain this second application.

The principles for a grant of stay of execution pending appeal are well settled. Firstly that the orders sought are discretionary; that the application was brought without unreasonable delay; the Applicant must satisfy the court that he will suffer substantial loss; the Applicant must provide security for due performance.

The date judgment was delivered was on the 13th March, 2013 and the Memorandum of Appeal was filed on the 10th April, 2013. The Applicant being aggrieved by the Ruling made on the 6th June, 2013 proceeded to move this court by filing the application herein dated 18th June, 2013. This court is satisfied that the Applicant moved expeditiously and in a timely manner. The application is found to have been brought without any delay.

On the issue of the Applicant suffering substantial loss this court is of the view that the decretal sum is not a colossal amount. Even though the Applicant asserted that the Respondent was a man of straw the Respondent has demonstrated otherwise by disproving the same. The decisions are legion on the aspect that a successful litigant must not be deprived the opportunity of enjoying the fruits of his judgment. Refer to the renowned case of **Kenya Shell V. Kibiru & Another**, [1986] KLR 410.

This court finds that the Appellant has not satisfactorily demonstrated to the court the substantial loss it stands to suffer if monies are paid out to the Respondent, in the event the appeal succeeds.

Lastly the Applicant must in any event provide security for due performance. The Applicant is willing to provide such security but is adamant that the decretal sum be deposited in court or in a joint interest earning account.

I reiterate that the orders sought are discretionary and the court must also act judicially and must balance the interests of the Applicant with those of the Respondent. The judgment was delivered on the 13th March, 2013 and one and a half years down the line he is still waiting to enjoy the fruits of his judgment and is being asked to wait until the appeal is heard and determined, which might be another long waiting period. In such circumstances the Respondent must be allowed to partially enjoy the fruits of his judgment.

## **FINDINGS**

This court has jurisdiction to hear and determine the application to set aside the Order of 6th June, 2013.

The application to set aside the said Order is found to be meritorious. The Applicant is found to have satisfied most of the conditions to warrant Orders for stay of execution pending the hearing and determination of the appeal.

## **DETERMINATION**

For the reasons set out above, the Ruling of 6th June, 2013 is hereby set aside and substituted with an Order that there shall be a stay of execution pending hearing and determination of appeal upon the following conditions;

1. That the Respondent be paid a third of the decretal sum, forthwith.
2. The balance to be invested in a joint interest earning account in the names of both Counsel for the Appellant and the Respondent.

Costs shall be in the cause.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 24th day of November, 2014.**

**A. MSHILA**

**JUDGE**