



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 26 OF 2014**

**SIRGOI HOLDINGS LIMITED.....APPELLANT**

**VERSUS**

**MARTHA BETTY KAMUNU.....RESPONDENT**

**RULING**

1. The appellant prays for stay of execution of the decree in the lower court pending the hearing and determination of this appeal. The appellant is aggrieved by the judgment delivered on 11th February 2014 in Civil Case 419 at the Eldoret Chief Magistrates Court. The lower court awarded the respondent Kshs 2,700,000 as special damages for unlawful closure of her business premises by the appellant. The respondent was also awarded interest and costs. The appellant has lodged a memorandum of appeal dated 28th February 2014.
2. The grounds of the motion are set out at length in the notice of motion dated 17th June 2014. The appellant avers that the respondent is “a man of straw”; and that if the decretal sums are paid to her, she will be unable to refund the amount in the event the appeal succeeds. The appellant contends that unless the stay is granted, it will suffer irreparable loss, damage or substantial loss. Its appeal would in the circumstances be rendered nugatory.
3. It is the appellant’s case that no prejudice will be suffered by the respondent if the prayers sought are granted. The applicant states that it is ready and willing to deposit the entire decretal sum in a joint interest earning account as security for due performance of the decree. Lastly, the appellant avers that this motion has been presented in good faith and without delay. Those matters are buttressed by two depositions of Barbara Tanui, the chairman of the board of the appellant, sworn on 17th June 2014 and 9th July 2014 respectively.
4. The motion is contested. There is a replying affidavit sworn by the respondent on 30th June 2014. The gravamen of the reply is this: that the respondent is a person of means and capable of refunding the decretal sums. To demonstrate it, she has annexed her bank statements from Equity Bank Eldoret marked *MBK 1*. She has also produced a single business permit for her hotel, *Royal Chic* located along Oginga Odinga Street, Eldoret marked *MBK 2*, a title for Eldoret Municipality Block 23 (King'ong'o) 789 and a valuation report relating to motor vehicle KBH 202X.
5. Those averments are challenged by the appellant in the further affidavit sworn on 9th July 2014. It is deposed that the respondent’s title to the land is doubtful as it only details proprietorship and value as at the year 2011. Regarding the motor vehicle, the appellant retorts that it is owned by a third party, *Tisam Motors Ltd* and that the valuation report is aged. The single business permit is challenged for want of books of account. The respondent in answer has filed a supplementary affidavit sworn on 16th July 2014 annexing more current valuations of the assets.
6. On 23rd October 2014, the learned counsel for both parties made their arguments to Court. I have considered the application, depositions, and the rival submissions.
7. The court may grant a stay pending appeal under Order 42 of the Civil Procedure Rules 2010. The present motion is predicated upon Order 42 rule 6 (1) of the Rules which provides-

*“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 order 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.”*

8. In the case of Butt v Rent Restriction Tribunal [1982] KLR 417 the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. in Wilson v Church (No 2) 12 Ch D [1879] 454 at 459.

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”*

9. Justice Madan delivered himself thus in the Butt case (Supra) at page 419,

*“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”*

10. Again the court will grant a stay if special circumstances of the case dictate so. See Attorney General v Emerson and others 24 QBD [1889] 56 at page 59. In the Butt decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. Those general principles were restated in Madhupaper International Limited v Kerr [1985] KLR 840 at page 846.

11. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania [2010] eKLR (Civil Application No 68 of 2008).

12. I have been asked to consider the *capacity* of the respondent to refund the sums in the decree. The court of appeal had occasion to consider the matter in MDC Holdings limited and others v J.P. Machira Nairobi, Civil Appeal Nai 7 of 2002 (unreported). The court held-

*“The respondent..... also contended that if the decretal sum is paid the respondent is in a position to refund it in the event of a successful appeal. In those circumstances the appeal would not be rendered nugatory.*

*“In our judgment we are satisfied that the respondent has shown by evidence that he is not a man of straw and if execution is allowed to proceed he will be in a position to pay back the decretal amount in the event the intended appeal succeeded. The respondent is the owner of unencumbered landed property to the value of over Kshs. 69 million and we see no difficulty in the respondent refunding Kshs. 8,798,107.20”.*

13. From the affidavit of Barbara Tanui sworn on 7th August 2014 in support of another chamber summons of even date, there is no doubt that execution of the decree is proceeding. Doubt is

- removed completely by the auctioneer's notice dated 1st August 2014. The latter summons was filed during the court vacation to move the court for a temporary relief pending the hearing of the present motion. The key question then is whether the respondent would be in a position to refund the decretal sums if the appeal is successful. Tied to that is the question whether the appellant stands to suffer substantial loss.
14. From the documents annexed to the replying affidavit, I *cannot* say the respondent fits the description of *a man of straw*. True, the registered owner of the vehicle KBH 202X does not answer to the respondent; and, there is no clear statement of profit and loss of the hotel business. But I have considered the title annexed for Eldoret Municipality Block 23 (King'ong'o) 789. The immovable property is in the *name* of the respondent. The current valuation annexed to her supplementary affidavit is Kshs 1,300,000 as at 14th July 2014. There are also the respondent's bank statements from Equity Bank, Eldoret, showing a credit balance of Kshs 1,496,870.87 as at 10th June 2014. There is also a hotel, *Royal Chic* located along Oginga Odinga Street, Eldoret being run by the respondent.
15. I am also alive that as a general proposition, the execution of a *money decree* does not constitute substantial loss. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR. In this case, the respondent has demonstrated she has unencumbered *landed property*, is running a hotel business and she has a *significant* bank balance. It rebuts the appellant's case that she is not a woman of means. See *MDC Holdings limited and others v J.P. Machira* Nairobi, Court of Appeal, Civil Appeal Nai 7 of 2002 (unreported).
16. The appellant had made a similar application for stay of execution in the lower court. On 12th June 2014, the application was dismissed. Learned counsel for the respondent submitted that under Rule 6 (1), the appellant should have moved this court to set aside that ruling instead of presenting a fresh motion here. I think that is a narrow and selective reading of the last paragraph in that rule. It is expressly provided in the Rule that *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. What the words that follow that sentence provide is that a person aggrieved by a stay granted by the lower court may move the appellate court to set aside the order. No order of stay was granted by the lower court: instead, the appellant's motion for stay was dismissed. There is nothing to set aside in this Court.*
17. I will now turn to other aspects of this motion. The impugned judgment was delivered on 11th February 2014. The appeal was lodged on 3rd March 2014. But the motion for stay was not presented to this court until 17th June 2014, four months after the judgment. I have also noted that the appellant did not disclose in its motion and affidavit that it had filed a mirror image of the present motion in the lower court for stay; and, that the application was dismissed on 12th June 2014. It is that dismissal that triggered the filing of the present motion on 17th June 2014. The details of the dismissed motion were only brought to the attention of the court in the supplementary affidavit of the *respondent's* counsel sworn on 8th July 2014. In view of the motion that was pending and finally dismissed by the lower court, I cannot say the delay was deliberate or inexcusable. It is the non-disclosure of those proceedings, or the dismissal of application for stay, that I find offensive and which militates against the grant of a discretionary relief.
18. What is critical in a matter of this nature is for the applicant to show it will suffer substantial loss or that the appeal will be rendered nugatory. The applicant has freely offered to deposit the decretal sum in a joint interest account. Clearly, the payment of the decree will not occasion *substantial loss*. I have no evidence that the business of the appellant will be *ruined* by the payment or its assets lost. In a nutshell, there is no concrete evidence showing that the appellant will suffer *substantial loss* by payment of the *money decree*. True, the auctioneers' redemption notice targets Eldoret municipality Block 7/70 owned by the appellant. But like I said, the appellant has said it is in funds to place the decretal sum in a joint account. I have found earlier on the evidence that the respondent has *landed property*, a *significant* bank balance and a hotel business sufficient to repay the decretal sums if the appeal succeeds. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018. There is no good reason to deny her the fruits of her judgment at this stage.

19. In a synopsis, I am not satisfied that the appellant has shown it will suffer *substantial loss* or that the respondent is incapable of refunding the decretal sums. I am not then able to say that *sufficient* basis has been laid for grant of stay or that the appeal, if successful, will be rendered *nugatory*.

20. Granted all those reasons, the appellant's notice of motion dated 17th June 2014 is devoid of merit. It is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 20th day of November 2014.**

**GEORGE KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

**Mr for the appellant/applicant instructed by Kalya & Company Advocates.**

**Mr for the respondent instructed by J. N. Njuguna & Company Advocates.**

**Mr J. Kemboi, Court clerk.**