



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 481 OF 2012

SUNDONWER LODGE LTD.....PLAINTIFF/RESPONDENT

VERSUS

**KENYA TOURIST DEVELOPMENT CORPORATION
DEFENDANT/APPLICANT**

R U L I N G

1. The **Notice of Motion** application before the court is dated **7th July 2014** by the Defendant/Applicant. The application is filed under Sections 1A, 1B, 3A of the Civil Procedure Act, and Order 42 Rule 6 of the Civil Procedure Rules and seeks the following orders:-

1. *There be a stay of execution of Judgement delivered by the Honourable Court on 8th April 2014 pending the hearing and determination of the intended appeal.*
2. *The court do make such further orders as it may deem fit under the circumstances of the case.*
3. *The costs of this application be in the cause.*

2. The application is premised on the grounds set out therein and is supported by affidavit of **Carey Francis** dated **7th July 2014**. Mr. Carey Francis describes himself as the Head of Legal Services of the Defendant/Applicant and duly authorised to depone to the affidavit.

3. The application is opposed by the Plaintiff/Respondent vide a replying affidavit sworn by **Samuel Warugu Kimotho** dated and filed in court on **1st September 2014**. Mr. Kimotho describes himself in the said replying affidavit as one of the directors of the Plaintiff/Respondent and duly instructed to depone to the facts stated in the affidavit. The Plaintiff/Respondent also filed Grounds of Opposition to the application on **1st September 2014**.

4. The brief background to the application is that on **8th April 2014** this court delivered a Judgement in favour of the Plaintiff in the following terms.

- i. *Special damages at Kshs. 153,000/= being the appraisal and application fees with interest thereon at court rates from the date of filing of the suit.*
- ii. *Kshs. 30,000,000/= in damages with interest at Court rates from the date of filing the suit until full settlement.*
- iii. *The costs of the suit shall be for the Plaintiff.*

5. Immediately after the said Judgement the court granted the Defendant/Applicant a stay for a period of 15 days pending the filing of a formal application for stay. This is the said formal application, but which was filed after a period of more than 90 days after the Judgement. The Plaintiff/Respondent herein states that this application has been filed after an inordinate delay and that on this ground alone, the application should not be allowed.

6. With the leave of the court parties filed written submissions to the Defendant's application. The Defendant/Applicant submitted that they have the first test in an application for stay is whether the Applicant has an arguable appeal. The Applicant shall seek the Court of Appeal's consideration on whether there can be an award of damages for breach of contract within our jurisdiction. The Applicant further will address whether the Plaintiff proves its case on a balance of probability to warrant the award in the judgement. In this regard, the Applicant relied on the Court of Appeal's decision as hereunder:-

1. Civil Appeal No. 323 of 2002; Securicor Courier (K) Limited – vs – Benson David Onyango & Another.

The Court of Appeal held that general damages are not awarded for breach of contract.

7. The Applicant submitted that the main issue under challenge in the intended appeal is the award of Kshs.30,000,000/= to the Plaintiff herein as damages for breach of contract. The Applicant submitted that the amount of Kshs.30,000,000/= is colossal by any standards, and that in the event the intended appeal succeeds there is doubt on whether the Plaintiff has the ability to refund the said sum. The Plaintiff has filed a replying affidavit sworn by its director Mr. Samuel Warugu Kimotho and it does not show its ability to refund the sum of Kshs.30,000,000/=.

8. The Applicant also submitted that on the balance of convenience, the same tilts in favour of the Defendant/Applicant for the following reasons:-

- The Defendant is a State Corporation and the award effects public money hence the need to consider the constitutional provision on public funds under Chapter 12 of the Constitution
- The Applicant is a reputable State Corporation with substantial assets and recovery of the decretal sum in the event of the intended appeal falls in not in doubt. The Applicant cited **Civil Application No. 322 of 2006 (UR 178/00) Kenya Hotel Properties' Ltd. – vs – Willesden Investments Ltd.** It was held that:-

“the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind.”

The Applicant submitted that the present application has merit and the Applicant also offered to comply with any conditions set by court.

9. In response, the Plaintiff/Respondent submitted that Judgement was entered against the Defendant on 8th April 2014 and immediately the said Judgement was pronounced by the court, the Defendant/Applicant applied for stay of execution for 30 days. The Plaintiff/Respondent opposed the application but the court granted 15 days stay of execution pending formal application for stay of execution.

The present application was filed on 15th July 2014 i.e. 3 months and 7 days after the said Judgement was delivered. The Defendant/Applicant has not offered any explanation for the delay. The period taken in filing the present application is inordinate. Pursuant to the provisions of Order 42 Rule 6 (2) (1) (a) of the Civil Procedure Rules, 2010 a party who is desirous to seek stay of execution of a delivered Judgment has to move to court without unreasonable delay. The Plaintiff submitted that the period taken by the Defendant/Applicant before moving the court is unreasonable in the circumstances. The Plaintiff/Respondent further submitted that the Defendant/Applicant has not demonstrated to the court the injury it is likely to incur if stay of execution is refused. It has not demonstrated what substantial loss it is likely to suffer if stay of execution is refused.

10. In paragraphs 11 and 14 of the supporting affidavit, the deponent has deposed that the Defendant/Applicant is a State Corporation with substantial assets, a good financial base and an impeccable reputation. In the light of that self assessment, the Plaintiff submitted that the Defendant/Applicant will not suffer any substantial loss once they release the decretal sum as it will continue operating and discharging its statutory duties. It would have been otherwise if they had alleged the contrary. On this ground alone, stay of execution ought to be refused as the Defendant/Applicant has failed to satisfy the condition laid down in the said Order 42 Rule 6 (2) (1) (a), that a party who seek stay has a duty to demonstrate to the court that if stay is refused, he/she will suffer substantial loss. The Plaintiff further submitted that the Defendant/Applicant has not demonstrate to the court that if stay is not granted it will have difficulties in recovering the decretal sum and costs from the Plaintiff/Respondent. What the Defendant/Applicant has deposed in paragraph 10 of the supporting affidavit is that it does not know the financial position of the Plaintiff. The Respondent in paragraph 11 of the replying affidavit has deposed through its director that it is in operation and is capable of re-imbursing back the decretal sum once paid and if at all the Applicant succeeded in its intended appeal. There is no evidence tendered by the Applicant to show that the Respondents will be unable to refund the decretal sum if at all the appeal succeed.

11. The Plaintiff/Respondent further submitted that the Applicant has not offered any security at all as required under the provisions of Order 42 Rule 6 (2) (1) (b) of the Civil Procedure Rules, 2010. In the case of **Kenya Shell Ltd – Vs – Benjamin Karuga Kibiru and Ruth Wairimu Karuga [1982 – 88] IKAR 1018**. The Court of Appeal while considering stay of execution under Rule 5 (2) of the Court of Appeal Rules held *inter-a-alia*:-

“(4) It is not normal in money decrees for appeal to be rendered nugatory if payment is made.”

The court further considered the provisions of Order 41 Rule 4 of the Civil Procedure Rules, 2010. In the reasoned Judgement of Justice Platt at page 1022, paragraph 4 from top the learned Judge observed:-

“It is usually a good rule to see if Order 41, Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

12. I have carefully considered the application and the submissions of the parties. The issues for this court to consider are:-

- i. ***Whether there is a Notice of Appeal or if indeed the Applicant has filed an appeal as alleged.***
- ii. ***Whether the Plaintiff/Respondent can refund the decrial sum in the event of the said appeal succeeding.***
- iii. ***Whether the Defendant/Applicant has furnished security.***

xiii. On the first issue that is, whether the Applicant has filed a Notice of the intended appeal, there is no evidence on the court record either of a Notice of intended appeal, or of the appeal itself. However, the Applicant in the supporting affidavit of Carey Francis at paragraph 7 thereof, deposed that they filed a Notice of Appeal on 22nd April 2014. Although the Applicant did not attach a copy of that Notice, this court has no reason to doubt that submission, and I behave that indeed the Applicant did file a Notice as deposed in the said affidavit. This finding, however, does not dispense with the need for every Applicant to show to the court a copy of such Notice of Appeal.

xiv. The second issue is whether the Plaintiff/Respondent is capable of refunding the decretal sum should the said intended appeal succeed. The clear position of the law is that a Judgement Holder should not be stopped or delayed from enjoying the fruits of his Judgement unless there are very good reasons for doing that. On the same breath, a Judgement Debtor should not be denied the suit property should its appeal succeed and the suit property has been disposed off and that the Judgement Creditor is now poor or bankrupt after using the suit property. This court therefore

has a balancing act to ensure that the parties before the court are equally protected with regard to the suit property.

xv. In the instant case, the suit property of over Kshs.30,000,000/=, when subjected to the applicable interest, is a very large sum of money. Without doubting the ability of the Plaintiff to repay this money with interest, it is also true that there is no evidence before the court to establish the financial status of the Plaintiff. This is not a burden to be pushed to the Plaintiff to discharge, but such kind of information can be preferred by a party seeking to establish that the suit property would still be safe in its custody should the intended appeal succeed and it be required to refund the same. This assurance is not clearly forthcoming or discernable from the pleadings, although it is not the duty of the Plaintiff/Respondent to prove it. But a discerning court must still have it in mind whether the Judgement Creditor can be in a position to refund the suit property. This then leads me to the third issue.

xvi. To balance the rights of both parties regarding the suit property, and in the light of the need to secure the Judgement Creditor and the Judgement Debtor pending the intended appeal, it is my view that the Applicant should offer a security for the suit property. The Applicant merely stated that it is willing to provide security without indicating what kind of security that is. In the absence of any proposal from the Applicant, it is this court's view that the security to be given shall be the suit property itself to the extent determined by this court.

xvii. In the upshot, I allow the Notice of Motion application by the Defendant/Applicant dated 7th July 2014 in the following terms:-

- a. ***There shall be a stay of execution of Judgement delivered by the court on 8th April 2014 pending the hearing and determination of the intended appeal on the CONDITION that the sum of Kshs.30,153,000/= being the Judgement sum herein, without applicable interest, shall be deposited by the Defendant/Applicant into a joint interest earning account in the name of the parties' advocates herein within 15 (fifteen) days from the date of this Ruling.***
- b. ***Costs of this application is assessed at 50% and given to the Plaintiff/Respondent.***

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Oyugi for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Teresia – Court Clerk