REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 998 of 1999

KENYA TANZANIA UGANDA LEASING LIMITED……...……PLAINTIFF
VERSUS

MUKENYA NDUNDA…….....1ST DEFENDANT

CRATER AUTOMOBILES LIMITED…….……2ND DEFENDANT
AND
MUKENYA NDUNDA…….....……...PLAINTIFF
VERSUS

KENYA TANZANIA UGANDA LEASING LIMITED……...…..1ST DEFENDANT

CRATER AUTOMOBILES LIMITED…….....2ND DEFENDANT

R U L I N G

1. I have before me the 2nd Defendant's Notice of Motion dated 23rd October, 2012. The 2nd Defendant prays that pending the hearing and determination of its intended appeal, this Court be pleased to issue an order of stay of execution of the Decree emanating from the Judgment delivered on 28th September, 2012. The motion is brought under Sections 1A and 1B, 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules.

2. In the Affidavit in support of the application sworn on 23rd October, 2012 Joel Karanja deposed that the 2nd Defendant is dissatisfied with the Judgment of this court delivered on 28th September, 2012 and thereby intends to appeal the same. That the 2nd Defendant has since filed a Notice of Appeal which was lodged on the 9th October, 2012. That the Appeal has high chances of success and if the execution of the decree is allowed, the said Appeal would be rendered nugatory and the 2nd Defendant would suffer *"irreparable damage"*. The 2nd Defendant substantiated the alleged damage by stating that the Plaintiff may fail to reimburse the decretal amount of Kshs.300,000/- that would have been paid to her, should the 2nd Defendant's Appeal prove successful. It is also the 2nd Defendant's contention that there will be no prejudice that will be occasioned to the Plaintiff if the application is allowed. Moreover, it is asserted that the application has been brought timeously and that in addition, the 2nd Defendant is ready to give security that this Court would deem fit for the due performance of the Decree.

3. The Plaintiff opposes the motion through a Replying Affidavit sworn on 7th November, 2012. The crux of it is that there is no eminent danger of execution of a decree which is yet to be prepared and obtained by the Plaintiff's Advocates. The Plaintiff in response to the 2nd Defendant's assertions, contends that there is no basis shown that the intended appeal has high chances of success and there is nothing on

record to show that the 2nd Defendant would suffer irreparable damage should the decree be executed. That further, the 2nd Defendant has failed to adduce evidence in support of the fact that the Plaintiff is a woman of straw incapable of reimbursing Kshs.300,000/- ordered by the Court in the event that the Appeal proves successful. The Plaintiff also contends that she will suffer prejudice occasioned by a delay in realizing the fruits of litigation considering the duration that the instant case has been pending in court and the sensitivity of the withheld Title deeds of LR No. Machakos/Matuu/2002, 3541 and L.R no. 254, Matuu Township. The Plaintiff also deponed that if the deponent is amenable to offering security to secure the Decree then the 2nd Defendant should be ordered to avail within a specified period of time the entire decretal sum upon issuance of the Decree and for the same to be held in a joint interest earning account in the names of both Advocates on record, pending the hearing and determination of the Intended Appeal.

4. I have read the Application, Supporting and Replying Affidavits of the respective parties. I have also considered the submissions of the learned counsels. The conditions for granting a stay of execution pending appeal are well known. It is trite law that an applicant for stay of execution pending appeal under order 42 rule 6 has to establish sufficient cause for the grant of the order and the same can be demonstrated by showing that he is likely to suffer substantial loss unless the order sought is granted; that the application has been made without undue delay; and such security as the court may order for the due performance of the decree or order be given. These then are the conditions this court has to consider.

5. On the issue of whether the Application has been brought timeously, I find that the Application has been made without undue delay as the same was filed on 25th October 2012 less than a month after the Judgement was delivered on 28th September, 2012. The Plaintiff, however contends that the Application has been brought rather prematurely as there is no imminent danger of execution of a decree that is yet to be prepared and obtained by either the Plaintiff or her Advocates. I agree with this contention, as there seems to be no Decree on record and this application may have been made prematurely. However, this argument may fall within the rubric of procedural and technical rules, as the Decree will eventually be prepared and dully extracted. In any event, the application is required to be made timeously. I am therefore prepared to disregard this aspect in view of the overriding objective to do justice as set out in sections 1A and 1B of the Civil Procedure Act. As to the arguments of whether the pending Appeal has merits it has been stated time and again, that it is not up to this court to access the merits of the Appeal but that such a task befalls the Court of Appeal. I therefore say no more on that issue.

6. The applicants contended that they will suffer irreparable damage if stay of execution is not granted. There is a difference between substantial loss and irreparable damage but it was not shown how the applicant stands to suffer substantial loss if the orders sought were not granted. All the Applicant contends is that the Plaintiff may not have means to reimburse the decretal amount of money should the Appeal be successful. The Plaintiff however rebuts this claim and contends that the 2nd Defendant has not adduced any evidence to show that she is a person of straw. That may be so, but my view is that once the 2nd Defendant made such an assertion it was imperative upon the Plaintiff to rebut it. This she did not. she had not demonstrated that she is a person of means, more so given the fact that this Court found that she was devastated emotionally and financially by the repossession of Motor Vehicle registration No. KAG 026B - Mitsubishi Fuzo Lorry. This devastation was to the extent that her children had to drop out of school. I agree with the sentiments of Hon. Musinga J (as he then was) in the case of **Daniel Chebutul Rotich& 2 Others vs. Emirates Airlines Civil Case 368 of 2001** where he stated that:-

"Substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum."

In view of these circumstances that the Plaintiff has had to cope with certain financial losses, I find that the 2nd Defendant's fears may well be founded.

7. I also note that the Plaintiff has indicated that she stands to suffer prejudice that will be occasioned by the further delay in realizing the fruits of litigation. As I stated in the case of **KENYA COMMERCIAL**

BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR:-

"In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced"

In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.

8. To this end, the order that commends itself to me is to direct that the 2nd Defendant do deposit in an interest earning account in the joint names of the Advocates firms representing the Plaintiff and the 2nd Defendant a sum of Kshs.300,000/- within 21 days of today. Accordingly, the application may be allowed as prayed subject to the Defendants depositing the sum of Kshs.300,000/- within 21 days as aforesaid, in default of which, the stay shall lapse.

DATED and **DELIVERED** at Nairobi this 18th day of February, 2013

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A. MABEYA

JUDG