

REPUBLIC OF KENYA

High Court at Kitale

Civil Case 20 of 2005

ISAAC NDARWA KIARIE ::: PLAINTIFF.

VERSUS

HARRISON WAFULA KHAMALA

HOLMAN BROTHERS (E.A.) LTD::: DEFENDANT.

R U L I N G.

Order 42 Rule (6) of the Civil Procedure Rules is clear. No appeal shall operate as a stay of execution but the court appealed from may for sufficient cause order of stay of execution. Rule 6 (2) of the said Order 42 curtails the grant of an order for stay of execution unless 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 such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

Herein, there is no dispute that the applicant's application for stay dated 13th November, 2012 has been made without unreasonable delay. There is also no dispute that the applicant is ready to provide security but at his own terms rather than the court's. It may be stated that a party wishing to have the court exercise discretion in his favour, would have no room to dictate his own terms but would have to await imposition of any terms and/or conditions by the court.

Be that as it may, the basic issue arising in this application is whether the applicant has demonstrated his likelihood of suffering substantial loss if stay pending appeal is not granted.

Undoubtedly, the loss anticipated by the applicant is a monetary loss in that he will suffer substantial loss if the decretal amount is paid to the respondent who might be incapable of refunding it should the appeal succeed. However, there is no evidence whatsoever to suggest that the respondent would be incapable of refunding the decretal sum if it is paid to him by the applicant.

In any event, substantial loss must be more than mere payment of money. The applicant has not shown in what other manner other than the payment of the decretal sum would substantial loss be occasioned to him.

In sum, the applicant has failed to satisfy this court that he will suffer substantial loss if a stay order is not granted

Nonetheless, the applicant has demonstrated his willingness to provide security for the due performance of such decree or order as may ultimately be binding on him. His grounds in support of this application clearly demonstrate that he has an arguable appeal but this does not mean that the appeal shall succeed.

Consequently, the application for stay of execution pending appeal is granted on condition that the applicant deposits into court a sum of Ksh. 700,000/= within the next fourteen (14) days from the date hereof failure to which the stay order will be vacated forthwith and the respondent be at liberty to execute.

Ordered accordingly.

[Read and signed this 30th day of April, 2013.]

[In the presence of M/s. Munialo for plaintiff/respondent and the defendant in person.]

J.R. KARANJA.

JUDGE.