



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Suit 55 of 2004**

CHARLES KIMOSO TOTON.....PLAINTIFF/RESPONDENT

**VERSUS**

REUBEN CHERUTICH CHEBON.....1<sup>ST</sup> DEFENDANT/APPLICANT

JOB CHEBON T/A WOTE EXECUTIVE.....2<sup>ND</sup> DEFENDANT/APPLICANT

**RULING**

By a Notice of Motion dated and filed on 15<sup>th</sup> January 2013, the Applicant sought among others, an order to grant him a grace period of 6 months to enable him raise the decretal sum of Ksh 1,731,341.16 as condition of a stay of execution of a decree against him pending his appeal.

The Applicant gave no particular reasons for the extension of 6 months. He did not for example say that his goats will be weaned for sale or crop of barley or wheat or maize will be harvested in 6 months and he could therefore be in a position to pay either half or entire decretal sum. His application was consequently opposed by the Respondent/decreed holder.

I have considered the entire application and the various Affidavits for and against the Application. The Application is a sequel to my Ruling of 6<sup>th</sup> December 2012 in which I granted a stay of execution of my judgment delivered on 29<sup>th</sup> June 2012, subject to the terms that the Applicant would deposit half the decretal amount into court, and pay the other half to the Respondent/decreed-holder, within a period of 60 days – which period was in the draft of the Ruling of 6<sup>th</sup> December 2012 but was not captured in the typed Ruling itself. The Applicant now wants that period extended to 6 months.

The idea of splitting the security was two-fold, to lessen the burden upon the Appellant and to secure half of the decretal sum deposited in court so that the decreed-holder would not be denied entirely the fruits of his judgment.

The Applicant, the judgment-debtor, does not think or believe that this is fair at all. He again moved the court under the provisions of Order 42, rule 6 of the Civil Procedure Rules 2010. An order of stay of execution is subject to rule 6(2) of the said order -

- ***substantial loss shall be suffered by the Applicant unless the order of stay is granted,***
- ***the application is made without unreasonable delay,***

- ***the applicant grants such security as the court orders.***

For the purpose of this Order (*42 rule (6)*), an appeal is deemed to have been made when a Notice of Appeal is filed (rule 6(4)).

A Notice of Appeal to the Court of Appeal dated 9th July 2012 was filed on the same day. The first application for stay of execution is dated 2.08.2012, and was filed on 3.08.2012. That application was the subject of my Ruling delivered on 6.12.2012 as already stated above.

The Applicant being dissatisfied with the terms of stay imposed in that Ruling now seeks a modification of those conditions, and says that he may comply with those terms in 6 months, when he hopes his appeal to the Court of Appeal could have been determined. If his prayer is granted, the Applicant would in effect have obtained a stay of execution unconditionally.

I am afraid, the law does not operate in that way. The Applicant is in effect engaging the Court in what is in Parliamentary debates called "*filibustering*", and in court language – "*abuse of the court process*" – wear down both your opponent and the court until both accede to your terms. I find that type of litigation totally unacceptable. It is done in bad faith - "*mala fides*".

The law requires that application for stay of execution be made without unreasonable delay. This was done way back in August 2012, and the court rendered itself in the Ruling of 6.12.2012. For the same court to render itself on the same issue 3 or so months later is an abuse of process however euphemistically the the Applicant puts-it - "***an extension of 6 months***" to comply with terms of security for stay of extension!. In effect the Applicant is saying, I will not comply, whether am able or not. There is absolute lack of candor and good faith.

In the circumstances, I find no merit at all in the Applicant's Notice of Motion dated and filed on 15<sup>th</sup> January 2013, and the same is dismissed with costs to the Respondent/deeree-holder.

It is so ordered.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of April, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**