



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1250 of 2004

GOERGE ODINGA ORARO.....PLAINTIFF

VERSUS

ERIC GOR SUNGU.....DEFENDANT

RULING

1. The **notice of motion dated 19th November 2012** is an application by the Defendant/Judgment-Debtor for stay of execution of decree pending appeal. It is brought under **Order 42, Rule 6** of the **Civil Procedure Rules** (the **Rules**). The grounds for the application appearing on the face thereof are -

- (i) That the Defendant filed **Court of Appeal Civil Appeal No. 226 of 2011** which is pending disposal.
- (ii) That if stay is not granted the appeal will be rendered nugatory.
- (iii) That the Defendant is willing to deposit reasonable security.

2. There is a supporting affidavit sworn by the Defendant annexed to the application. Various documents are exhibited in the affidavit, including a valuation of L.R. KISUMU/KONYA/4184 which the Defendant offers as security, and a certificate of official search of the property. An open market value of KShs 4.5 million is given.

3. The Plaintiff/Decree-Holder opposed the application by his own **replying affidavit sworn and filed on 20th November 2012**. The following grounds of objection to the application emerge from that affidavit –

- (i) That there has been “undue, unreasonable, inexcusable and inexplicable delay of over 1 year and 4 months” in applying.
- (ii) That it has not been demonstrated how the Defendant’s appeal would be rendered nugatory if stay is not granted.
- (iii) That the value of the security offered is exaggerated and it should not be accepted by the court.

4. The Plaintiff filed a further replying affidavit on 5th December 2012 sworn by him. To it is annexed a valuation report of the same property offered as security by the Defendant. This valuation gives an open market value of KShs 2 million, a forced-sale value of KShs 1.5 million and an insurance value

of KShs 1.8 million.

5. The application was canvassed by way of written submissions. Those of the Defendant were filed on 25th February 2013 while the Plaintiff's submissions were filed on 11th March 2013. I have considered those submissions, together with the cases cited by the Defendant.

6. Order 42, Rule 6(2) of the Rules sets out in mandatory terms the conditions for grant of stay of execution. It states –

“(2) No order for stay of execution shall be made under sub-rule (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.”

7. **Substantial Loss:** The Defendant addressed this issue in his supporting affidavit. He deponed that he stood to suffer substantial loss unless the stay sought is granted in that “attachment and auction” would subject his family and him to “undue hardship” before the judicial process is completed. He also deponed that the Plaintiff is a man of means “and shall not be prejudiced in any manner” by any delay occasioned by the stay sought.

8. Hardship *per se* occasioned by one's obligation to satisfy a decree duly passed against him cannot constitute substantial loss. So far as I am now aware, the only substantial loss that the courts have accepted in money decrees is that if the judgment-debtor's appeal succeeds he may not be able to easily, or at all, get a refund of the decretal sum paid. The Defendant's own averment that the Plaintiff is a man of means, something that the Plaintiff himself has affirmed, means that he would easily refund the decretal sum in the event that the Defendant's appeal succeeds.

9. A holder of a decree for money is entitled to enjoy the fruits of his judgment, and a stay of execution of such decree will not be lightly granted. I am not satisfied that the Defendant has demonstrated that he stands to suffer substantial loss unless the stay sought is granted.

10. **Unreasonable Delay:** The Defendant filed his application more than one year and four months after judgment, and only after execution proceedings issued. He has not offered any explanation at all in the supporting affidavit for this unreasonable delay.

11. **Security:** The parties have differed on the value of the security offered by the Defendant. How two valuation professionals can arrive at such disparate values of the same property is beyond me. But I will not get into that. If I were to grant stay of execution, which I will not as the Defendant has failed to establish substantial loss and filed his application with unreasonable delay without explanation, I would have imposed security in the form of a deposit of the decretal sum in an interest-earning joint account.

12. As it is now, the application is dismissed with costs. The interim stay of execution is lifted. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY 2013

**H. P. G. WAWERU
JUDGE**

DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2013