



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 286 OF 2010**

**NAMPAK KENYA LTD .....APPELLANT**

**VERSUS**

**PAUL MURUGA WACHIRA.....RESPONDENT**

**RULING**

1. The Respondent obtained judgment in the lower court against the Appellant for the sum of KShs 409,784/75 together with costs and interest. The Appellant duly lodged appeal herein against the resultant decree.

2. The Appellant then sought by **notice of motion dated 8<sup>th</sup> December 2010** stay of execution of the said decree pending disposal of his appeal. The application is brought under **Order 42, Rule 6** of the **Civil Procedure Rules, 2010** (the **Rules**).

3. There is a supporting affidavit sworn by one **IAN RANDAL**, the Managing Director of the Appellant. It is deponed in the said affidavit, *inter alia*, that the Appellant stands to suffer substantial loss unless stay is granted because in there was no likelihood of recovery of the decretal sum in the event that the Appellant succeeded in its appeal because the Respondent is not in any gainful employment and his source of income is unknown; that therefore the appeal would thereby have been rendered nugatory; that the Appellant is prepared to secure the decree by deposit of the decretal sum in court; and that there is no unreasonable delay in applying.

4. Apparently unconditional interim stay of execution was granted pending disposal of the application.

5. The Respondent opposed the application by grounds of opposition. It is stated in those grounds that the Respondent is a man of means and will be able to repay the decretal sum. It is also stated that he is a prominent person. No replying affidavit was filed.

6. The application was canvassed orally before Khaminwa, J on 23<sup>rd</sup> February 2011. The learned Judge is no longer available to prepare the ruling, and that is how the matter has landed on my desk.

7. I have considered the submissions of the learned counsels as recorded by Khaminwa, J., including the cases cited.

8. Order 42, Rule 6(2) sets out the legal conditions for the grant of an order of stay of execution. Those conditions are that the application must be made without unreasonable delay; that the applicant must stand to suffer substantial loss unless the order for stay sought is granted; and that the applicant must give such security as the court might order for the due performance by him of any order or decree that may ultimately be binding upon him upon disposal of his appeal.

9. In money decrees it is not usual for any substantial loss to be occasioned merely upon the judgment-debtor meeting his obligation to pay the decree. But where there is likelihood that he might not be able to recover the decretal sum in the event that he succeeds in his appeal, or where he may have

considerable difficulty in recovering the money, there will be substantial loss and the appeal might thereby have been rendered nugatory.

**10.** In the present case, the Appellant has alleged that the Respondent is not in any gainful employment and that his means of income are unknown. The Respondent has met that challenge merely by filing grounds of opposition in which he has asserted that he is a prominent person and a man of means. He has not filed any replying affidavit. Grounds of opposition are not evidence. The Respondent's means are a matter peculiarly within his own knowledge. He should have met the Appellant's challenge by means of a replying affidavit setting out his means.

**11.** In the circumstances, I am satisfied that the Appellant stands to suffer substantial loss unless stay of execution is granted. I will allow the application and order that there shall be stay of execution of decree of the lower court pending disposal of the appeal upon the condition that the Appellant shall deposit in court within 21 days of delivery of this ruling the decretal sum (for purposes of this order rounded off at KShs 700,000/00). In default of such deposit the stay of execution now granted shall lapse automatically. Costs of this application shall be in the appeal. Those will be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY 2013**