



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. 12 OF 2013

1. **SATYA GANDHI**
2. **PRIEYA GANDHI.....APPELLANTS**

VERSUS

COMMERCIAL BANK OF AFRICA LIMITED.....RESPONDENT

RULING

1. The Court’s discretion in granting stay of execution of decree pending appeal is governed by **Order 42, Rule 6(2)** of the **Civil Procedure Rules, 2010** (the **Rules**) which provides -

“(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.”**

2. The Appellants have applied for stay of execution of the decree of the lower court by **notice of motion dated 23rd April 2013**. The Respondent has opposed the same. I have read the supporting affidavit and grounds of opposition. There is no replying affidavit filed.

3. I have considered the oral submissions of the learned counsels appearing, including the cases cited. I have also considered the written submissions of the parties filed in the lower court where a similar application was considered and allowed upon terms that the Appellants refused to meet.

4. As for delay, ruling by the lower court on the similar application for stay was delivered on 25th March 2013. The present application was filed on 23rd April 2013. In the circumstances of this case I am satisfied that the application has been made without undue delay.

5. As for substantial loss, the decree in issue is a money decree. Substantial loss will normally not occur in paying a money decree. But there may be substantial loss where, if the appeal ultimately succeeds, the applicant is not able to recover the decretal sum paid to the respondent, or where there may be undue difficulty in such recovery.

6. In the present case the Respondent is a bank. It has not been alleged by the Appellants that the Respondent will have any difficulty at all in refunding the decretal sum (now standing at about KShs 2 million), or that the Appellants would encounter considerable difficulty in recovering the same.

7. What the Appellants say is that such recovery will not be possible without “further court process”. Even assuming that the Respondent would not willingly refund the decretal sum (and there is nothing in the record upon which such an assumption can be legitimately made), “further court process” cannot necessarily amount to substantial loss.

8. It is also to be noted that the greater portion of the sums awarded in the judgment carries interest at 12.75% per annum from 1st June 2005 until payment in full. It is probably in their best interest for the Appellants pay up the decretal sum now and avoid further accruing interest. They have not pleaded any inability to pay.

9. As no substantial loss has been established on balance, I will refuse the application. If I were to allow it I would have imposed the security of deposit of the decretal sum in court.

10. As it is, the notice of motion dated 23rd April 2013 is dismissed with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JULY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2013