



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 202 OF 2009**

**SEBASTIAN ASEMBO OPAKA..... PLAINTIFF**

**VERSUS**

**VIJAYKUMAR SHAMJI PATEL.....1<sup>ST</sup> DEFENDANT**

**AMRATBEN PATEL.....2<sup>ND</sup> DEFENDANT**

**WARMWELL LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULINGS**

1. By a Notice of Motion application dated and filed on 20<sup>th</sup> May 2013 the Defendants sought the following orders:-
  - i. **Spent**
  - ii. **Spent**
  - iii. **The honourable Court be pleased to grant a stay of execution of the ruling that was delivered on 30<sup>th</sup> April 2013 pending the hearing and determination of the appeal.**
  - iv. **That costs be provided for.**
2. The Defendants were aggrieved by this court's ruling that was delivered on 30<sup>th</sup> April 2013 which struck out their Defence and entered judgment in favour of the Plaintiff for sum of Kshs. 4,000,000/= together with interest thereon at court rates from the date of filing suit together with costs. They argued that the Plaintiffs would not be prejudiced by a stay of execution pending appeal and that they were willing to deposit the principal sum of Kshs. 4,000,000/= into court as security.
3. In the Supporting Affidavit by Vijaykumar Shamji Patel sworn on 20<sup>th</sup> May 2013, the Defendants contended that the Defence had raised legal issues on the Plaintiff's application dated 9<sup>th</sup> July 2012 including whether or not although the Plaintiff had *locus standi* to bring the proceedings herein in view of the fact that Spell Investments Limited paid the funds to it, two (2) people including the Plaintiff and one Robert Asembo had both separately claimed to have been the lawful owners of the said funds. It was the Defendants case that the said issue remained debatable and hence they had an arguable appeal with a high probability of success which would be rendered nugatory if the court did not grant the orders sought.
4. In his Replying Affidavit sworn on 3<sup>rd</sup> June 2013, the Plaintiff averred that the Defendants had not made out a good case for the grant of a stay pending the hearing and determination of the appeal

on the grounds that:-

- a. **The mere fact of filing an Appeal did not entitle the Applicants to obtain Stay Orders.**
  - b. **The cause of action in this matter arose in 2007, when the Defendants received the Plaintiff's money, and they had to date insisted on holding onto it without any reason or probable cause. That is well over six years.**
  - c. **It was in the interest of justice that litigation must come to an end and this Honourable Court has a duty to discourage busy bodies who only wanted to abuse the court process to achieve ulterior motives other than justice.**
  - d. **The Defendants had not demonstrated that the Plaintiff was a man of straw and incapable of issuing a refund of the decretal sum in the unlikely event that Defendant's appeal went through.**
  - e. **The Defendant lacked good faith in their Application for stay, as the decretal sum after the Ruling being contested is well over Kshs. 6.5 Million and not Kshs. 4 Million that the Defendants were willing to deposit in court.**
  - f. **The issues raised for argument in the present application, especially the question of who released the funds to the Defendants and the legality of the same theory could not be raised in support of the present application because they had already been canvassed before this Honourable Court and could not be a basis for supporting an Application for stay of execution.**
5. The Plaintiff argued that the Defendants had admitted receipt of the sum of Kshs 4,000,000/= and that nothing much would be achieved by staying execution herein as the present application was merely an academic exercise. He contended that it was in the interests of justice and equity that the Defendants' application be dismissed.
  6. At this stage the court is really not interested on the merits or facts of the case as the same were dealt with by the rulings of this court of 30<sup>th</sup> April 2013 and that of Musinga J of 26<sup>th</sup> June 2012.
  7. In their written submissions dated 21<sup>st</sup> June 2013 and filed on 23<sup>rd</sup> June 2013, the Defendants argued that they had satisfied all the conditions set out under Order 42 Rule 6(2) of Civil Procedure Rules, 2010. They argued that they had filed their application without unreasonable delay, that they were ready to deposit the decretal sum in court and that the court should consider the issue of substantial loss on a case by case basis. It was their submission that **“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative analysis.”**
  8. In his written submissions dated and filed on 18<sup>th</sup> June 2013, the Plaintiff admitted that the Defendants had made their application for stay of execution in good time without any inordinate delay. He, however, argued that the sum of Kshs. 4,000,000/= as security was way below the decretal sum which he put at Kshs. 6,500,000/= and accordingly, the Defendants had failed to satisfy the condition of providing adequate security. The Plaintiff also argued that the Defendants had failed to show how the execution, which in itself was a lawful process would irreparably affect or negate the essential core of their appeal.
  9. The Plaintiff further submitted that in the two (2) rulings delivered by the court had found that the Defendants had admitted receipt of the sum of Kshs. 4,000,000/= and that the said sum did not belong to them.
  10. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

**No order for stay of execution shall be made under subrule (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 (emphasise mine)**
- b. **Such security as the court orders for the due performance of such decree or order as may ultimately be binding upon on him has been given by the applicant.”**
- k. It is clear that the three (3) prerequisite conditions for a stay pending appeal cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met at the same time before such an order can be granted. The issue of these three (3) conditions being inseparable was dealt with in the case of **Mukuma vs Abuoga [1988] KLR 645 and Re: Kenya Shell Limited vs**

**Kibiru & Another [1986] KLR** in which Platt Ag JA observed as follows:-

**“The application for the stay made before the High Court failed because the first of the conditions set out in... was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Company would be unable to pay the money..”**

12.The Defendants are required to demonstrate to the court that:-

- a. **Substantial loss may result to the applicant unless the order was made; and**
- b. **The application was made without unreasonable delay; and**
- c. **Such security as the court orders for the due performance of such decree or order as may ultimately binding on them has been given by the applicant.**

13.It is not in dispute that the Defendants filed the present application without any delay. The ruling of the previous application was delivered on 30<sup>th</sup> April 2013 and they filed the said application on 20<sup>th</sup> May 2013. The Defendants filed the application for stay of execution within about three (3) weeks which essentially means that they satisfied one of the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.

14.To establish whether the Petitioners were likely to suffer substantial loss, the court has had due regard to the case of **James Wangalwa & Another vs Agnes Naliaka (2012) eKLR**, in which the court observed as follows:-

**“...the process of execution...by itself does not amount to substantial loss.... This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party.”**

15.The court is not satisfied that the Defendants will suffer any substantial loss if they paid out the money to the Plaintiff because they had themselves admitted that they received the sum of Kshs. 4,000,000/= . They cannot suffer any loss when they are not kept out of pocket of the sum of Kshs. 4,000,000/= which would in any event cannot be considered as security. The money does not belong to them.

16.Bearing in mind that execution proceedings is a lawful process and should not be stayed unless there is very good reason to do so and considering that the Defendants have failed to satisfy all the conditions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, the court is not persuaded at all that it should grant the orders sought by the Defendants.

17.For the foregoing case, the court finds that the Defendants’ Notice of Motion application dated and filed on 20<sup>th</sup> May 2013 is unmerited, frivolous and an abuse of the process of the court and in the circumstances, the same is hereby dismissed with costs to the Plaintiff.

18.It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of September 2013**

**J. KAMAU**

**JUDGE**