



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS'**  
**CIVIL APPEAL NUMBER 596 OF 2010**

**NETSOL (K) LIMITED. .... APPELLANT**

**VERSUS**

**FILMCO AGENCIES LIMITED. .... RESPONDENT**

*(From the Appeal and Orders of Hon. Chief Magistrate S N Riechi delivered on 29<sup>th</sup> November 2010)*

**R U L I N G**

The application before the court is the Notice of Motion dated 16<sup>th</sup> June, 2011 brought by the Appellant/Defendant. It seeks a stay of execution of the judgment and decree made in favour of the Respondent/Plaintiff, until this appeal is heard and finally determined.

By orders made earlier by this court, a sum of Ksh.1,010,413/70 being half of the decretal sum of Ksh.2,017,827/40 was deposited in the court as part security, awaiting the result of this application.

In support of the application for stay, the Applicant states that this application has been made timeously while half the decretal sum has been deposited in court. That the Applicant/Appellant is likely to suffer substantial loss and damage because the decretal sum is large and, payment of it before the appeal is decided, will put too much economic pressure on it which will disrupt its operations.

The Applicant also submitted that it has an arguable appeal with high probability of success because the special damages awarded were neither pleaded nor proved. That the appeal will be rendered nugatory if it eventually succeeds and that that will subject the Appellant/Applicant into loss, hardship and/or damage.

Finally, the Applicant also argued that if the stay is granted as sought, the same will not prejudice the Respondent/Decree-holder, since half the sum due is already deposited and secured. The Applicant requested that the sum of Ksh.1,010,413/70 now deposited in court should be placed in a bank in a joint interest-earning account operated by counsel of the two parties.

On the other hand, the Respondent opposed the granting of any stay. It urged that it is a holder of decree

of a substantial sum, which it obtained in a case filed in the year 2009 arising from a claim for payment of goods sold and delivered to the Appellant. That it has lost much economic benefit from the failure of the Appellant to honour its financial obligation after it received the goods, for which it was bound to pay.

The Respondent further argued that the Appellant admitted that payment of the decretal sum, all at once to the Respondent, will cause a financial strain to the Appellant/Applicant, which is an admission that it has a shaky economic future. In the circumstances, it argued, the Applicant should not be given a stay sought and the court should allow the Respondent to recover the judgment sum without delay.

The Respondent also argued that the Appellant has not demonstrated that it will suffer loss and damage which would only arise if the Respondent is made of straw, because of which it will not have capacity to repay or refund the sum if it eventually lost the appeal. On the contrary, the Respondent argued, it has demonstrated strong ability to refund such sum since its financial turnover is over Ksh.270,000,000/- annually. It annexed its Auditor's Report to demonstrate the point.

Finally, the Respondent expressed unwillingness to open or operate a joint bank account with the Appellants however attractive that should be. Instead it sought that the stay be rejected and the Applicant be allowed to recover and enjoy the substance of its decree, starting with release to it of the deposited sum.

I have carefully considered the arguments advanced by both sides. In this case I accept that the application for stay was timeously made. It is also correct to say that the Applicant has deposited a substantial security in court to the extent of covering half the decretal sum due. The question of whether or not the appeal has arguable issues is neither here nor there and the Applicant will always answer the question positively by asserting that the appeal has good chances of success. The court, will of course, find it inappropriate at this stage, to assert that the appeal will or will not succeed. This leaves the main issue to be decided to be whether or not the Applicant will suffer a substantial loss or damage if the stay sought is not granted.

Substantial loss, as I understand it, is the situation where the appeal eventually succeeds but it is rendered nugatory because the original decree-holder, who already had been paid part or whole of the decretal sum, becomes unable to refund it because he is made of straw. He will have spent the decree sum after receiving the same and the successful Appellant will not be able to easily recover it back.

So, will the Applicant herein, suffer substantial loss? It asserted so from the bar and in its supporting affidavit. It, however, never demonstrated that the Respondent was made of straw. Indeed careful reading of the supporting material did not positively come out on that point. It is like the Applicant skirted the actual demonstration of the point.

In my view and understanding bold statements from the bar or in the supporting affidavit, is not sufficient demonstration of whether the Appellant will actually suffer loss. The Applicant was under obligation to show actual or practical evidence to prove that the Respondent is indeed made of straw. That it will, therefore, be unable to refund the decretal sum if paid to the Respondent. This, the Applicant in my view, failed to do.

On the other hand the Respondent came out strongly to demonstrate that it was a strong business enterprise with a financial turn-over of Ksh.270,000,000/- annually. That it was more than capable of refunding the decretal sum of just over two million. It even went further to demonstrate that the one who needed protection was itself and not the Applicant. It pointed out the fact that the Applicant admitted in this application, that if the stay is not granted and it is forced to pay the decretal sum, its financial foundation may put to economic stress. And so the Respondent sought for immediate relief and security from what may possibly happen to the Applicant.

I have considered this issue. It is true that the Respondent has demonstrated that it is economically strong and it is not therefore made of straw. I also accept the argument based on the facts on the record, that if it was settled of the whole or part of its decree sum immediately, it will be able to refund the same if it

eventually lost this appeal. I also find myself persuaded that the Respondent has a concrete judgment for a substantial sum of Ksh.2,017,827/70 in respect of which there is so far, no justification for placing it, the Respondent, in a disadvantageous position in case the appeal fails to succeed. That is besides the risk, that the Applicant/Appellant may not in the future, have financial capacity to pay the sum; in which case the Respondent will find difficulty in realizing the fruits of its litigation. The court is not oblivious to the fact that the decree aforesaid was obtained by the Respondent after a lengthy and protracted litigation.

The result, therefore, is that the Applicant/Appellant, has failed to satisfy this court on the issue of substantial loss. It, instead, turned on and shot itself on the foot. In the circumstances, this application for stay must fail. It is dismissed with costs. The sum of Ksh.1,010,413/70 deposited in court should be released to Respondent in partial satisfaction of the decree, forthwith. Orders accordingly.

Dated and delivered in Nairobi this 21st day of March 2012.

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**D A ONYANCHA**

**JUDGE**