



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Suit 91 of 2007

PAUL KIPROTICH

KOECH.....PLAINTIFF

VERSUS

TIMSALES COMPANY

LIMITED.....DEFENDANT

RULING

I have before me an application by way of Notice of Motion dated 20th July, 2011 and filed on behalf of the defendant/applicant substantially under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. It seeks mainly an order of stay of execution of the decree herein pending hearing and final determination of an intended appeal. I say intended because an application for enlargement of time to lodge the same is said to have been lodged with the Court of Appeal. The principal ground for the application is that unless the stay is ordered, the applicant stands to suffer irreparable loss. In the affidavit in support of the application, **Linah Jepkosgei Kigen**, counsel, for the applicant, has deponed, *inter alia*, that the respondent may not be in a position to refund the decretal amount in the event its appeal succeeds.

The application is opposed and there is an affidavit of counsel for the plaintiff/respondent in opposition to the application. It is deponed, in the said affidavit, *inter alia*, that the application is incompetent because it is supported by an affidavit sworn by counsel rather than the applicant's representative; that no appeal has in fact been lodged and that the court has been moved rather late in the day. There is also a further affidavit sworn by the same counsel in which it is deponed, *inter alia*, that the applicant's application in the Court of Appeal to enlarge time was returned to it with the consequence that the process of lodging appeal has therefore not commenced.

When the application came up for hearing before me on 14th March, 2012, counsel agreed to file written submissions but in the end only the applicant's counsel did so. Counsel for the respondent elected to rely upon the affidavits filed in opposition to the application.

I have considered the application, the affidavits filed and the submissions of the applicant's counsel. Having done so, I take the following view of this matter. For the applicant to succeed in this application, it had to satisfy the conditions set in Order 42 Rule 6 of the Civil Procedure Rules. Under the rule, I am required to consider first whether there is sufficient cause to warrant stay of execution and

such order cannot be made unless:-

(a) I am satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without inordinate delay and;

(b) Such security as I may order for the due performance of the decree has been given by the applicant.

To show sufficient cause and possibility of suffering substantial loss, counsel for the applicant has deponed that the respondent's means are unknown and if the decretal amount is paid to him, it may be out of the reach of the applicant. The respondent's response is that only the applicant's representative should have deponed to that fact. Counsel for the applicant may not know the personal circumstances of the respondent but he has deponed that he has the authority of the applicant to make the affidavit and on that authority he has deponed that the respondent's economic means are unknown and he may not be in a position to refund the decretal amount once it is paid over to him and the appeal eventually succeeds. In my judgment, that is a statement which counsel can make on the authority of his client. I am not therefore persuaded that the affidavit is incompetent. In any event the respondent himself gave authority to his counsel to make the affidavits in opposition which affidavits in my view, cannot be described as incompetent. Those affidavits however, do not rebut the averment of counsel for the applicant that the respondent may not be in a position to refund the decretal amount if he is paid and the appeal eventually succeeds.

In the absence of demonstration that the respondent will repay the decretal amount should he be required to do so in the event of a successful appeal, I am persuaded that the applicant will suffer substantial loss unless execution is stayed. The intended appeal may very well be rendered nugatory even if it eventually succeeds.

With regard to delay, I note that judgment was delivered on 30th March, 2011. This application was then lodged on 20th July, 2011. The delay involved is therefore of over three (3) months. Given that costs were taxed on 5th July, 2011, I am of the view that this application was filed without unreasonable delay as the same was lodged only two weeks after the costs were taxed.

The last test is that of security. The applicant has offered to pay the decretal amount in an interest bearing account in the joint names of the advocates of the parties until the appeal is determined. That in my view would constitute adequate security.

The applicant has therefore satisfied all the requirements of Order 42 Rule 6 of the Civil Procedure Rules.

Before concluding this ruling there is one matter which was raised by counsel for the respondent that as no appeal has been lodged this application lacks "substratum". The short answer is found in sub-rule 4 of Rule 6 of Order 42 which reads as follows:-

"4 For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given."

This record has a Notice of Appeal which was lodged on 7th April, 2011 by the applicant. Indeed a copy of the same notice is exhibited by the applicant's counsel as "LTK I". In the premises this court has jurisdiction to entertain the application.

In the end the defendant's application dated 20th July, 2011 is allowed and I make the following orders:-

(1) There will be stay of execution of the decree herein pending hearing and determination of the intended appeal on condition that the applicant deposits the decretal amount plus costs and interest to date into an interest earning account in a reputable financial institution in the joint names of the advocates of both parties within thirty (30) days from the date hereof.

(2) The defendant/applicant shall take diligent steps to prosecute its intended appeal.

(3) In the event that the applicant fails to make the deposit ordered in (1) above this application shall be deemed to have been dismissed with costs.

(4) The plaintiff/respondent shall be at liberty to apply to discharge this order in case the defendant/applicant fails to comply with conditions (1) and (2) above.

(5) Subject to condition 3 above the costs of this application shall abide the results of the intended appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF JUNE, 2012

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Ms. Mufutu H/B for Kigen for the Plaintiff and

Mr. Karani for the Respondent.

**F. AZANGALALA
JUDGE**

6TH JUNE, 2012